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W. C. HANDLEY,
Appellee,

v.

ALECK McALONAN and
DAVID S. DAVIDSON,
(Defendants.)

—
DAVID S. DAVIDSON,
Appellant.

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 627¹

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Judgment by confession for \$696.40 was entered in favor of plaintiff, W. C. Handley, and against defendants, Aleck McAlonan and David S. Davidson. The judgment was entered on a promissory judgment note which showed on its face that it was secured by a chattel mortgage. The note was signed by defendant McAlonan alone. It contained on its back a guaranty which was signed by both defendants. Both defendants filed a verified petition which prayed that the judgment be opened and leave given them to plead. The trial court entered an order that the judgment stand for \$273.40 and that defendants be allowed to defend as to the balance of the claim. Defendant Davidson appeals from that portion of the order which allowed the judgment to stand for \$273.40.

He contends that his verified petition showed that he had a defense to the whole of the judgment and that therefore the trial court erred in granting him leave to defend as to part only of the judgment. Many defenses to plaintiff's claim are set up in defendants' petition. Some apply to the whole of the claim and some to a part of it. Plaintiff contends that defendants' petition is vague and uncertain in its allegations and that it does not make a

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W. O. HANLEY,
Appellant,

v.

ALICE McALONAN and
DAVID S. DAVIDSON,
(Defendants.)

DAVID S. DAVIDSON,
Appellant,

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

223 I.A. 627

MR. PRESIDING JUDGE BRADLEY DELIVERED THE OPINION OF THE COURT.

Judgment by confession for \$285.40 was entered in favor of plaintiff, W. O. Hanley, and against defendants, Alice McAlonan and David S. Davidson. The judgment was entered on a promissory judgment note which showed on its face that it was secured by a chattel mortgage. The note was signed by defendant McAlonan alone. It contained on its back a guaranty which was signed by both defendants. Both defendants filed a verified petition which prayed that the judgment be opened and leave given them to plead. The trial court entered an order that the judgment stand for \$275.40 and that defendants be allowed to defend as to the balance of the claim. Defendants Davidson appeal from that portion of the order which allowed the judgment to stand for \$275.40.

He contends that his verified petition showed that he had a defense to the whole of the judgment and that therefore the trial court erred in granting him leave to defend as to part only of the judgment. Many defenses to plaintiff's claim are set up in defendant's petition. Some apply to the whole of the claim and some to a part of it. Plaintiff contends that defendant's petition is vague and uncertain in its allegations and that it does not make a

clear showing that they have a defense to the action, and that therefore there was no abuse of the trial court's discretion in denying defendants' petition. It may be conceded that a number of the allegations in the petition are justly subject to criticism, but after a careful analysis of all of the allegations we are satisfied that there are allegations sufficient to make out a prima facie defense to the whole of the judgment. Plaintiff strenuously contends that the petition does not clearly show a defense to any part of the note, but this contention is without merit. It appears that the trial court was of the opinion that the petition showed a defense to approximately sixty per cent of the amount of the judgment.

That part of the judgment order of the Municipal Court of Chicago entered August 11, 1930, wherein the court ordered that "judgment to stand for Two Hundred seventy-three and 40/100 Dollars (\$273.40) and execution to issue for said amount," is reversed, and the cause is remanded with directions to the trial court to allow appellant, Davidson, to defend as to the entire claim of plaintiff, the judgment to stand as security.

THAT PART OF THE JUDGMENT ORDER ENTERED
AUGUST 11, 1930, WHEREIN IT WAS ORDERED
THAT "JUDGMENT TO STAND FOR \$273.40 AND
EXECUTION TO ISSUE FOR SAID AMOUNT,"
REVERSED, AND CAUSE REMANDED WITH
DIRECTIONS.

Gridley and Kerner, JJ., concur.

clear showing that they have a defense to the action, and that therefore there was no abuse of the trial court's discretion in denying defendants' petition. It may be conceded that a number of the allegations in the petition are hardly subject to criticism, but after a careful analysis of all of the allegations we are satisfied that there are allegations sufficient to make out a prima facie defense on the whole of the judgment. It is respectfully suggested that the petition does not clearly show a defense to any part of the note, but this contention is without merit. It appears that the trial court was of the opinion that the petition showed a defense to approximately sixty per cent of the amount of the judgment. That part of the judgment order of the Municipal Court of Chicago entered August 11, 1930, wherein the court ordered that "judgment be entered for Two Hundred seventy-three and 40/100 Dollars (\$273.40) and execution to issue for said amount," is reversed, and the cause is remanded with directions to the trial court to allow appellant, Davidson, to defend as to the entire claim of plaintiff, the judgment to stand as necessary.

THAT PART OF THE JUDGMENT ORDER ENTERED AUGUST 11, 1930, WHEREIN IT WAS ORDERED THAT JUDGMENT BE ENTERED FOR \$273.40 AND EXECUTION TO ISSUE FOR SAID AMOUNT, IS REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

Davidson and Kerner, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

34685

RIDGELAND STATE BANK,
Appellee,

v.

M. J. BOYLE & COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

262 I.A. 627²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Ridgeland State Bank, plaintiff, sued M. J. Boyle & Company, defendant, in the Municipal Court of Chicago in a first class action. The case was tried by the court and there was a finding against defendant and plaintiff's damages were assessed at the sum of \$3,046.40. Judgment was entered on the finding and defendant has appealed.

Plaintiff sued to recover upon a check for \$3,046.40 issued by defendant to A. Kohl & Son, on August 11, 1928, and which was indorsed by the latter. Plaintiff claimed to be the holder in due course of the check. Defendant, in its affidavit of merits, denied that plaintiff was the owner and holder of the check in due course, and denied that there was due plaintiff from defendant the sum of \$3,265.04 or any other sum of money. Defendant was engaged in the contracting business and had entered into various contracts with the West Chicago Park Commissioners to do certain work. A. Kohl & Son were engaged in the plumbing business and were employed as subcontractors by defendant to do certain plumbing work under the said contracts. On August 11, 1928, defendant, upon receiving a waiver of lien from A. Kohl & Son, issued the check in question to them in payment of certain work done and materials furnished under their contract with defendant. Several days thereafter A. Kohl, one of the members of the firm, informed defendant that his firm

would be unable to proceed with the work under their contract because "he was bankrupt and owed everybody, including the material men and subcontractors." Defendant at once stopped payment of the said check and thereafter paid subcontractors and material men who had performed work and furnished materials under contracts with A. Kohl & Son an amount in excess of the amount of the said check. A. Kohl & Son were doing their banking business with plaintiff and at the time in question owed the latter over \$6,000 for moneys advanced to them to be used by them upon their contracts. It appears that A. Kohl & Son had also assigned to plaintiff various contracts they had made with defendant. When A. Kohl received the check from defendant he deposited it with plaintiff bank "for account of A. Kohl & Son." The deposit slip which was made out at the time of the deposit contained a notice that in receiving the deposit the bank acted "only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care." The bank book of A. Kohl & Son which contained the receipt of plaintiff for the check contained a like notice. At the time of the deposit plaintiff gave A. Kohl & Son credit for the amount of the check. It also honored certain other checks which had previously been issued by the latter and cancelled and delivered to A. Kohl & Son a note in the sum of \$2,000 that had previously been executed by the latter. Plaintiff put the check of defendant through the clearing house and it was returned to the former marked, "Payment Stopped." Thereupon plaintiff charged to the account of A. Kohl & Son the amount of the check and made new loans to the latter to cover the amount of the overdraft caused by this charge.

It is not disputed that defendant would have a complete defense to any action that might be commenced by A. Kohl & Son upon the check. Defendant contends that the evidence establishes that plaintiff in receiving the check acted merely as a collecting

would be unable to proceed with the work under their contract because "he was bankrupt and owed everybody, including the material men and subcontractors." Defendant is now stopped payment of the said check and therefore has subcontractors and material men who had performed work and furnished materials under contract with A. Kohl & Son an amount in excess of the amount of the said check. A. Kohl & Son were doing their banking business with plaintiff and at the time in question owed the latter over \$4,000 for money advanced to them to be used by them upon their contracts. It appears that A. Kohl & Son had also advanced to plaintiff various contracts they had made with defendant. When A. Kohl received the check from defendant he deposited it with plaintiff bank. The account of A. Kohl & Son. The deposit slip which was made out at the time of the deposit contained a notice that in receiving the deposit the bank acted "only as depository's collecting agent and assumes no responsibility beyond the exercise of due care." The bank book of A. Kohl & Son which contains the record of plaintiff's for the check contained a like notice. At the time of the deposit plaintiff gave A. Kohl & Son credit for the amount of the check. It also showed certain other checks which had previously been issued by the latter and cancelled and delivered to A. Kohl & Son a note in the sum of \$4,000 that had previously been executed by the latter. Plaintiff got the check of defendant through the clearing house and it was returned to the latter marked, "Payment stopped." Thereupon plaintiff charged to the account of A. Kohl & Son the amount of the check and made new loan to the latter to cover the amount of the deposit made by this charge. It is not alleged that defendant would have a complete defense to any action that might be commenced by A. Kohl & Son upon the check. Defendant contends that the evidence establishes that plaintiff is entitled to recover the check and that as a consequence

agent for A. Kohl & Son and was therefore not a holder of the check in due course. Plaintiff contends that the trial court was warranted in holding that it "took the check in question as owner and holder thereof for value and not as collecting agent for Kohl." Plaintiff further contends that the burden of showing that it was not a holder in due course was upon defendant and that the latter has failed to successfully carry the burden. It is conceded that plaintiff made out a prima facie case when it introduced the check in evidence and proved that it had not been paid. Defendant then introduced the deposit slip and the bank book in evidence and rested. These exhibits, standing alone, clearly proved that plaintiff received the check as a collecting agent for its depositor, A. Kohl & Son. The burden then shifted to plaintiff. Plaintiff then introduced certain evidence that tended to show that at the time A. Kohl & Son deposited defendant's check with plaintiff an oral agreement was made between plaintiff and the depositor whereby plaintiff became the absolute owner of the check in question, and plaintiff contends that thereby the provisions in the deposit slip and bank book were waived and the oral agreement became the contract. Defendant also introduced in evidence plaintiff's ledger account with A. Kohl & Son and it strenuously insists that this account proves conclusively that the bank considered the transaction as one in which it was merely an agent to collect the check. After a careful examination of the entire evidence we have reached the conclusion that the theory of fact of plaintiff that it was the owner and holder of the check for value is against the manifest weight of the evidence. As this case may be tried again we refrain from analyzing and commenting upon the facts and circumstances that have caused us to reach this conclusion and we are of the opinion, especially after considering the manner in which the case was tried, that justice will be best served

by a series of the same.

The subject of the present is to be

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MINNIE I. WOOD, Administratrix
of the Estate of Frank F. Wood,
Deceased,

Appellee,

v.

WILLIAM V. TYLER,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellant, Tyler, has appealed from an order adjudging him guilty of contempt of court and committing him to the common jail of Cook county, there to remain "until he is released by due process of law or further order of this court, said commitment not to exceed six months."

For a history of this case prior to the time of the instant contempt proceedings, see In re Estate of Wood v. Tyler, 256 Ill. App. 401. Appellant did not petition the Supreme court for a certiorari in that case and our judgment therein is final. The mandate of this court was filed in the Circuit court, and appellee, Minnie I. Wood, Administratrix of the Estate of Frank F. Wood, Deceased, filed a petition in that court which recites, inter alia, an order of that court that commands appellant to pay to her as administratrix, within thirty days, the sum of \$4,374.53, moneys belonging to the said estate, and the petition avers that appellant has not paid that sum nor satisfied the order, and prays that the court may enforce its judgment order by proceedings under section 82 of the Administration of Estates Act and that a rule may be entered upon appellant requiring him to show cause at a short date why he should not be punished for contempt for his failure to comply with the order of the court. A rule was entered and appellant

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• Answer 1 of question 2

not to exceed six months."

For a history of this case prior to the time of the
present proceedings, see the history of case v. 1917.

The bill was filed in the court on the 1st day of
January, 1917, in which case the court judgment was in favor
of the plaintiff in that case and the judgment therein is final.

The mandate of this court was filed in the District Court, and
appealed, Minnie L. Wood, Administrator of the Estate of Frank
L. Wood, Deceased, filed a petition in that court which recited,
"that after a hearing on the bill of the plaintiff in that case, the court
in its order of that date did command the plaintiff to pay
to her as administratrix, within thirty days, the sum of \$1,000.00
always belonging to the said estate, and the petition avers that
the plaintiff has not paid that sum nor satisfied the order, and prays
that the court may enforce its judgment order by proceedings under
the writ of execution of the administration of Justice and that a rule be
made to compel upon appeal requiring him to show cause as a court
into why he should not be required to satisfy the bill before the
court with the order of the court. A rule was entered and appeal

filed his amended answer to the petition. A large part of this answer is entirely irrelevant, as it is merely an attempt to relitigate the merits of the original case. Aside from this irrelevant matter appellant answered that at the time appellee, as administratrix of the estate of Good, filed her original petition in the Probate court he "did not have any money arising out of the payment of said check and never has had since and was utterly unable financially to pay the sum even out of his own private funds, aside from any consideration of said check;" "that he has been advised that this court has no jurisdiction to enforce the judgment entered herein in the Circuit Court by contempt proceedings. Your respondent admits that he is an attorney at the Cook County Bar but that he has not for a long time been engaged in the general practice of the law and that his income derived as an attorney or from any other source during the past few years has not been sufficient to meet his just obligations and that whatever moneys he received as income or from his profession or otherwise, have not been enough to pay off or liquidate his just liabilities and expense of living; that he has been in ill health during the last few years and that he is under a physician's care now and that his life has been despaired of a short time since; that his present health is poor and his physician insists that he must refrain from work and nervous strain of every kind if he would avoid serious complications, he now being over seventy years of age. That since the entry of the order of the Probate Court, to-wit, January 17th, ^{1928,} this respondent's failure to comply with said order or subsequent orders was not due to any wilfullness or fraud on his part but solely and only by reason of his pecuniary inability and misfortune, over which he had no control;" that from January 1, 1925, to June 21, 1930, his total disbursements were \$5,581 in excess of his total receipts. Appellant prayed to be discharged from the alleged contempt.

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[illegible]

Appellant claims that the record shows two verdicts returned by the jury in the former proceeding, in re Estate of Wood v. Tyler, supra; that the first found the issues for the estate and assessed the damages at \$4,374.53, and that the second reads as follows: "Be the jury find that the said Respondent William V. Tyler has in his possession the sum of \$4374.53 belonging to the Estate of Frank W. Wood, Deceased. (Foreman) (1) Harry C. Boone, (2) Edmund V. Bucher, (3) John Himmell, (4) Anton Vodeh, (5) Michael Szymanski, (6) Ervey Wilson, (7) John Donnelly, (8) F. J. Rutaszak, Jr., (9) M. L. Reimen, (10) Gustav Carlson, (11) Guy L. Egbert, (12) H. O. Olson," and he has the boldness to argue that the alleged first verdict, above mentioned, should now be regarded as the real verdict of the jury and the one that must control any judgment entered in the cause, and that under such a verdict only an ordinary judgment for money could properly have been entered against him in the original proceeding. Our opinion in the case cited clearly shows (p. 413) that the parties agreed upon the forms of verdict submitted to the jury; also what verdict the jury actually returned (p. 404), and what judgment was entered by the trial court. The present contention is merely an effort to contradict or impeach the verdict and final judgment entered in that proceeding. We may state, however, that the record and bill of exceptions in that case show that the verdict actually returned by the jury found that the respondent had in his possession \$4,374.53 belonging to the estate, and we may add that appellant, in the brief he filed therein in this court, stated that such was the verdict of the jury. There is no merit in the instant contention. From anything we have said, we do not wish to be understood as holding or intimating that there would be merit in the instant contention if the jury had actually returned such a verdict as appellant now claims they did.

Appellant next contends that the judgment in the instant

...the record shows two verdicts
...in the former proceeding. In the latter of
...the first found the issues for the
...and assessed the damages at \$2,744.83, and they thereupon
...the jury find that the said respondent is liable
...in his possession and control of \$2,744.83 belonging to the
...of Frank V. Wood, Deceased. (Exhibit) (1) Harry G. Boone,
(2) Edmund V. Thomas, (3) John H. Miller, (4) John V. Miller,
(5) Harry Wilson, (6) John H. Miller, (7) T. J. H. Miller,
(8) M. L. Miller, (9) Harry Wilson, (10) Harry Wilson, (11) Harry Wilson, (12)
...and he has the balance he claims that the alleged firm
...should not be regarded as the real verdict
...of the jury and the one that must control any judgment entered in the
...and that under such a verdict only an arbitrary judgment for
...money could properly have been entered against him in the original
...proceeding. Our opinion in the case cited clearly shows (p. 412)
...that the parties agreed upon the terms of verdict submitted to the
...jury and that verdict the jury actually returned (p. 404), and that
...judgment was entered by the trial court. The present contention is
...merely an effort to contradict or impeach the verdict and that judgment
...must be entered in that proceeding. It may appear, however, that the
...terms and will of exception in that case when that the verdict
...actually returned by the jury found that the respondent had in his
...possession \$2,744.83 belonging to the estate, and we say that that
...in the trial he filed therein in this court, stated that
...the verdict of the jury. There is no merit in the instant
...contention. From anything we have said, we do not wish to be under-
...stood as holding or intimating that there would be merit in the instant
...contention if the jury had actually returned such a verdict as against
...the claimant's bill.

...the judgment in the instant

case cannot be enforced by contempt proceedings under section 82 of the Administration of Estates Act. In support of this contention he cites Tappy v. Kilpatrick, 337 Ill. 600. In that case the Supreme court passed upon sections 53 and 54 of the law in relation to idiots, lunatics, drunkards and spendthrifts, which did not provide for trial by jury, and the court held that these sections could not be used to try contested rights to property as between conservators and third persons, or where the claim of the conservator is an ordinary cause of action for money due, as the remedy in such case is an action at law, and the application of these sections to such cases would constitute an infringement of the constitutional right to trial by jury. In support of its opinion the court referred to certain decisions (Dinamoor v. Bressler, 164 Ill. 211, and Martin v. Martin, 170 Ill. 13) that passed upon sections 81 and 82 of the Administration of Estates Act, but it must be borne in mind that those cases were decided before sections 81 and 82 had been amended so as to allow trial by jury. But the court, in Tappy v. Kilpatrick, *supra*, p. 604, in passing upon sections 81 and 82 as they then were, held that the trial court, in the exercise of equitable jurisdiction, where a trust relation exists or there is any other condition authorizing the court to order a delivery of the property, might make such an order. In legal effect, the judgment in In re Estate of Wood v. Tyler, *supra*, found that a trust relation existed, and that appellant was guilty of withholding trust funds belonging to the estate. In our former opinion we strongly approved these findings. Therefore, in our judgment, appellant might have been imprisoned for contempt under sections 81 and 82 as they were before the amendment allowing trial by jury. (See Tappy v. Kilpatrick, *supra*, p. 604.) However, these sections have been amended and appellant has had a trial by jury, and, therefore, there can be no reasonable doubt, in our opinion, that the judgment of commitment was fully warranted under

... cannot be entered by courts presiding under section 52
of the Constitution of Kansas. In support of this contention
he cites Terry v. Kilpatrick, 207 Ill. 602. In that case the
supreme court passed upon sections 51 and 52 of the law in relation
to habeas, mandamus and quo warranto, which did not
provide for trial by jury, and the court held that these sections
could not be used to try contested claims to property as between
citizens and third persons, or where the claim of the citizen was
is an ordinary cause of action for money due, as the remedy in such
cases is an action at law, and the application of these sections to
such cases would constitute an infringement of the constitutional
right to trial by jury. In support of its opinion the court referred
to certain decisions (Wheeler v. Wheeler, 102 Ill. 211, and Wheeler
v. Wheeler, 170 Ill. 12) that passed upon sections 51 and 52 of the
Constitution of Kansas, but it must be borne in mind that those
cases were decided before sections 51 and 52 had been amended as to
trial by jury. And the court, in Terry v. Kilpatrick, supra,
p. 602, in passing upon sections 51 and 52, as they then were, held
that the trial court, in the exercise of equitable jurisdiction, where
a trust relation exists or there is any other condition entitling
the court to order a delivery of the property, might make such an
order. In legal effect, the judgment in In re Estate of Terry v.
Terry, supra, found that a trust relation existed, and that appellant
was entitled of standing trust funds belonging to the estate. In
our former opinion we expressly approved these findings. Therefore,
in our judgment, appellant might have been imprisoned for contempt
under sections 51 and 52 as they were before the amendment affecting
trial by jury. (Terry v. Kilpatrick, supra, p. 602.) However,
these sections have been amended and appellant has had a trial by
jury, and, therefore, there can be no reasonable doubt, in our
opinion, that the judgment of commitment was fully warranted under

the law and the record in this case. Sections 81 and 82 contain very useful and necessary provisions in the administration of estates, and it is clear that the legislature intended to put teeth in these sections. Our Supreme court has held that equitable rules apply to proceedings under them. Section 82 provides:

"If such person refuses to answer such proper interrogatories as may be propounded to him, or refuses to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof, upon a requisition being made for that purpose by an order of the said court, such court may commit such person to jail until he shall comply with the order of the court therein, and if such order is for the delivery of such property or effects the court may enforce such order by execution against the real and personal property of the person thus ordered.

"With respect to property and effects concerning which there is raised a question of title, or of the right of property, or claim of adverse title, the court shall (upon trial by jury as provided in the preceding section, if such trial is demanded) enter a judgment according to the right of the matter and enforce the same by execution against the real and personal property of the person against whom such judgment is rendered, or the court may enforce its judgment and order in the premises by proceedings in contempt against any of the parties to said proceedings."

The third and last contention of appellant is that the answer of appellant to the rule showed that he was insolvent, and that insolvency is a complete defense to the instant proceedings. Even in cases where insolvency may be pleaded it is the settled rule of law that inability to comply with an order requiring the payment of money resulting from poverty or insolvency must clearly appear, and it would be a sufficient reply to the instant contention to say that appellant, in his answer, has not made out a prima facie showing under that rule, as there is no averment that he owns no property of any kind. He concedes, in his brief, that the averments in his answer as to his insolvency are subject to criticism. In support of the instant contention he cites The People v. LaMothe, 351 Ill. 351. While that case has no application to a proceeding brought under sections 81 and 82, nevertheless, the rule that a court of equity has power to punish by imprisonment for contempt upon the refusal of a trustee to pay over money actually received and wrongfully withheld, where the

the law and the record in this case. Section 31 and 32 contain very useful and necessary provisions in the administration of estates, and it is clear that the legislature intended to put such in these sections. The Supreme court has held that such provisions apply to testamentary trusts under these sections 31 and 32.

over money actually received and rightfully withheld, where the
by instrument for payment upon the receipt of a check or pay-
ment. Nevertheless, the rule that a check is not a payment is limited
where an application for a proceeding brought under section 11 and
confirmation is after The People v. Lasker, 211 N.Y. 222. It is that
involuntary are subject to criticism. In support of the instant
conclusion, in his brief, that the agreement in his answer as to his
debt is an agreement that he owes no property of any kind. He
in his answer, has not made out a prima facie showing under that rule
he a sufficient reply to the instant contention to say that appellant
resulting from poverty or involuntary want clearly appears, and it would
that inability to comply with an order requiring the payment of money
in cases where involuntary may be pleaded is as the settled rule of law
involuntary is a complete defense to the instant proceedings. Even
answer of appellant to the rule showed that he was insolvent, and the
The third and last contention of appellant is that the

disobedience is wilful, as where the defendant actually has the money in his possession and refuses to pay it over, or where he has had it but has wrongfully disposed of it, is therein fully recognized. In The People v. Zimmer, 238 Ill. 607, 618, the court held that where a receiver has wrongfully converted or expended money in his hands and is proceeded against in the cause in which he was appointed for contempt on account of a failure to comply with an order to pay, inability to pay, resulting from the wrongful act, does not present a defense to the proceeding, and the receiver may be imprisoned for the contempt notwithstanding his inability to pay. The provisions of sections 81 and 82 would be emasculated, in fact, rendered practically useless, by a holding that mere inability to pay the amount fixed by the order presents a defense to the instant proceeding. Such an interpretation would do violence to the plain language and purpose of the sections.

We stated, in our former opinion, our conclusions as to the conduct of appellant. He has been found guilty by three different courts of a betrayal of his trust and of withholding moneys belonging to the estate of his deceased friend and client. In an effort to avoid restoring to the estate what clearly belongs to it, he, a lawyer, has not only resorted to every technicality, but has not hesitated, as we found in our opinion, to present false testimony in two courts of justice. He now seeks to becloud the record in a proceeding wherein the judgment of the Circuit court has been made final by the decision of this court. It would be a serious reflection upon justice if he were permitted to escape the effect of the just order in the instant proceeding.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Girdley, J., concurs.
Kerner, J., not participating.

disposition is still, as where the defendant actually has the money in his possession and refuses to pay it over, or where he has had it but has wrongfully disposed of it, in which latter case, in The People v. Singer, 228 Ill. 607, 612, the court held that where a receiver has wrongfully converted or expended money in his hands and is prosecuted therefor in the case in which he was appointed for contempt on account of a failure to comply with an order to pay, liability to pay, resulting from the wrongful act, does not prevent a return of the proceeding, and the receiver may be imprisoned for the contempt notwithstanding his inability to pay. The provisions of section 11 of the Code of Civil Procedure, in force at the time of the decision, by a holding that were inapplicable to the case fixed by the order granting a return to the instant proceeding. Such an interpretation would be violative of the plain language and purpose of the sections.

It stated, in our former opinion, our conclusions as to the amount of appellant. He had been found guilty by three different courts of a conspiracy of his friend and of withholding money belonging to the estate of his deceased friend and client. In an effort to avoid restoring to the estate what clearly belongs to it, he, a lawyer, has not only refused to obey judicially, but has, in addition, sought to prevent the court from ascertaining the facts of the case. He now seeks to prevent the record in a proceeding wherein the judgment of the Circuit Court has been made final by the action of this court. It seems to us that the defendant's conduct is so grossly negligent as to require the return of the writ in the instant proceeding.

The judgment of the Circuit Court of Cook County is affirmed.

ATTORNEYS.

WILLIAM J. ...

WILLIAM J. ...

34928

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

JOHN P. CASSIDY,
Plaintiff in Error.

67
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago against John P. Cassidy, defendant, plaintiff in error, which charged him with a violation of the statute (sec. 4, par. 141, ch. 38, Cahill's Ill. Rev. Stat.), which provides (inter alia) that "no person shall carry concealed on or about his person a pistol, revolver or other firearm." Defendant pleaded not guilty and waived a jury trial. The court found him guilty and sentenced him to a term of one year in the House of Correction and to pay a fine of one dollar. He sues out this writ of error.

The record contains no bill of exceptions and the sole contention of defendant is that the information is insufficient to support the finding and judgment. The information alleges (inter alia) that defendant, on March 15, 1930, at the City of Chicago, "did then and there unlawfully carry concealed on or about his person a Revolver or other firearm," in violation of the statute. Defendant made no motion to quash the information and interposed no objection of any kind to the sufficiency of the information. He did make a motion for a new trial and also one in arrest of judgment, which motions were overruled by the court. Sec. 6, par. 740, ch. 38, reads as follows: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the

14-00000

THE PEOPLE OF THE STATE OF
IN SENATE
JANUARY 1, 1935
JOHN F. O'BRIEN,
Respondent in Error.

REPORT OF JUDGE
OF THE COURT

THE COURT OF APPEALS IN THE CITY OF CHICAGO

IN REPLY TO THE REPORT OF THE JUDGE OF THE COURT

Chicago against John F. O'Brien, defendant, plaintiff in error,
which charges him with a violation of the statute (Sec. 4, Art. III,
Ch. 38, Statutes of the State of Illinois), which provides (inter alia) that
"no person shall carry concealed on or about his person a pistol,
revolver or other firearm." Defendant pleaded not guilty and waived
a jury trial. The court found him guilty and sentenced him to a
term of one year in the House of Correction and to pay a fine of
\$100.00. He has now appealed to this court.

The record contains no bill of exceptions and the sole
contention of defendant is that the information in the indictment to
support the finding and judgment. The information alleges (inter
alia) that defendant, on March 18, 1933, at the City of Chicago,
"with him and about his person" carried on or about his person
a "revolver or other firearm," in violation of the statute. Defendant
waives his right to a jury trial and is sentenced on appeal
to pay a fine of \$100.00 and to serve a term of one year in the
House of Correction. He has now appealed to this court. The
court has now affirmed the judgment of the court below, which
sentence was affirmed by the court, Sec. 4, Art. III, Ch. 38,
Statutes of the State of Illinois. "Every defendant is entitled to a
trial by a jury of his peers and to the assistance of counsel and to
the right to confront the witnesses against him and to cross-examine
them and to have the aid of the court in the presentation of the
evidence and to have the aid of the court in the determination of the
law." The court has now affirmed the judgment of the court below,

offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury," etc. (Italics ours.) While it is evident that the word "on" was inadvertently omitted from the information, this omission, in our judgment, does not render the information insufficient to sustain the verdict and judgment. "The offense was stated plainly enough to be readily understood by the jury, and it informed the defendant of the offense with which he was charged so that he could properly prepare his defense. This is all the law requires. (Glover v. People, 204 Ill. 170; People v. Green, 276 id. 346; People v. Robertson, 284 id. 628.)" (The People v. Krause, 291 Ill. 64, 65. See also The People v. Scattura, 238 Ill. 313; The People v. Connors, 301 Ill. 249, 250-1.) The record shows that defendant was represented by counsel and it is clear that the omission of the word "on" did not tend to confuse defendant, his counsel or the trial court, as to the offense charged.

Moreover, under the statute a defendant may be charged with carrying concealed on his person a pistol, etc., or he may be charged with carrying concealed "about" his person a pistol, etc., or he may be charged with carrying concealed on or about his person a pistol, etc. The meaning of "on his person" is plain. "'About his person' means sufficiently close to the person to be readily accessible for immediate use." (The People v. Hiemph, 322 Ill. 51.) The word "or" in the instant information may be treated as surplusage and the information then charges that the defendant did then and there carry concealed about his person a revolver, etc., which would clearly be a sufficient statement of a charge under the statute, and as there is no bill of exceptions, we must assume that the evidence proved such a charge.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

attorney in the hearing and testimony of the witnesses creating the
evidence, or so plainly that the nature of the offense may be easily
understood by the jury, etc. (See also, etc.) This is an obvious
fact that the word "or" was inadvertently omitted from the information.
This omission, in our judgment, does not render the information
invalidations to sustain the verdict and judgment. "The offense was
stated plainly enough to be readily understood by the jury, and it
informed the defendant of the offense with which he was charged so
that he could properly prepare his defense. This is all the law
required. People v. Brown, 111 Ill. 180; People v. Brown, 111 Ill. 180; People v. Brown, 111 Ill. 180. (The People v. Brown, 111 Ill. 180.)
The People v. Brown, 111 Ill. 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

34664

LITHUANIAN BUILDING AND LOAN
ASSOCIATION OF CHICAGO, a
corporation,

Appellant,

v.

PINKERT STATE BANK,
a corporation,

Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

262 I.A. 628

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 30, 1924, plaintiff commenced an action in case in the Circuit court against defendant, claiming damages in the sum of \$2000. To the amended declaration, filed May 26, 1926, defendant filed a plea of the general issue. On December 7, 1929, plaintiff's attorneys served notice on defendant's attorneys to the effect that on December 9, 1929, at the opening of court, they would appear before Judge Caverly, one of the judges of said court, and move to set the cause for trial "for a day certain." The common law record does not disclose that on December 9th, or thereafter, the court entered any order whatsoever on said motion. It, however, does disclose that on May 13, 1930, the cause was called for trial, ex parte - no one appearing for defendant, before Judge Caverly; that a jury was called and sworn; that after hearing evidence presented by plaintiff they returned a verdict finding defendant guilty and assessing plaintiff's damages at \$2,000; and that the court entered judgment against defendant in that sum and ordered that plaintiff have execution. The common law record further discloses that on June 26, 1930, defendant, by leave of court, filed a written motion (supported by an amended petition and an affidavit) in the nature of a writ of error coram nobis, praying that the judgment of May 13, 1930, be vacated; and that the court on the same day ordered that

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-11-2001 BY 60322 UCBAW

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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1940

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CONFIDENTIAL

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100-443887-100

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

the execution, which had been issued on the judgment, be stayed. On July 9, 1930, plaintiff, as respondent to said motion and petition, filed an answer thereto together with the affidavits of three attorneys-at-law. On July 14, 1930, there was a hearing before Judge Caverly upon the motion, petition and answer, at which (according to the bill of exceptions) certain affidavits were read, certain written evidence was introduced, the testimony of two witnesses for defendant (petitioner) heard, and also the testimony of Charles F. Wehner, minute clerk for Judge Caverly, called by plaintiff (respondent). At the conclusion of the hearing the court ordered and adjudged that the entry of the judgment of May 13, 1930, in favor of plaintiff (respondent), was "due to an error of fact and to a misprision of the clerk of this court and said judgment " " is hereby vacated and set aside, and said cause ordered to be placed upon the trial calendar of this court for trial in due course." From this order or judgment, vacating the judgment of May 13, 1930, etc., plaintiff (respondent) prosecutes the present appeal.

In defendant's petition of June 26, 1930, it is alleged, inter alia, in substance that upon the hearing on December 9, 1929, of plaintiff's motion to set the cause for trial "for a day certain," the court refused to do so and denied the motion; that on said day "no order was entered and no direction given by the court with respect to said cause or its trial beyond the denying of the motion then submitted;" that the motion book of the minute clerk, who was present in the court room of Judge Caverly on said date, contains a notation or entry with respect to the cause, indicating that the same had been placed "at the foot of the calendar;" that such notation or entry "is an error and a misprision of said clerk, for, in fact, no order or direction was given or stated by the court on the hearing of said motion on December 9, 1929, directing said cause to be placed at the foot of the calendar or in any way indicating

the resolution, which had been issued on the 1st of June, 1930, was as follows:

On July 6, 1930, Plaintiff, as respondent, in answer to said motion and petition filed an answer thereto together with the affidavits of three witnesses.

On July 14, 1930, there was a hearing before Judge Gately upon the motion, petition and answer, at which (according to the bill of exceptions) certain affidavits were read, certain written evidence was introduced, the testimony of two witnesses for defendant (petitioner) read, and also the testimony of Charles E. Womack, minute clerk for Judge Gately, called by plaintiff (respondent). At the conclusion of the hearing the court ordered and adjourned until the 15th of July, 1930.

In favor of Plaintiff (respondent), was "due to an error of fact and as a misapprehension of the facts of this case, and said judgment" is hereby vacated and set aside, and said cause ordered to be placed upon the trial calendar of this court for trial in the summer of 1930.

This order of judgment, vacating the judgment of July 14, 1930, etc., Plaintiff (respondent) presented the proper appeal.

In defendant's petition of June 22, 1930, it is alleged, inter alia, in substance that upon the hearing on December 7, 1929, of Plaintiff's motion to set the cause for trial "for a day certain," the court refused to do so and denied the motion; that on said day "no order was entered and no discussion given by the court with respect to said cause or the trial beyond the granting of the motion then submitted;" that the motion book of the minute clerk, who was present in the court room of Judge Gately on said day, contains a notation to that effect; that the court, in its order of July 14, 1930, vacating the judgment of July 14, 1930, etc., and a misapprehension of said facts, etc., in fact, no order of vacation was given as stated in the bill of exceptions and said motion on December 7, 1929, directing said cause to be placed on the trial calendar on the first of the summer or in any way postponing

such disposition of the motion or the cause;" that on the hearing of said motion Judge Caverly "stated that, in view of the fact that the case had been dragging along as it had, he did not feel called upon to allow the motion or set the cause for trial;" that notwithstanding the court's denial of said motion, etc., the cause, nevertheless, "was so placed at the foot of the calendar by said clerk, due to the mistake made by him in making the notation on the motion book as above set forth;" that thereafter on May 11, 1930, the cause appeared on a trial call of Judge Caverly, on which call, as published in the Chicago Law Bulletin, was a notation that said call "included cases theretofore passed to the foot of the calendar;" and that the cause also appeared on said trial call for May 13, 1930, and that the call for that day, as published in said Bulletin, "did not contain a notation that said call included cases passed to the foot of the calendar."

It is further alleged in defendant's petition in substance that after December 9, 1929, defendant's attorneys did not watch the court calls of Judge Caverly "because they did not believe said cause could appear on a trial call of that judge until some order had been entered by the court pursuant to notice or until a further calendar of pending cases had been prepared and published by the clerk of the court, and that for that reason neither defendant nor its attorneys knew that said cause was on said trial calls, and that none of them was present in court on May 11, or May 13, 1930;" that the court records disclose that, in the absence of defendant and its attorneys, on May 13, 1930, plaintiff presented certain proofs, which resulted in a verdict in its favor and a judgment; that defendant has a good and meritorious defense to the whole of plaintiff's cause of action as set forth in its declaration; and that upon a trial on the merits it will be able to show that it was not in any way guilty of the negligence charged

such disposition of the motion or the answer" that on the morning of said motion Judge Gaverly "stated that, in view of the fact that the case had been brought along as it had, he did not feel called upon to allow the motion or set the cause for trial;" that notwithstanding the court's denial of said motion, etc., the cause nevertheless, "was as placed at the foot of the calendar by said clerk, due to the mistake made by him in making the notation on the motion book as above set forth;" that thereafter on May 11, 1930, the cause appeared on a trial call of Judge Gaverly, on which call as published in the Chicago Law Bulletin, was a notation that said call "included cases therefore passed as the foot of the calendar," and that the cause also appeared on said trial call for May 12, 1930, and that the call for that day, as published in said Bulletin, "did not contain a notation that said call included cases passed to the foot of the calendar."

It is further alleged in defendant's petition in response that after December 3, 1929, defendant's attorneys did not watch the court calls of Judge Gaverly "because they did not believe said cause would appear on a trial call of that Judge until some entry had been entered by the court pursuant to motion or until a further order of pending cases had been prepared and published by the clerk of the court, and that for that reason neither defendant nor the attorneys knew that said cause was on said trial calls, and that none of them was present in court on May 11, or May 12, 1930;" that the court records disclose that, in the absence of defendant and the attorneys, on May 12, 1930, plaintiff presented certain proofs, which resulted in a verdict in its favor and a judgment; that defendant has a good and meritorious defense to the whole of plaintiff's cause of action as set forth in its petition; and that upon a trial on the merits it will be able to show that it was not in any way guilty of the negligence charged

against it with respect to the coaching of the check referred to in said declaration.

and defendant prayed in the petition "that, by reason of the aforesaid mistake and misprision of the clerk in placing said cause at the foot of the calendar, when no order or direction to that effect had been entered or given by the court, the judgment (so entered on May 13, 1930) may be vacated and set aside and that said cause may be set down for trial at such time as may be convenient to the court."

In the answer of plaintiff (respondent) to the petition, while admitting that the minute book of the clerk of Judge Caverly's court contains a notation to the effect that on December 9, 1929, the cause had been placed at the foot of the calendar, plaintiff denied practically all of the allegations of defendant's petition, and alleged that on May 8, 1930, the cause appeared on Judge Caverly's trial call; that said call, as published in said Law Bulletin, "contained a notation that it included cases theretofore passed to the foot of the calendar;" that on plaintiff's motion the trial of the cause was continued to May 12th, on which day plaintiff's witnesses and attorneys were present and ready for trial; and that the cause was continued to May 13, 1930, on which day there was an ex parte trial, plaintiff's witnesses heard before a jury, and a verdict and judgment rendered in plaintiff's favor for \$2,000. And the answer denied that defendant was entitled to the relief as prayed.

No useful purpose will be served in here reviewing the evidence in detail as appears from the testimony of witnesses given on the hearing on July 14, 1930, and as contained in the various affidavits then read to the court. Suffice it to say that the evidence sufficiently discloses that no order was entered by Judge Caverly on December 9, 1929, placing the cause at the foot of his

...it will appear in the course of the case that ...
...in said declaration.
...and defendant prayed in the petition "that, by reason
of the various misdeeds and allegations of the plaintiff in placing
said cause at the foot of the defendant, when no order or direction
to that effect had been entered or given by the court, the judgment
(as entered on May 15, 1930) may be vacated and set aside and that
said cause may be set down for trial at such time as may be con-
venient to the court."

In the answer of plaintiff (respondent) to the petition,
while admitting that the minute book of the clerk of the court
contains a notation to the effect that on December 4, 1929,
the cause had been placed at the foot of the defendant, plaintiff
denied specifically all of the allegations of defendant's petition,
and alleged that on May 15, 1930, the cause appeared on Judge
Gentry's trial roll; that said roll, as published in said law
bulletin, contained a notation that it included some thirty
cases at the foot of the defendant; that on plaintiff's motion the
trial of the cause was continued to May 15, 1930, on which day plain-
tiff's witnesses and attorneys were present and ready for trial;
and that the cause was continued to May 15, 1930, on which day there
was an oral trial. Plaintiff's witnesses were sworn before a jury,
and a verdict and judgment rendered in plaintiff's favor for \$2,000.
and the answer denied that defendant was entitled to the relief
as prayed.

In order to appear will be served in due reviewing the
cause in detail as appears from the documentary of witness from
the hearing on July 15, 1930, and as contained in the various
affidavits then read to the court. But it is to say that the
affidavits collectively disclose that no order was entered by Judge
Gentry on December 4, 1929, placing the cause at the foot of the

then existing trial calendar; that on the contrary the judge then refused to set the cause for a day certain, as requested by plaintiff, and refused to place it at the foot of his calendar; that defendant and its attorneys were justified in assuming that the cause would not thereafter be put upon any trial calendar without notice to them or until new trial calendars were made up by the clerk at the beginning of the succeeding court year; that prima facie defendant has a meritorious defense to plaintiff's action; that neither defendant nor its attorneys were guilty of any negligence in not watching the daily calls of Judge Caverly, as appeared in the Law Bulletin, and particularly those appearing on May 8th, May 11th, and May 13th, 1930; that none of them was guilty of any negligence in not being in Judge Caverly's court on May 13, 1930; that the cause was on that day upon the trial calendar because of the mistake or misprision of the minute clerk in erroneously putting the same at the foot of the calendar contrary to the court's directions; that when the cause was called for trial on May 13, 1930, plaintiff's evidence heard, verdict received and judgment entered, in the absence of defendant and its attorneys, the said mistake or misprision of the clerk was unknown to Judge Caverly; and that had it then been known to him the trial would not have been had or the judgment in question entered.

Under the evidence, and holdings of our Supreme and appellate courts applicable thereto, we think the court was fully justified in entering the judgment order appealed from, whereby the judgment of May 13, 1930, was vacated and the cause ordered to be placed upon the trial calendar for trial in due course. (See Jacobson v. Ashkinaze, 337 Ill. 141, 146; Chapman v. North American Ins. Co., 292 Id. 179, 183; Cramer v. Commercial Men's Ass'n, 260 Id. 316, 322; Barnes v. Chicago City Ry. Co., 185 Ill. App. 143, 150-1.) In Holbrook v. Lawton, 237 Ill. App. 497, 503, it is said:

"The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court." Accordingly the judgment order appealed from is affirmed.

AFFIRMED.

McAnlan, P. J., concurs;
Kerner, J., took no part in the decision.

The Secretary of the Board in this case is to advise the parties
what action he proposes. It is suggested that the action be
taken in view of the fact that the Board is not a court
of law and the parties are not bound by its decision.
The Board is to advise the parties of its decision.

Very truly,
Yours,
[Signature]

Enclosed, I am sending
to you the report of the
Board, which you may wish to
review.

Very truly,
Yours,
[Signature]

Enclosed, I am sending
to you the report of the
Board, which you may wish to
review.

Very truly,
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The Board is to advise the parties of its decision.

34709

A. F. PHILLIPS,
Appellee,

v.

MURRAY & NICKELL MFG. CO.,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 628²

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action of trover for damages for the conversion of certain botanical drug products, there was a trial without a jury in June, 1930, resulting in the court finding defendant guilty and assessing plaintiff's damages at \$690.72. Judgment in that sum was entered against defendant and this appeal followed.

In 1924 and thereafter defendant was engaged in dealing in such products in Chicago and prior to 1926 another corporation, Nickells-Rowland Co., (hereinafter called Nickells Co.) was engaged in a similar business in New York City. The two corporations were closely associated. F. B. Klock was the president of both. His son, Harold F. Klock, was an officer of defendant and E. P. Nickells was the manager of Nickells Co. at New York. For many years plaintiff was engaged at North Wilkesboro, North Carolina, in collecting and selling such products. One of his customers was the Nickells Co., and in the spring of 1924 he sold and shipped to it at New York about \$3000 worth of goods. He had difficulty in collecting his account and on October 14, 1924, calling upon E. P. Nickells, he arranged for the re-purchase of a portion of the goods so sold and delivered, at agreed prices, which, including two items for freight charges, aggregated \$1464.20. The bill of sale of that date of



ADAMSON TRADING COMPANY
CHICAGO, ILL. COUNTY.

14400
A. F. FREEDMAN
Applicant
v.
HUBERT & HICKMAN, INC.
a corporation
Respondent

2021.A.628

MR. JUSTICE BRANDEIS DELIVERED THE OPINION OF THE COURT.

In an action at law for damages for the conversion of certain patented drug products, there was a trial without a jury in June, 1930, resulting in the court finding defendant guilty and assessing plaintiff's damages at \$400.75. Judgment in that case was entered against defendant and this appeal followed.

In 1924 and thereafter defendant was engaged in dealing in such products in Chicago and prior to 1928 another corporation, Nicholas-Hawland Co., (hereinafter called Nicholas Co.) was engaged in a similar business in New York City. The two corporations were closely associated. F. H. Klock was the president of both. His son, Harold F. Klock, was an officer of defendant and A. P. Nicholas was the manager of Nicholas Co. of New York. For many years plaintiff was engaged at North Minneapolis, North Carolina, in collecting and selling such products. One of his customers was the Nicholas Co., and in the spring of 1928 he sold and shipped to it at New York about \$3000 worth of goods. He had difficulty in collecting his account and on October 14, 1928, calling upon H. F. Nicholas, he arranged for the re-purchase of a portion of the goods so sold and delivered, at agreed prices, which, including two items for freight charges, aggregated \$464.30. The bill of sale of that date set

the Nickells Co. to plaintiff (introduced in evidence) shows that the repurchased goods included a stated number of pounds at stated prices of black haw bark, life root, black cohosh root, mandrake root, wild cherry bark and bamboo brier root. The arrangement was that these goods should be left in the possession of the Nickells Co. on consignment. Shortly thereafter all of the black haw bark and 500 pounds out of 4379 pounds of the black cohosh root were delivered to plaintiff. The balance, as plaintiff's property, remained in the possession of the Nickells Co. for future disposition. Plaintiff testified that about a year thereafter he made unsuccessful demands of the Nickells Co. for said balance of the goods and later was informed that they had been shipped to defendant at Chicago. Harold F. Klock, called as plaintiff's witness, testified that he was "familiar in a way with the dealings between defendant and the Nickells Co. with reference to the transfer of certain merchandise from the New York warehouse of said Nickells Co. to defendant in Chicago;" that the operations of the Nickells Co. were no longer profitable and that "we (meaning defendant) decided to close them along towards the close of the year 1925;" that at the direction of F. B. Klock he (the witness) went to New York and closed up the business of the Nickells Co. and "turned over the building to the owner;" and that some of the merchandise which it had had in its possession was shipped to defendant at Chicago. Plaintiff further testified that in the spring of 1926 he personally called on F. B. Klock at defendant's office in Chicago, showed him a list of the goods which he (the witness) had left in New York on consignment with the Nickells Co., and demanded the return of these goods or payment therefor by defendant; that Klock replied that defendant's "records were in confusion," that he did not know whether or not the goods were then in defendant's possession, but that he would investi-

the Nicholas Co. to plaintiff (introduced in evidence) above that the returned goods included a stated number of pounds of stated prices of black raw bark, like root, black cotton root, hemlock root, wild cherry bark and banded white root. The arrangement was that these goods should be left in the possession of the Nicholas Co. on assignment. Shortly thereafter all of the black raw bark and 500 pounds out of 475 pounds of the black cotton root were delivered to plaintiff. The balance, as plaintiff's property, remained in the possession of the Nicholas Co. for future disposition. Plaintiff testified that about a year thereafter he made unsuccessful attempts at the Nicholas Co. for said balance of the goods and later was informed that they had been shipped to defendant at Chicago. Plaintiff is a called as plaintiff's witness, testified that he was "familiar in a way with the dealings between defendant and the Nicholas Co. with reference to the transfer of certain merchandise from the New York warehouse of said Nicholas Co. to defendant in Chicago;" that the operations of the Nicholas Co. were no longer profitable and that "he (meaning defendant) decided to close them about towards the close of the year 1922;" that at the direction of T. B. Black he (the witness) went to New York and closed up the business of the Nicholas Co. and "turned over the building to the owner;" and that some of the merchandise which it had had in the possession was shipped to defendant at Chicago. Plaintiff further testified that in the spring of 1923 he personally called on T. B. Black at defendant's office in Chicago, showed him a list of the goods which he (the witness) had left in New York on consignment with the Nicholas Co., and demanded the return of these goods or payment therefor by defendant; that Black replied that defendant's "records were in confusion," that he did not know whether or not the goods were then in defendant's possession, but that he would investigate.

gate, etc.; that following this interview there was correspondence between plaintiff and defendant; and that under date of August 31, 1926, defendant, by said Klock, wrote plaintiff a letter. This letter was admitted in evidence, over the objection of defendant on the ground that it, with the other correspondence, disclosed negotiations "to settle the controversy amicably." The letter is in part as follows:

"Whatever goods there are, are stored at Chicago and we can ship them for you. So far as we are able to distinguish, these are the identical goods shipped by you. The fact that they are in Chicago is no fault of ours. We had no knowledge that you had any consigned goods at the Nickells-Rowland Co. and we haven't been able to establish that fact at the present time."

Plaintiff further testified that shortly thereafter he called defendant's office over the long distance telephone and talked with a man who said he was Harold F. Klock, told him that he had been able to dispose of the "wild cherry bark," requested him to ship the same to Parke-Davis Co., at Detroit, and that Klock replied that it "would go out promptly." but that defendant did not ship the goods to Parke-Davis Co.; that subsequently, after plaintiff had complained by letter of such non-shipment, he received a reply letter, signed by F. B. Klock, denying that defendant had agreed to make such shipment; that plaintiff again called at defendant's office in Chicago in the spring of 1927, talked with Harold F. Klock and again demanded the goods; and that Klock, after furnishing certain papers requested, said that "he would sift the matter further." Plaintiff's attorney, Edgar J. Shoen, testified that early in May, 1928, he telephoned defendant's office and asked to talk with F. B. Klock, that he talked with a man who said his name was Klock, that he said he had been retained by plaintiff to obtain the repossession of certain merchandise (stating what it was), etc.; that Klock replied that defendant "had received this merchandise, but that

...that following this interview there was correspondence between plaintiff and defendant and that under date of August 21, 1934, defendant, by said Klock, wrote plaintiff a letter. This letter was admitted in evidence, with the objection of defendant on the ground that it, with the other correspondence, disclosed negotiations as to the controversy underlying. The letter is in part as follows:

"Whatsoever goods there are, we would like to have them and we will pay for them. We let you know we are able to do this. The fact that you have the goods is not in dispute. We had no knowledge that you had any consigned goods at the Klock-Klock Co. and we haven't been able to establish that fact at the present time."

Plaintiff further testified that shortly thereafter he called defendant's office over the long distance telephone and talked with a man who said he was Harold V. Klock, told him that he had been able to dispose of the "wild cherry bark," requested him to ship the goods to Park-Davis Co., at Detroit, and that Klock replied that it "would be all right," but that defendant did not ship the goods to Park-Davis Co. that subsequently, after plaintiff had complained by letter of such non-shipment, he received a reply letter, signed by F. B. Klock, saying that defendant had agreed to ship such shipment; that plaintiff again called at defendant's office in Chicago in the spring of 1937, talked with Harold V. Klock and again demanded the goods; and that Klock, after furnishing certain reports requested, said that "he would sell the matter further." Plaintiff's attorney, Edgar J. Moore, testified that early in May, 1938, he telephoned defendant's office and asked to talk with F. B. Klock, that he talked with a man who said his name was Klock, that he said he had been retained by plaintiff to obtain the merchandise of certain merchandise (stating what it was), etc.; that Klock replied that defendant "had received this merchandise, but that

the reason they were not willing to turn it back was the fact that they had a voucher in their possession of the Nickells Co. of New York, showing payment in full to my client (plaintiff) of his account;" and that on the day following this telephone conversation Shoen wrote defendant a letter and shortly thereafter received a reply, dated May 11, 1923, and signed by defendant by H. F. Klock. This letter was introduced in evidence. After stating some of the prior negotiations it concluded: "As quickly as we can segregate this particular invoice, we will advise you further." Shoen further testified that after he had several times conferred further with said Klock by telephone, and after being informed by him that further negotiations were useless, he, on plaintiff's behalf, on November 3, 1923, commenced the present action.

Plaintiff further testified as to the market values in New York in December, 1923, of all the goods enumerated in said bill of sale of October 14, 1924, and, deducting all the black haw bark and the part of the black cohosh root which he had received from the Nickells Co., said values totaled the sum of \$690.72, the amount of the court's finding and judgment. These values were not disputed by defendant on the trial.

The only witness testifying on behalf of defendant was Harold F. Klock, who was examined and cross-examined at length. Defendant also introduced in evidence a long statement of account, ending November 16, 1923, between plaintiff and the Nickells Co. This is the account referred to in the telephone conversation had between Shoen and either F. B. or Harold F. Klock. It shows the account to be a balanced one, but also shows that the reason for it being balanced is because of an item therein, under date of October 14, 1924, "by invoice \$1464.20." In other words, plaintiff is charged in said account with the goods which he repurchased on said

the reason they were not willing to turn it back was the fact that they had a voucher in their possession of the Nicholas Co. of New York, showing payment in full to my client (plaintiff) of his account," and that on the day following their telephone conversation Shoen wrote defendant a letter now correctly identified received a reply, dated May 11, 1935, and signed by defendant N. F. Black. This letter was introduced in evidence. After stating some of the prior negotiations it contained: "In policy as we can arrange this particular invoice, we will advise you further." Their further conduct from that time on was stated by defendant as follows: "After being informed by him that further negotiations were desired, he, on plaintiff's behalf, on November 2, 1935, commenced the present action. Plaintiff further testified as to the money value in New York in December, 1935, of all the goods mentioned in said bill of sale of October 14, 1934, and, testifying all the time that both and the part of the black money was which he had received from the Nicholas Co., said value totaled the sum of \$990.75, the amount of the court's finding and judgment. These values were not disputed by defendant on the trial.

The only witness testifying on behalf of defendant was Harold F. Black, who was examined and cross-examined at length. Defendant also introduced in evidence a long statement by account, ending November 16, 1935, between plaintiff and the Nicholas Co. This is the account referred to in the telephone conversation had between Shoen and either F. B. or N. F. Black. It shows the amount to be a balance due, but also shows that the reason for it being balance is because of an item therein, under date of October 14, 1934. "By invoice \$146.20." In other words, plaintiff is charged in said account with the goods which he repurchased on said

date from the Nickells Co., and which he left on consignment with it and which he never thereafter received, either from the Nickells Co. or defendant, except said "black haw bark" and the portion of the "black cohosh root," as above stated.

Defendant did not call as a witness F. B. Klock, who, as claimed at the trial, was ill at his home. Defendant's attorney was allowed to state, without objection by plaintiff's attorney, certain testimony that said Klock would give, if present, viz, (1) that he did not have any telephone conversation with plaintiff's witness, Shoen, in May, 1928, or at any other time, and (2)

"that at the time, December, 1925, or thereabouts, when the Nickells Co. shipped the stock of merchandise from New York to Chicago, it was received by defendant in Chicago, and credited at the current market price to the account of said Nickells Co. with defendant, and that there still remained a large deficit in the account."

And it was further stipulated between opposing counsel that "the merchandise shipped from New York by the Nickells Co. to defendant came in five or seven cars, the first shipment early in November, 1925, and the last shipment about December 30, 1925."

The main contention of counsel for defendant is that the finding and judgment are erroneous because against the manifest weight of the evidence on the question of defendant's conversion of the goods. We cannot agree with the contention. We think that plaintiff's evidence discloses a clear case of his ownership of the particular goods and of his right to the possession thereof, and of defendant's unlawful conversion of them after defendant had knowledge of plaintiff's claim and after it had received numerous demands for the return of the goods. In German National Bank v. Meadowcroft, 95 Ill. 124, 130, it is said: "In Chitty on Pleading, p. 167, it is said the action (trover) lies against any person who had in his possession, by any means whatever, the personal property of another, and sold it or used it without the consent of the owner, or refused to deliver it when demanded. And

date from the Nichols Co. which he felt on comparison with it and which he never thereafter received, either from the Nichols Co. or defendant, except said "black box" and the portion of the "black box" not, "as above stated."

Defendant did not call as a witness V. B. Black, who, as claimed at the trial, was ill at his home. Defendant's attorney was allowed to state, without objection by Plaintiff's attorney, certain testimony that said Black would give, to wit: (1) that he did not have any telephone conversation with Plaintiff's witness,

Green, in May, 1933, or at any other time, and (2)

"that at the time, December, 1933, or thereabouts, when the Nichols Co. shipped the stock of merchandise from New York to Chicago, it was shipped in a container in Chicago, and credited as the current date of the receipt of said Nichols Co. with defendant, and that there was a letter dated in the receipt."

and it was further stipulated between opposing counsel that "the merchandise shipped from New York by the Nichols Co. to defendant came in five or seven cars, the first shipment early in November, 1933, and the last shipment about December 30, 1933."

The main contention of counsel for defendant is that the finding and judgment are erroneous because against the manifest weight of the evidence on the question of defendant's conversion of the goods. We cannot agree with the conclusion. To claim that Plaintiff's evidence discloses a clear case of his ownership of the particular goods and of his right to the possession thereof, and of defendant's unlawful conversion of them after defendant had knowledge of Plaintiff's claim and after it had received numerous demands for the return of the goods. In Green National Bank v. Haddock, 99 Ill. 124, 130, it is said: "In Green v. Haddock, p. 127, it is said the action (conversion) lies against any person who had in his possession, by any means whatsoever, the personal property of another, and sold it or used it without the consent of the owner, or refused to deliver it when demanded, and

it has been held that a person owning property mingled with that of another, may, on its conversion, maintain the action." In Wach v. Eillen, 230 Ill. App. 602, 608, it is decided in substance that to maintain an action of trover a plaintiff has the burden of proving (1) title to the property in question; (2) the right to the immediate possession of it; (3) the wrongful withholding of such possession, and (4) the value of the property at the time of the conversion. In the present case plaintiff satisfactorily proved all of these things and there is no substantial evidence to the contrary. Indeed some of the evidence introduced by defendant supports plaintiff's case.

Counsel also urge the reversal of the judgment because of claimed errors of the trial court in its rulings on the admissibility of evidence. It is contended that defendant's letter of August 31, 1926, and plaintiff's testimony as to certain conversations had between him and either of the two Klocks, officers of defendant, should not have been admitted because they were all parts of negotiations "looking to the settlement of an existing controversy." There is no merit in the contention. The letter and said testimony disclosed certain admissions made by defendant or its officers. In Hook v. Bunch, 130 Ill. App. 39, 41, it is said: "While it is true that an offer of compromise itself is not binding but independent admissions or statements of the facts made in connection with such offer of compromise, though made in an effort to make a settlement, may be given in evidence against the party making them." (Citing cases.) Equally without merit in our opinion is counsel's further contention that the court erred in allowing plaintiff to testify to a telephone conversation he had with a man in defendant's office who said he was Harold F. Klock, and in allowing plaintiff's witness, Whoen, to testify to a telephone conversation he had with a man in said office who said his name was Klock, because said respective men in said office, with whom said conversations were had, were not identified. The decisions of courts

it has been held that a person having property mingled with that
of another, may, on its conversion, maintain the action. In Black v.
Johnson, 200 Ill. App. 603, 605, it is decided in substance that to
maintain an action of trover a plaintiff has the burden of proving
(1) title to the property in question; (2) the right to the immediate
possession of it; (3) the wrongful withholding of such possession;
and (4) the value of the property at the time of the conversion.
In the present case plaintiff's testimony proved all of these
things and there is no substantial evidence to the contrary. Indeed
some of the evidence introduced by defendant suggests plaintiff's case
is correct. Council also urged the reversal of the judgment because
of claims of error of the trial court in the rulings on the admissibility
of evidence. It is contended that defendant's letter of August 21,
1935, and plaintiff's testimony as to certain conversations had between
him and either of the two Blackes, officers of defendant, should not
have been admitted because they were all parts of negotiations "looking
to the settlement of an existing controversy." There is no merit in
the contention. The letter and said testimony showed certain
admissions made by defendant or its officers. In Black v. Johnson, 200
Ill. App. 284-31, it is said: "While it is true that an offer of
compromise itself is not binding but independent admissions or admis-
sions of the facts made in connection with such offer of compromise,
though made in an effort to make a settlement, may be given in evi-
dence against the party making them." (Citing cases.) Equally reason-
able is our opinion in Johnson, further contention that the court
erred in allowing plaintiff to testify as to a telephone conversation he
had with a man in defendant's office who said he was Harold E. Black,
and in allowing plaintiff's witness, Johnson, to testify as to a telephone
conversation he had with a man in said office who said his name was
Black. Because said representative was in said office, with whom said con-
versations were had, were not identified. The decisions of courts

of review in this State are against counsels' contention. (Gedair v. Ham National Bank, 225 Ill. 572, 575; Estate of Wood v. Tyler, 256 Ill. App. 401, 412-3.) and we think that under the facts and circumstances disclosed the court did not err in excluding certain offered testimony as to the extent of the authority of E. F. Nickells as an agent of the Nickells Co. in New York.

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

34718

PETER MESTER,
Appellee,

vs.

MICHAEL MESTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 628

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced a 4th class action in tort in the municipal court against defendant to recover damages for personal injuries received in an automobile accident on the evening of February 2, 1930, which necessitated disbursements by plaintiff for physician's and hospital bills, etc. There was a trial without a jury in August, 1930, resulting in the court finding defendant guilty, assessing plaintiff's damages at \$664.60, and entering judgment against defendant in that sum, from which judgment this appeal is taken.

In plaintiff's statement of claim he alleged in substance that on February 2, 1930, he was a passenger in an automobile of defendant, "who was the owner and was then and there operating it;" that it was being driven northerly in Oak Park avenue, a north and south street in Chicago, and across the intersection of said avenue with Grand avenue, an east and west street; that plaintiff was in the exercise of due care for his own safety; and that defendant so negligently operated the automobile, at a time when another automobile entered said intersection and was moving westerly on Grand avenue, that the two cars collided, causing plaintiff's injuries and damage.

In defendant's affidavit of merits he denied that he personally was driving his automobile at the time and place of the collision, and alleged inter alia that the same was then being driven "by an agent of plaintiff," and that the collision was

2021.A.028

CHICAGO

STATE OF ILLINOIS

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IN JUDICIAL COUNCIL WITHIN THE JURISDICTION OF THE COURT.

Plaintiff commenced a civil action in 1929 in the Municipal Court against defendant to recover damages for personal injuries received in an auto collision on the evening of February 2, 1929, when defendant's automobile was driven by plaintiff for plaintiff's and Hospital Bill, etc. There was a trial with a jury in August, 1930, resulting in the court finding defendant guilty, assessing plaintiff's damages at \$1000.00, and entering judgment against defendant in that sum, from which judgment this appeal is taken.

In plaintiff's statement of claim he alleged in substance that on February 2, 1929, he was a passenger in an automobile of defendant, "who was the owner and was then and there driving it," that it was being driven northwardly in Oak Park Avenue, a north and south street in Chicago, and across the intersection of said Avenue with Grand Avenue, on east and west street; that plaintiff was in the exclusive of the car for his own safety; and that defendant so negligently operated the automobile, at a time when another automobile entered said intersection and was moving westerly on Grand Avenue, that the two cars collided, causing plaintiff's injuries and damage.

In defendant's affidavit of denial he denied that he personally was driving his automobile at the time and place of the collision, and alleged that the same was then being driven "by an agent of plaintiff," and that the collision was

occasioned "solely by the negligence of the operator of the other automobile."

On the trial plaintiff's testimony disclosed in substance the following facts: Plaintiff and defendant are brothers. On the evening in question plaintiff, his wife, two young daughters, and a friend named Steyr, called at defendant's home for a visit. When it was concluded defendant suggested that his son, Michael Mester, Jr. (then 18 years old) would drive the party to their homes in defendant's automobile, and he directed his son to do so, and plaintiff and the others got into the automobile and started for plaintiff's home. In the course of the journey the son drove the automobile northerly in Oak Park avenue. When it reached Grand avenue he either slowed down or stopped the automobile, and he then proceeded to cross the intersection. As he was doing so plaintiff noticed the other automobile, travelling westerly on Grand avenue at a rapid rate of speed and approaching the intersection from his right, and he "warned" the driver (defendant's son) of said automobile's approach and told him to slow down the automobile so as to allow the other automobile to pass in front of him. The driver, however, disregarding the request, continued on and said other automobile ran into defendant's automobile, etc., and plaintiff was severely injured. He was taken to a hospital where he remained for eleven days, receiving treatment. Plaintiff's testimony as to the details of the accident was corroborated by that of his witness, Steyr. Defendant, called as plaintiff's witness under section 33 of the municipal court act, testified: "I told my boy to take my brother home;" *** "I was the owner of the car." Defendant's son was the only witness called by him and his testimony disclosed that he was negligent in attempting to cross the intersection in front of said other automobile, which, approaching from his right, had the right of way under the statute. He testified: "I saw it when

occasionally "voiced by the negligence of the operator of the other automobile."

On the trial Plaintiff's testimony disclosed in sub-

stance the following facts: Plaintiff and defendant are brothers.

On the evening in question Plaintiff, his wife, two young daughters

and a friend named Steyer, called at defendant's home for a visit.

When it was suggested defendant suggested that his son, Alvin

Meister, Jr. (then 18 years old) would drive the party to their

homes in defendant's automobile, and he directed his son to do so,

and Plaintiff and the others got into the automobile and started

for Plaintiff's home. In the course of the journey the son drove

the automobile westerly in Oak Park Avenue. When it reached Grand

Avenue he almost drove over the automobile, and he then

proceeded to cross the intersection. As he was doing so Plaintiff

noticed the other automobile, travelling westerly on Grand Avenue

at a rapid rate of speed and approaching the intersection from his

right, and he "turned" the driver (defendant's son) of said auto-

mobile's approach and told him to slow down the automobile so as to

allow the other automobile to pass in front of him. The driver,

however, disregarding the request, continued on and said other

automobile ran into defendant's automobile, etc., and Plaintiff was

severely injured. He was taken to a hospital where he remained for

eleven days, receiving treatment. Plaintiff's testimony as to the

details of this accident was corroborated by that of his witness,

Steyer. Defendant, called as Plaintiff's witness under section 55

of the Evidence Code, testified: "I told my boy to take my

brother home;" and "I was the owner of the car." Defendant's son

was the only witness called by him and his testimony disclosed that

he was negligent in attempting to cross the intersection in front

of said other automobile, which, according to his wife, had

it was at a distance, and then I didn't see it after that until it stopped after it hit us."

It is not claimed that plaintiff was not seriously injured in the collision or that the finding and judgment are excessive. Defendant's counsel urge only two points as grounds for reversal of the judgment. One is, that the finding of the court on the question of defendant's liability is contrary to the weight of the evidence. This contention is without merit. It is clear that plaintiff was not guilty of any contributory negligence. And it is equally clear that the accident was occasioned, in part at least, by the negligence of defendant's said son (acting as defendant's agent at the time) in attempting to cross the intersection in front of the other oncoming automobile.

Equally without merit is counsel's further contention that plaintiff cannot recover because of a variance between the allegations of plaintiff's statement of claim and the proof. It is argued that there was such a variance because it is alleged that defendant was operating his automobile at the time of the accident, whereas the evidence discloses that defendant's son was operating it. A sufficient answer to the contention and argument is that the son was defendant's authorized agent or servant at the time and that defendant is responsible for said son's negligent acts. Furthermore, this is a 4th class action in the municipal court, where pleadings are not essential, and the case is such as is made by the proof. (Edgerton v. Chicago, etc. Ry. Co., 240 Ill. 311, 313; Bruner v. Grand Trunk Western Ry. Co., 319 Ill. 421, 425; Paris Flouring Co. v. Imperial Cotto Milling Co., 181 Ill. App. 215, 219).

The judgment appealed from is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

34727

HELLIE KIRBY, as executrix of
the last will of Frederick A.
Matthews, deceased,

Appellant,

v.

PERCIVAL B. COFFIN, as adminis-
trator of the estate of Ida
Marcoux, deceased,

Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

262 I.A. 628⁴

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court, entered March 31, 1930, after a trial de novo without a jury had on appeal from a judgment of the probate court, wherein, during the lifetime of Frederick A. Matthews, the Circuit court disallowed and denied his claim against the estate of Ida Marcoux, deceased.

On June 17, 1928, Ida Marcoux died intestate at Chicago, at the age of 68 years, and on the following day Percival B. Coffin, Public Administrator, was appointed administrator of her estate by the probate court of Cook county, and he took possession of her personal property and effects. During July, 1928, two petitions were filed in the probate court by Matthews, - one to obtain possession of certain furniture and household effects claimed to be owned by him, and the other to obtain possession of \$900 in currency and a \$50 Liberty Bond, also claimed to be owned by him and which had been deposited for safekeeping in Mrs. Marcoux's box in the vaults of the National Safe Deposit Co., Chicago. These petitions were not contested by the administrator and the furniture and effects, currency and bond were delivered to Matthews by order of the probate court. About nine months later, on April 10, 1929, Matthews filed in the probate court another written claim. In the affidavit accompanying it, sworn to on January 16, 1929, he states that "the annexed claim

WILLIAM B. COCHRAN, as executor of the last will of the deceased, deceased.

WILLIAM B. COCHRAN, as executor of the last will of the deceased, deceased.

2021 A. 628

MR. JUSTICE ...

This is an appeal from a judgment of the Circuit Court entered March 21, 1929, after a trial by jury and an appeal from a judgment of the probate court, wherein, during the lifetime of Frederick A. Matthews, the Circuit Court dissolved and denied his claim against the estate of Ida Matthews, deceased. On June 14, 1923, Ida Matthews died intestate at Chicago, at the age of 65 years, and on the following day Frederick A. Matthews, her husband, was appointed administrator of her estate by the probate court of Cook County, and at such appointment of her personal property and effects. In July, 1923, two petitions were filed in the probate court by Matthews, - one to obtain possession of certain furniture and household effects claimed to be owned by him and the other to obtain possession of \$200 in currency and a \$20 Liberty Bond, also claimed to be owned by him and which had been deposited for safekeeping in Mrs. Matthews's box in the vault of the National Safe Deposit Co., Chicago. These petitions were not considered by the administrator and the furniture and effects, currency and bond were delivered to Matthews by order of the probate court. About nine months later, on April 10, 1929, Matthews filed in the probate court another petition claiming that the currency claim is, same as on January 14, 1923, he claims that "the currency claim

against the estate of Ida Marcoux, deceased, is just and unpaid * * and that he has no other claim against said estate." The claim is as follows:

"\$1094, representing moneys which were the total earnings from employment of claimant as a vault attendant with the National Safe Deposit Co., Chicago, from June 25, 1918, up to and including January 8, 1920, which moneys were paid in currency that the claimant and decedent placed intact in a vault box in the name of decedent at said Deposit Co.

\$800, representing the reasonable value of lot 64 in section A and lot 83 in section A of Arlington Cemetery, previously owned solely by the claimant and transferred by him to the decedent, who was to hold the same for the benefit of the claimant.

The reasonable value of services rendered by claimant to decedent concerning her separate property under a continuing oral agreement, whereby decedent, Ida Marcoux, upon the death of her husband, Charles Marcoux, on or about October 29, 1897, requested the claimant to manage, maintain and generally deal with her property, in consideration of said Ida Marcoux promising to execute a last will giving all her property upon her death to the claimant.

The claimant accordingly rendered the foregoing service for said decedent from about November 15, 1897, to June 17, 1928, the date of decedent's death, and she died intestate without leaving any last will.

During all these years the claimant continuously and solely managed the sole and separate property of decedent, making most of the repairs with his own hands, supervising and directing those repairs that he could not make himself, and collected rents, rented flats, adjusted taxes, placed insurance, and did everything necessary for the complete management and control of said real estate.

The real estate at 2656 Southport Avenue, Chicago, was managed by the claimant for approximately 25 years, and the average gross annual rentals therefrom were \$1200, making total rentals of \$30,000. The real estate at 1652 North Kedzie Avenue, Chicago, was managed by the claimant for approximately 20 years, and the average gross annual rentals therefrom were \$840 a year, making total rentals of \$16,800. The lower flat at 1701-3 North Mozart Street, Chicago, was managed by the claimant for approximately 25 years, and the average gross annual rental therefrom was \$840 a year, making total rentals of \$21,000. The cottage at the same address was managed by the claimant for approximately 25 years, and the average gross annual rental therefrom was \$200 a year, making total rentals of \$18,000. Total gross rentals were \$81,000, and a reasonable fee for services of the claimant is 6 1/2 thereof, or \$49,080.

The foregoing claim is made without waiving any rights of the claimant to the property of the decedent under the Statute of Decent and Distribution of the State of Illinois."

The present transcript does not disclose that said claim ever was amended by the claimant. In the next to the last paragraph thereof there is a noticeable error in the figures. Six per cent of \$81,000 is \$4860, and not \$49,080, as alleged. Furthermore, the stated rentals on the four pieces of real estate aggregate \$82,800, and not \$81,000, as alleged. Six per cent on \$82,800 is \$4968.

[illegible]

1957年10月10日

1. 1990年2月25日 星期一

1. The first group of names is the list of names of the persons who were present at the meeting of the Board of Directors of the American Telephone and Telegraph Company, held on the 1st day of January, 1901, at New York City. The names are as follows:

at 10:30 p.m. on 10/10/50, the following information was received from the New York City Police Department, New York City, New York, dated 10/10/50, and transmitted by teletype to the Bureau on 10/10/50.

[illegible]

The following information was obtained from the records of the Federal Bureau of Investigation, Washington, D.C., dated November 10, 1964.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year ending June 30, 1901:

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The result of this process is that the majority of the population now lives in cities and towns. This has a number of important consequences for the United States. First, it has led to the development of a large urban population, which has created a demand for a wide range of goods and services. This has led to the growth of the service sector of the economy. Second, it has led to the concentration of political power in urban areas. This has led to the development of a political system in which the interests of urban areas are given priority over the interests of rural areas. Third, it has led to the development of a culture that is based on the values of urban life. This culture is characterized by a high level of materialism, a high level of individualism, and a high level of conformity. These three factors are the result of the process of urbanization, and they have had a profound impact on the United States.

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to assist the Government in the development of the national economy and to assist the Government in the development of the national economy and to assist the Government in the development of the national economy.

The present document is not an official document of the United Nations Secretariat.

There are no other persons named in the letter.

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... ..

Adding this last mentioned figure to the other items of \$1094 and \$860, the claimant's total claim apparently is \$6862. But as to the item of \$1094, the claimant had already received, during July, 1928, the sum of \$900, which as then claimed was the amount of currency belonging to him in said safety deposit box.

It further appears from the transcript that during November, 1929, there was a hearing on the claim in the probate court, at which evidence was introduced on behalf of the claimant and also on behalf of the administrator, and that on November 30, 1929, the probate court entered an order finding that the claimant "has rendered services to the decedent during her lifetime valued at \$36,400, which compensation was to be payable at her death, and that she died without paying the same;" and adjudging that the claimant recover from said administrator, out of the assets of the estate, "the sum of \$36,400, which is hereby allowed as a claim of the 6th class against the estate." From this judgment the administrator perfected an appeal to the circuit court where, during March, 1930, there was the trial de novo as stated, during which considerable oral and documentary evidence was introduced. On March 31, 1930, the circuit court found the issues against the claimant and entered the judgment against him as first above mentioned. After the entry of the judgment Matthews, on May 23, 1930, died at the age of 88 years, leaving him surviving his three daughters Nellie Kirby, Julia Mills and Louise Currier. Mrs. Kirby subsequently was appointed executrix of Matthews' last will (executed after the death of Mrs. Marcoux), and was substituted as plaintiff in the present cause in the circuit court, and thereafter she perfected in this court the present appeal from said judgment of March 31, 1930. At the time of the trial in the circuit court the public administrator had not been able to discover the whereabouts or existence of any heirs-at-law of Ida Marcoux, deceased.

On said trial in the circuit court, Matthews made claim

The following is a summary of the facts and circumstances of the case, as presented by the plaintiff's counsel:

The plaintiff, Mrs. Mary Ann Smith, is a widow residing at 1234 Main Street, New York City. She is the mother of three children: John Smith, aged 25; William Smith, aged 22; and Mary Smith, aged 18. The defendant, John Doe, is a resident of 5678 Broadway, New York City, and is the father of the same three children.

On or about the 1st day of January, 1900, the defendant, John Doe, was arrested by the New York City Police Department on a charge of having committed a crime against the plaintiff, Mrs. Mary Ann Smith. The defendant was held in custody until the 10th day of January, 1900, when he was released on bail.

The plaintiff alleges that the defendant, John Doe, has failed to appear in court to answer the charge against him, and that he has failed to pay the bail which was required of him. The plaintiff further alleges that the defendant, John Doe, has failed to provide for the support and maintenance of his family, and that he has failed to pay the expenses of the plaintiff and her children.

The plaintiff prays that the court will order the defendant, John Doe, to appear in court to answer the charge against him, and that the court will order the defendant to pay the bail which was required of him. The plaintiff further prays that the court will order the defendant to provide for the support and maintenance of his family, and that the court will order the defendant to pay the expenses of the plaintiff and her children.

The plaintiff declares under oath that the foregoing facts and circumstances are true and correct to the best of her knowledge and belief.

Dated this 1st day of January, 1900.

Mary Ann Smith, Plaintiff.

John Doe, Defendant.

for the entire estate of Mrs. Marcoux, to the value in all of about \$43,500, and consisting of gold coin and currency of about \$15,000 and four parcels of unincumbered and improved real estate in Cook county of the total value of about \$28,500. According to the statement of her counsel in his brief here filed this claim was based on "an oral contract between the parties (Mrs. Marcoux and Matthews) whereby the decedent (Mrs. Marcoux) promised to leave her entire estate at her death to the claimant." It will be noticed that this claim is materially different from the one as filed in the probate court. Counsel further states that "the promise of Ida Marcoux was made in consideration of Matthews' services of more than 35 years for her, in solely conserving, managing and enhancing her property, and in further consideration of Matthews having delivered all of his property to Ida Marcoux during her lifetime." It will also be noticed that counsel's statement, as to the "further consideration" for said claim for the entire estate, is at variance with Matthews' actions, taken shortly after the death of Mrs. Marcoux, in making claim in the probate court for, and obtaining an order for, certain furniture and household effects and said \$900 in currency and said \$50 Liberty bond. And counsel further states in his brief that Mrs. Marcoux's said promise "was part of a pact between them (Mrs. Marcoux and Matthews) that the survivor would have the property both had." The main contentions of the administrator in the circuit court were, and are in this court, in substance (1) that plaintiff's claim (that there was such a promise made by Mrs. Marcoux in her lifetime, or that there existed between her and Matthews such a pact or express contract) is not sustained by such clear and convincing evidence as the law requires; and (2) that if there was such a pact or express contract between them, it had for its basis their unlawful and meretricious relationship, which continued unchanged from its inception prior to 1893, and, hence, the said pact or contract is not

for the entire contents of Mrs. Watson's, to the value in all of about \$40,000, and commission of sale and carrying of about \$12,000 and four barrels of unimproved and improved real estate in Cook county at the total value of about \$25,000. According to the statement of her counsel in his briefs filed this claim was based on "an oral contract between the parties (Mrs. Watson and Watson) whereby the defendant (Mrs. Watson) promised to leave her entire estate at her death to the plaintiff." It will be noticed that this claim is materially different from the one as filed in the Probate court. Counsel further stated that the promise of Mrs. Watson was made in consideration of Watson's services of more than 25 years for her, in solely conducting, managing and expanding her property, and in further consideration of Watson's having delivered all of his property to her Watson saying her lifetime. It will also be noticed that counsel's statement, as to the "written acknowledgment" for said claim for the entire estate, is of variousness with Watson's claims, namely, namely after the death of Mrs. Watson, in making claim in the Probate court for, and obtaining an order for, certain furniture and household effects and sold \$500 in currency and said \$500 liberty bond. The counsel further stated in his brief that Mrs. Watson's said promise was part of a gift between them (Mrs. Watson and Watson) that the plaintiff would have the property both had. The main consideration of the administrator in the claim is that there was such a promise made by Mrs. Watson in her lifetime, or that there existed between her and Watson such a gift or express contract, is not sustained by such clear and convincing evidence as the law requires; and (2) that it there was such a gift or express contract between them, it had for its basis their mutual and mutual relation, which continued unchanged from the inception prior to 1885, and, hence, the said gift or contract is not

legally enforceable.

Prior to 1893, Matthews had a lawful wife. A few years after the death of Mrs. Marcoux's husband, and sometime prior to 1893 (the exact time not being shown), he (Matthews) deserted his wife and his three daughters, and went to live with Mrs. Marcoux at her home in Chicago. In 1893 Mrs. Matthews obtained a divorce from him. At no time thereafter were Matthews and Mrs. Marcoux legally married, and there was no evidence to support a common law marriage. Their relationship at its commencement was unlawful and meretricious and continued to be such. He was still living with her at her home in Chicago when she died in June, 1928. They never held themselves out to be married. She retained the name of Ida Marcoux and was always so called by her friends and neighbors.

During the first 10 or 12 years that Matthews lived with Mrs. Marcoux there is no evidence that he rendered any household services for her in her home. During that time, and also from 1904 until 1916 he conducted a hardware store on North avenue, near Mrs. Marcoux's home at 1701 Mozart street, and worked in the store daily and sometimes during the evenings. Some of his witnesses testified that on occasions from 1904 to 1922 they saw him doing household work at said home, such as keeping the place clean, washing dishes, making small repairs, scrubbing floors, etc. From 1922 until 1927 a woman named Bays did all the household work, except cooking, and during the last year of Mrs. Marcoux's life she, herself, did the cooking and another woman named Heck did the other household work.

About the time that Matthews ceased to conduct the hardware business and store in 1916, Mrs. Marcoux caused a judgment to be entered against him in the superior court on his judgment note for \$2,000, dated October 23, 1915, and payable to her order. This fact was shown by the introduction by the administrator of a certified copy of the judgment record. During the year 1917 and up to July,

legally separated.

From 1908 to 1910, Mrs. Watson had a lawful wife.

After the death of Mrs. Watson's husband, and sometime prior to 1910 (the exact time not being shown), he (Watson) cohabited with his wife and his three daughters, and went to live with Mrs. Watson at her home in Chicago. In 1910 Mrs. Watson obtained a divorce from him. At no time thereafter were Watson and Mrs. Watson

legally married, and there was no evidence to support a common law marriage. Their relationship at the commencement was unlawful and continued as such. He was still living with her at her home in Chicago when she died in June, 1910. They never held themselves out as being married. The relation was known to the neighbors and was always so called by her friends and neighbors.

During the time he was living with Mrs. Watson from 1910 to 1912, Watson lived with

Mrs. Watson there in no evidence that he rendered any services for her in her home. During that time, and also from 1910 until 1912 he conducted a hardware store on North Avenue, near Mrs. Watson's home at 1701 Market Street, and worked in the store daily and sometimes during the evenings. Some of his witnesses testified

that on occasions from 1910 to 1912 they saw him being household work at said home, such as helping the glass clean, washing dishes, making small repairs, sweeping floors, etc. From 1910 until 1912 a woman named Mary did all the household work, except cooking, and during the last year of Mrs. Watson's life she, herself, did the cooking and another woman named Mack did the other household work. About the time that Mrs. Watson began to conduct the hardware business and from 1910, Mrs. Watson caused a judgment to

be entered against him in the superior court on his judgment note for \$2,000, later reduced to \$1,000, and payable to her order. This fact was shown by the introduction by the administrator of a certified copy of the judgment record. During the year 1911 and up to July,

1918, Matthews, apparently, was not engaged in any business. In July, 1918, when he was about 75 years of age, he commenced working as a vault attendant for the National Safe Deposit Co., receiving a wage or salary of \$60 a month. He continuously worked there during business hours until January, 1920. After that date it does not appear that he had any regular employment. While working for the Safe Deposit Co. he received in wages or salary the total sum of \$1094. This money as received he gave to Mrs. Marcoux and at his request she put it in her safety box for safekeeping and had the package marked in his name. After her death and upon the box being opened there was found to be \$900 in currency in the package, and said sum on his petition was paid over to him as above stated.

As to the claim of Matthews' counsel that, during the entire period Matthews lived at Mrs. Marcoux's home from about 1893 to the time of her death in 1928, he solely managed, conserved and enhanced her estate, the evidence does not support the claim. While it appears that at times he collected rents for her and at her request assisted her in managing and caring for her several buildings and properties, it also appears that for these services he was amply paid. During all of the period he lived in Mrs. Marcoux's home and had his meals there. And there is no evidence that he ever paid to her anything for room and board except the testimony of the witness Louis Buchardt, who testified in substance that he worked in Matthews' store for a period of about 2-1/2 years, from February, 1912, to September, 1914, and that on several occasions during that period Matthews gave him money with which to buy groceries, medicine, etc. for Mrs. Marcoux.

And there is no definite, convincing evidence of any such express oral contract or pact between Matthews and Mrs. Marcoux as counsel claims. No writing evidencing or even suggesting such a contract or pact was introduced. The only testimony remotely suggestive

1913, Matthew, apparently, was not engaged in any business. In July, 1913, when he was about 75 years of age, he commenced working on a vessel attached to the National Safe Deposit Co., receiving a wage or salary of \$60 a month. He continuously worked there during business hours until January, 1920. After that date it does not appear that he had any regular employment. While working for the Safe Deposit Co. he received in wages or salary the total sum of \$1000. This money he received he gave to Mrs. Watson and at his request she put it in her safety box for safekeeping and had the money noted in his name. After her death and upon the box being opened there was found to be \$200 in currency in the package, and said sum as his portion was paid over to him as above stated. As to the claim of Matthews' counsel that, during the entire period Matthews lived at Mrs. Watson's home from about 1902 to the time of her death in 1908, he mainly managed, controlled and supervised her affairs, the evidence does not support the claim. While it appears that at times he collected rents for her and at her request acted as her agent in receiving and paying for her several buildings and properties, it also appears that for these services he was amply paid. During all of the period he lived in Mrs. Watson's home and had his meals there. And there is no evidence that he ever paid to her anything for room and board except the testimony of the witness Louis Buchanan, who testified in substance that he worked in Matthews' store for a period of about 2-1/2 years, from February, 1911, to September, 1914, and that on several occasions during that period Matthews gave him money with which to buy groceries, medicine, etc. For Mrs. Watson. And there is no belief, concerning evidence of any such nature that contact or deal between Watson and Mrs. Watson as stated claim. No written evidence or even unsworn evidence is presented as proof of such an infirmity. The only testimony remotely suggestive

of such a contract or pact is that of the witness Anna Hanschke. She testified in substance that she had known Mrs. Marcoux for about 25 years prior to her death; that she used to take trips with her; that in 1905 the two decided to go together to Milwaukee, Wisconsin (a distance of less than 100 miles); that as they were about to leave Mrs. Marcoux said to Matthews: "Now, you know, Fred, the understanding is that if I don't come back, what is mine is yours;" that on another occasion in 1925 (about twenty years later) she (the witness) was visiting at the Marcoux home and in Matthews' presence there was talk about a neighbor having died without having made a will; that she (the witness) said that "this was going to cause a lot of trouble" and she asked Mrs. Marcoux "How about yourself?"; and that Mrs. Marcoux replied: "That is all settled; that is all on black and white; what is mine goes to Mr. Matthews."

After reviewing the evidence we are of the opinion that the circuit court was fully warranted under the law and the evidence in disallowing and denying Matthews' said claim to Mrs. Marcoux's entire estate because of an express oral contract or pact as alleged. In Wood v. Evans, 113 Ill. 126, 121, it is said: "It is also a well settled doctrine where an attempt is made to effect a distribution of property different from that provided by law, by a contract resting in parol, the evidence relied upon to establish such a contract is looked upon with jealousy, and should be weighed in the most scrupulous manner." In Wallace v. Rappleye, 103 Ill. 229, 241, our Supreme Court quotes with approval from Graham v. Graham, 34 Pa. St. 475, where it is said in part: "Even if any such contract may be enforced, it can only be when it is clearly proved, by direct and positive testimony, and when its terms are defined and certain. The danger attendant upon the assertion of such claims requires * * that a tight rein should be held over them." (See, also, Anderson v. Augustana College, 300 Ill. 72, 80; Garren v. Whook, 306 id. 154, 161; Tanner v. Tanner,

of such a contract in good is that of the witness Mrs. Katschke.
 The decided in substance that she had known Mrs. Katschke for
 about 25 years prior to her death; that she used to come in with
 her; that in 1908 she had decided to go together to Milwaukee.
 Wisconsin (a distance of less than 100 miles); that as they were about
 to leave Mrs. Katschke said to defendant "Now, you know, Fred, the
 understanding is that if I don't come back, what is mine is yours";
 that on another occasion in 1908 (about twenty years later) she
 (the witness) was visiting at the Katschke home and in passing
 witness there was told about a neighbor having died without having
 made a will; that she (the witness) said that "this was when he owned
 a lot of property" and she asked Mrs. Katschke "how about your will; and
 that Mrs. Katschke replied: "That is all settled; that is all my business
 and what is mine goes to Mr. Katschke."
 After reviewing the evidence we are of the opinion that
 the circuit court was fully warranted under the law and the evidence
 in dissolving and annulling defendant's said claim to Mrs. Katschke's
 entire estate because of an express oral contract as part of a will.
 In Wood v. Wood, 113 Ill. 2d, 121, 122, 123, it is also a well
 settled doctrine where an attempt is made to effect a disposition of
 property different from that provided by law, by a contract resting
 in part, the evidence relied upon to establish such a contract is
 looked upon with jealousy, and should be weighed in the most scrupulous
 manner." In Wallace v. Haggerty, 109 Ill. 2d, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

326 id. 302, 305.)

Inasmuch as in our opinion the existence of such an oral agreement or pact between Mrs. Marcoux and Matthews as counsel claims was not sufficiently proved by the evidence, we deem it unnecessary to discuss the administrator's second contention as above stated, or any of his other grounds here urged for the affirmance of the judgment appealed from.

Counsel for the claimant further contends that the trial court committed reversible error in not allowing in evidence certain portions of Matthews' deposition, which was taken on the eve of the trial in the circuit court and while he was ill at his home. During the trial the administrator introduced in evidence the certified copy of the confessed judgment which in 1916 Mrs. Marcoux had caused to be entered against Matthews on his note payable to her order for \$2,000. By the portions of the deposition referred to Matthews sought to give testimony explaining why that judgment was entered. And his counsel argues that the testimony was admissible under the 3rd exception of section 2 of the Evidence and Depositions Act. Under the particular wording of the statute we do not think that the court erred in its ruling, but even if the ruling were erroneous it would not be a sufficient ground for a reversal of the judgment appealed from. The case was tried by the court without a jury and under all the evidence we think the court's finding and judgment were proper.

The judgment appealed from is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

200 100, 100, 100

...as in the opinion the existence of such an error

agreement or bond between Mrs. Harlow and Harlow as counsel during
was not sufficiently proved by the evidence, we deem it unnecessary to
discuss the Administrator's second contention as above stated, or any
of his other contentions urged for the affirmance of the judgment.
Affirmed.

Conceded for the plaintiff further contents that the trial

court committed reversible error in not allowing in evidence certain
evidence of plaintiff's deposition, which was taken on the day of the
trial in the circuit court and while he was ill at his home. During
the trial the Administrator introduced in evidence the certified copy
of the contract between him and the plaintiff, dated and made in 1900
whereby plaintiff received on his note payable to her order for \$2,000.
of the payment of the deposition returned to Harlow which he gave
testimony explaining why that judgment was entered. And his counsel
advised that the testimony was admissible under the 375 exception of
evidence of the plaintiff and defendant. After the plaintiff
witnessed at the hearing on the issue as to what time the court entered the
verdict, and even if the ruling were erroneous it would not be a
nullification ground for a reversal of the judgment appealed from. The
case was tried by the court without a jury and under all the evidence
we think the court's finding and the entry were proper.

The judgment is affirmed.

ATTORNEYS

WILLIAM, F. & J. AND OTHERS, PLAINTIFFS.

34752

FRED W. RENTZ and AUGUSTA
RENTZ,

Appellants,

v.

WILLIAM E. MEYERS and
GEORGE J. JANK, doing business
as W. E. MEYERS & CO.,
Appellees.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

262 I.A. 629

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a coram nobis proceeding, under section 89 of the Practice Act, the clerk's transcript discloses that on May 3, 1930, the circuit court entered the following order:

"This cause coming on to be heard on plaintiffs' demurrer to the motion and affidavit of defendant, W. E. Meyers, filed herein, after arguments of counsel and due deliberation by the court said demurrer is overruled, to which plaintiffs except. Thereupon plaintiffs pray an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed upon filing herein their appeal bond in the sum of \$250, to be approved by the court within 30 days from this date, and 60 days time is hereby allowed plaintiffs in which to file their bill of exceptions."

In apt time an appeal bond was approved and filed and also a bill of exceptions, and on September 17, 1930, the transcript was filed in this court. It appears therefrom that on April 8, 1925, plaintiffs commenced an action in case against defendants in the circuit court; that in their declaration they charged that by reason of certain claimed fraudulent representations and acts of defendants (who are real estate brokers) in connection with a proposed exchange of certain encumbered real estate of plaintiffs for other real estate, they (plaintiffs) had been damaged in the sum of \$9,320; that defendants appeared by attorneys and subsequently filed a plea of not guilty; that on December 14, 1926, on motion of plaintiffs' attorney the court ordered that the cause be placed on the "passed case calendar;" that over two years later the court, of its own

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MR. JUSTICE ...

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motion and on June 12, 1929, ordered that it be "taken off of the passed case calendar and reinstated on the trial call;" that on November 7, 1929, there was an ex parte trial of the cause before a jury, - plaintiffs and their attorney being present, but defendants not being present or their attorneys; that upon evidence being heard the jury returned a verdict finding defendants guilty and assessing plaintiffs' damages at \$9820; that judgment in that sum was entered against defendants; that after several terms of court had passed defendants, on March 13, 1930, appeared and moved that the judgment be set aside, etc., because of errors of fact; and that the motion was supported by two affidavits. In the affidavit of Alfred M. Rueben, one of defendants' attorneys, it is alleged in substance that on June 8, 1926, affiant entered into a verbal agreement with plaintiffs' attorney, whereby it was agreed that the cause be placed upon the calendar of "passed cases," that "no advantage would be taken" by either affiant or plaintiffs' said attorney of the other; that if the cause should appear on a trial calendar each attorney would notify the other of that fact and that no judgment by default should be entered against either of the parties to the litigation without notice, etc.; that said cause appeared on said passed case calendar for about two years; that neither affiant nor defendants were notified that it had been taken therefrom and placed on a trial calendar and neither had any knowledge or were given any notice that it would be called for trial on November 7, 1929; and that said verdict and judgment were allowed to be entered by plaintiffs' attorney in violation of his said verbal agreement with affiant. The affidavit of William E. Meyers, one of the defendants, corroborated that of Rueben and he further alleged that he and his co-defendant have a good defense on the merits to the whole of plaintiffs' demand, in that neither they nor either of them made the fraudulent representations or did the fraudulent acts as charged by plaintiffs, and in that plaintiffs had suffered no damage.

motion and on June 12, 1933, entered that it be taken off of the
ground case calendar and reentered on the trial call; that on
November 7, 1933, there was an ex parte trial of the cause before
a jury - plaintiffs and their attorney being present, but defendants
not being present or their attorney; that upon evidence being heard
the jury returned a verdict finding defendants guilty and assessing
plaintiffs' damages at \$2500; that judgment in that case was entered
against defendants; that after several terms of court had passed
defendants, on March 12, 1935, appeared and moved that the judgment
be set aside, etc., because of errors of fact; and that the motion
was supported by two affidavits. In the affidavit of Alfred M. Brown
one of defendants' attorneys, it is alleged in substance that on June
3, 1935, affiant entered into a verbal agreement with plaintiffs'
attorney, whereby it was agreed that the cause be placed upon the
calendar of "passed cases," that "no advantage would be taken" by
either affiant or plaintiffs' said attorney of the other; that if
the cause should appear on a trial calendar each attorney would notify
the other of that fact and that no judgment by default should be entered
against either of the parties to the litigation without notice, etc.;
that said cause appeared on said passed case calendar for about two
years; that neither affiant nor defendants were notified that it had
been taken therefrom and placed on a trial calendar and neither had any
knowledge or were given any notice that it would be called for trial
on November 7, 1935; and that said verdict and judgment were allowed
to be entered by plaintiffs' attorney in violation of his said verbal
agreement with affiant. The affidavit of William A. Rogers, one of
the defendants, corroborated that of Brown and he further alleged that
he and his co-defendant have a good defense on the merits to the cause
of plaintiffs' demand, in that neither they nor either of them made the
liamants representations or did the fraudulent acts as charged by
plaintiffs, and in that plaintiffs had entered no damages.

The transcript further discloses that in the coram nobis proceeding, on March 29, 1930, by leave of court, plaintiffs filed a special demurrer to defendants' "motion and affidavits," to the effect that the same were insufficient in law to confer upon the court jurisdiction to set aside said judgment of November 7, 1929, - the term in which it was entered having passed; and that after a hearing upon the demurrer the court entered the interlocutory order or judgment appealed from as first above mentioned.

After reviewing the present record, we are of the opinion that the appeal must be dismissed because it is not taken from any final order in the coram nobis proceeding, which is to be considered as a new suit (Mitchell v. King, 187 Ill. 453, 457; Bomitati v. American Linseed Co., 221 id. 161, 164.) It does not appear from the court's order that plaintiffs, after their demurrer had been overruled, elected to abide by their demurrer. If they had so elected, the court, having overruled the demurrer, could doubtless have set aside the original judgment of November 7, 1929. (People v. Crooks, 326 Ill. 266, 280; Chapman v. North American Insurance Co., 292 id. 179, 189); but it does not appear from ^{the} common law record that the court entered any such final order, and apparently plaintiffs had the right to file an answer or plea to defendants' motion and affidavits (which are regarded as their declaration) and thereby form an issue of fact on the allegations contained in said affidavits and subsequently have a hearing. (People v. Crooks, 326 Ill. 266, 280-1.)

Possibly the reason that the appeal was taken from the interlocutory order is that the bill of exceptions, signed by the trial judge, contains the statement that "upon consideration by the court of said demurrer, the court overruled said demurrer and ordered that the judgment entered against defendants on November 7, 1929, be vacated and set aside." But we, as an appellate tribunal cannot

The following is a summary of the facts of the case as stated in the complaint. The complaint is dated March 20, 1930, by leave of court, Plaintiff filed a special motion to set aside the judgment of the court, dated November 7, 1929, and the same were made returnable in the court upon the court's order to set aside said judgment of November 7, 1929, - the term in which it was entered having passed, and that after a hearing upon the motion the court entered the following order:

That the appeal be dismissed because it is not taken from any final order in the case being prosecuted, which is to be considered as a new suit (Michigan v. Linn, 197 Ill. 482, 483; Dominick v. Linn, 201 Ill. 141, 144). It does not appear from the court's order that Plaintiff, after their demurrer had been overruled, elected to abide by their demurrer. It they had so elected, the court, having overruled the demurrer, would have set aside the original judgment of November 7, 1929. (People v. Brockman, 222 Ill. 324, 325; People v. Brockman, 222 Ill. 324, 325; but it does not appear from the court's order that the court entered any such final order, and apparently Plaintiff had the right to file an answer or plea to the demurrer and affirmative (which are regarded as their demurrer) and thereby raise an issue of fact in the allegations contained in said affirmative and subsequently have a hearing. (People v. Brockman, 222 Ill. 324, 325-1.)

Probably the reason that the appeal was taken from the interlocutory order is that the bill of exceptions, stated by the trial judge, contains the statement that "upon consideration by the court of said demurrer, the court overruled said demurrer and entered the following order against defendant on November 7, 1929."

look to the bill of exceptions to determine the extent or effect of a judgment order. That must be determined solely from the judgment order as contained in the common law record or record proper, which, in a suit at law, "consists of the process, * * the declaration, pleas, demurrer, if there is any; also any judgment upon demurrer, or other judgment, interlocutory or final." (Van Cott v. Prague, 5 Ill. App. 99, 101.) In People v. Kuhn, 291 Ill. 154, 162, it is said: "It is the office of a bill of exceptions to bring before the court matters outside of the record proper, and matters of record cannot be shown by such a bill. * * The record imports absolute verity and is the sole, conclusive and unimpeachable evidence of the proceedings in the lower court. * * The general rule recognized by courts is, that in the event of a conflict between the bill of exceptions and the record proper the record will control as to all matters shown and properly appearing in that record, and as to matters properly included in the bill of exceptions it will prevail over matters shown in the record proper."

For the reasons indicated the present appeal is dismissed.

APPEAL DISMISSED.

Scanlan, P. J., and Kerner, J., concur.

Look to the bill at exception as determining the extent or effect
of a judgment entry. That must be determined solely from the
judgment entry as contained in the record. It is not the province
which, in a suit at law, consists of the process; * * the defendant's
pleas, answers, etc. There is only one judgment upon demurrer, or
other judgment, interlocutory or final." (Van Hook v. Brown, 8 Ill.
App. 39, 101.) In Harris v. Harris, 221 Ill. App. 123, it is said:
"It is the office of a bill of exceptions to bring before the court
matters outside of the record proper, and matters which cannot
be shown by such a bill. * * The remedy against absolute verity
and is the rule, conclusive and binding upon the witnesses of the tri-
bunal in the lower court. * * The general rule regarding by-
errors is, that in the event of a conflict between the bill of ex-
ceptions and the record upon the record will control as to all
matters shown and properly appearing in that record, and as to
matters properly included in the bill of exceptions it will prevail
over matters shown in the record proper."

For the reasons indicated the present exception is dismissed.

APPEAL DENIED.

35042

RELIANCE BANK & TRUST CO.,
individually and as Trustee,
Complainant and appellee,

v.

STELLA SKAMSKI and SOLLIE
DOLINSKY,
Defendants.

On appeal of SOLLIE DOLINSKY,
Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

262 I.A. 629²

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Superior court, entered December 20, 1930, appointing the Citizens State Bank of Chicago as receiver of certain improved premises in Chicago. The order was entered in a foreclosure proceeding commenced on December 11, 1930. Dolinsky was served with summons on December 15, 1930, but no service was had on Stella Skamski.

The trust deed sought to be foreclosed is dated September 2, 1927. By it Stella Skamski, a widow, conveyed the premises to the Reliance State Bank (complainant's then corporate name), trustee, as security for her eight principal promissory notes, aggregating \$16,000, and each payable to bearer. Six of the notes, "A" to "F" inclusive, are for \$1,000 each, - three of them being payable on September 2, 1929, 1930 and 1931, respectively, and three on September 2, 1932. The last two notes ("G" and "H") are for \$5000, each payable on September 2, 1932. All notes bear interest at the rate of 6 per cent per annum, payable semi-annually, on March 2nd, and September 2nd in each year, and the interest payments are evidenced by coupon notes. The trust deed contains the usual provisions, including one that in case of default of payment of any part of

1911

RELIANCE BANK & TRUST CO.,
Individually and as Trustee,
Complainant and Appellant.

ETALIA THOMAS and others,
Defendants.

COOK COUNTY.

262 I.A. 629

On appeal from the judgment of the
Circuit Court of Cook County.

THE COURT GRANTED THE VERDICT OF THE COURT.

This is an interlocutory appeal from an order of the
circuit court, entered December 30, 1900, granting the motion
of Etalia Thomas et al. to set aside the verdict in the
Chicago. The order was entered in a proceeding proceeding
commenced on December 11, 1900. Briefly set forth with
on December 12, 1900, and no other was had on this matter.

The facts need not be set forth in detail. The
2, 1901. By its charter, a widow, conveyed the premises to
the Reliance State Bank (complainant's then corporate name), trustee,
as security for her eight principal promissory notes, aggregating
\$16,000, and each payable to bearer. Six of the notes, "A" to "F"
inclusive, were for \$1,000 each - three of them being payable on
September 2, 1900, 1901 and 1902, respectively, and three on September
2, 1902. The last two notes ("G" and "H") are for \$500 each,
payable on September 2, 1902. All notes bear interest at the rate
of 6 per cent per annum, payable semi-annually, on March 2nd, and
September 2nd in each year, and the interest payments are evidenced
by coupon notes. The trust deed contains the usual provisions,
including one that in case of default of payment of any part of

the indebtedness secured, the grantor waives all right to possession, income and rents, and agrees that the trustee make take possession and collect the same, and that the court, in which a bill of foreclosure is filed, may appoint a receiver, with power to collect the rents, etc., during the pendency of the foreclosure suit and the period of redemption.

In the original bill, after stating the execution and delivery of the notes and trust deed, complainant alleged that it became the owner and holder of all of the notes; that the principal note "B" for \$1,000, and due on September 2, 1930, as well as all coupon notes, due on September 2, 1930, and aggregating \$480, have not been paid; and that complainant files its bill for a foreclosure "subject to the continuing lien of said trust deed to secure the payment of notes "C" to "H", both inclusive, together with interest represented by the unpaid interest coupons which come due by their terms on March 2, 1931, and subsequent dates." From the allegations it may be inferred that principal note "A", as well as all coupon notes due prior to September 2, 1930, have been paid, and that complainant only seeks a partial foreclosure for a due indebtedness aggregating \$1480. Complainant further alleged that the premises "are located on 4457 Lindelee Street, in Chicago, Illinois; that they are improved with a three-story brick building which has three five room apartments, steam heat, and there is a two-car heated brick garage in the rear;" and that complainant is "informed and believes" that Sollic Dolinsky is the owner of the equity of redemption. The bill also prayed for the appointment of a receiver, etc. It is sworn to by one Emil Meier, who in the affidavit says that the allegations contained in the bill "are true of his own knowledge and belief,"

The transcript further discloses that on Saturday, December 13, 1930, Sollic Dolinsky was personally served with a written notice that on Monday morning, December 15, 1930, at the

the indebtedness incurred, the grantor reserves all right to possession, income and rents, and agrees that the trustee make take possession and collect the same, and that the court, in which a bill of foreclosure is filed, may appoint a receiver, with power to collect the rents, etc., during the pendency of the foreclosure suit and the period of redemption.

In the original bill, after stating the execution and delivery of the notes and trust deed, complainant alleged that it became the owner and holder of all of the notes; that the principal note "B" for \$1,000, and due on September 2, 1930, as well as all coupon notes, due on September 2, 1930, and amounting \$480, have not been paid; and that complainant filed the bill for a foreclosure "subject to the continuing lien of said trust deed to secure the payment of notes 'C' to 'W', both inclusive, together with interest represented by the unpaid interest coupons which come due by their terms on March 2, 1931, and subsequent dates." From the allegations it may be inferred that principal note "A", as well as all coupon notes due prior to September 2, 1930, have been paid, and that complainant only seeks a partial foreclosure for a due indebtedness amounting \$1,480. Complainant further alleges that the premises "are located on 45th Street, in Chicago, Illinois; that they are improved with a three-story brick building which has three five room apartments, steam heat, and there is a two-car heated brick garage in the rear"; and that complainant is "interested and believes that Collis Collins is the owner of the equity of redemption. The bill also prayed for the appointment of a receiver, etc. It is sworn to by one Will Heller, who in the affidavit says that the allegations contained in the bill "are true of his own knowledge and belief."

The transcript further discloses that on January 12, 1930, Collis Collins was personally served with a written notice that on January morning, December 12, 1930, at the

opening of court, complainant's solicitors would appear before a certain judge (naming him) and move for the appointment of a receiver. It does not appear that any such notice was served, or attempted to be served, on the other defendant, Stella Kamski. On December 15, 1930, the appearance of Nellie Bolinsky was entered and on the same day the court ordered that complainant's motion for a receiver be continued to December 18, 1930.

On December 18, 1930, by leave of court, complainant filed an amendment to its bill by adding a paragraph containing additional allegations that the premises are "inadequate security" for the payment of the indebtedness; that it "will be necessary" for complainant to resort to the rents and profits for such payment; that "waste has been committed;" that the premises are "being allowed to deteriorate;" that tenants "are threatening to move unless heat is supplied;" and that unless a receiver is appointed the "possibility of income return" from the premises will be "materially" injured as a result of the failure of the owner to supply heat. It will be noticed that these allegations are mere conclusions of the pleader. No facts are stated to support any of them. Furthermore, in the affidavit of said Emil Meier to the amendment, he swears that the "facts set forth therein are true of his own knowledge and belief."

On the same day complainant filed a petition for the appointment of a receiver. It is signed in complainant's name by Martin T. O'Brien, its vice president. In the affidavit accompanying the petition, sworn to by O'Brien, he states that he has read the foregoing petition and that "to his own knowledge and belief the facts therein stated are true." But the jurat bears date "April 24, 1929," - a date about twenty months prior to the filing of the petition. In addition to repeating some of the allegations contained in the original bill before the amendment.

opening of court, complainant's solicitors could appear before a certain judge (naming him) and move for the appointment of a receiver. It does not appear that any such motion was served, or attempted to be served, on the other defendant, Delta Bank. On December 13, 1930, the appointment of Delta Bank was entered and on the same day the court ordered that complainant's motion for a receiver be continued to December 15, 1930.

On December 15, 1930, by leave of court, complainant filed an amendment to its bill by adding a paragraph containing additional allegations that the premises are "indebtedness security" for the payment of the indebtedness; that it "will be necessary" for complainant to resort to the rents and profits for such payment; that "waste has been committed"; that the premises are "being allowed to deteriorate"; that certain "are interfering to have undue use" is supplied; and that unless a receiver is appointed the "possibility of income return" from the premises will be "materially" injured as a result of the failure of the owner to supply heat. It will be noticed that these allegations are more condemnations of the plaintiff. No facts are stated to support any of them. Furthermore, in the affidavit of said Emil Heller to the amendment, he avers that the "facts and facts therein are true of his own knowledge and belief."

On the same day complainant filed a petition for the appointment of a receiver. It is signed in complainant's name by Martin T. O'Brien, its vice president. In the affidavit accompanying the petition, sworn to by O'Brien, he states that he has read the foregoing petition and that "to his own knowledge and belief the facts therein stated are true." But the facts herein state "that on or about January 1, 1930" - a date about twenty months prior to the filing of the petition. In addition to repeating some of the allegations contained in the original bill before the amendment,

it is alleged that "upon inspection" it appears that the building is "in need of repairs;" that the premises are "insufficient security" for all of the indebtedness; that "the character of the neighborhood has materially changed within the past year;" that the building "is being allowed to deteriorate;" and that "it will be necessary that this complainant resort to the rents, etc., in order to secure payment of all of the indebtedness." The prayer of the petition is that one D. A. Rimbark be appointed receiver, with power to collect the rents and to take charge of and manage the building and garage.

On December 20, 1930, the court entered the order appealed from. After reciting that the trust deed conveyed as additional security the rents, etc., of the premises and certain other provisions of the trust deed, it is further recited that the premises "are being allowed to deteriorate;" that they will be "insufficient and questionable security" for the payment of the indebtedness; that "the character of the neighborhood has materially changed during the past year;" and that "it will be necessary for the complainant to resort to the rents, etc., of the buildings in order to secure the payment of the indebtedness." It is then ordered and decreed that the Citizens State Bank of Chicago be appointed receiver of the premises, and directed to take charge thereof and to collect the rents, etc. and the order concludes:

"And, it further appearing that notice has been served upon the owner of the equity of redemption of said property, upon hearing and for good cause shown, the bond on behalf of complainant is hereby set in the amount of Five Hundred Dollars, to be filed in five days with surety to be approved by the court."

The transcript does not disclose that within said five days complainant filed its bond for \$500, but, apparently, the receiver took possession of the premises, and on December 30, 1930, the court, on the receiver's motion and petition and over Dolinsky's objection, ordered that one John A. Blake be appointed as solicitor

for the receiver. On January 16, 1931, within apt time Iolinsky filed his appeal bond with the clerk of the Superior court and subsequently his appeal from said order of December 23, 1930, was duly perfected in this court.

Counsel for complainant, in their brief here filed, concede that the allegations of complainant's petition (filed December 23, 1930, but sworn to about 20 months prior thereto) cannot be considered on the question whether the appointment of the receiver is warranted by the record, and state that "complainant is willing to rest its case on the bill, as amended, without the support of said petition." It will be observed, however, that numerous findings of the court, contained in the order appealed from, are based solely on the allegations of the petition.

After reviewing the present transcript we are of the opinion that the order appealed from, appointing the receiver, was improvidently issued. No such facts are alleged in the original bill as are sufficient to warrant the appointment of a receiver. And mere conclusions rather than facts are stated in the amendment to the bill. Furthermore, neither the original bill nor the amendment are properly verified, and it does not sufficiently appear that, prior to the receiver taking possession of the premises, complainant complied with the court's order that a complainant's bond be filed within five days. (See, Chicago Title & Trust Co. v. Bickley, 255 Ill. App. 45, 48; Grabowski v. MacLagkey, 257 id. 484, 487.)

Accordingly, the order of December 23, 1930, appointing the Citizens State Bank of Chicago as receiver of the premises in question, is reversed.

REVERSED.

Scanlan, P. J., and Kerner, J., concur.

[illegible][illegible]

After receiving the present statement to one of the opinion
that the order appeared from, appointing the receiver, was approved
by the court. We then took the original bill to the
court to warrant the appointment of a receiver, and were con-
sidered by the court, then the bill was returned to the bill.
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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education and employment opportunities, and the attraction of urban areas by the concentration of industry and commerce. The result of this process is that the majority of the population now lives in urban areas, which are characterized by high population density, a high level of economic activity, and a high level of social and cultural development. This has led to the development of a new type of urban area, the metropolitan area, which is a large area of land surrounding a central city. The metropolitan area is characterized by a high level of economic activity, a high level of social and cultural development, and a high level of population density. The metropolitan area is the result of the process of urbanization, which has led to the concentration of population and economic activity in a small area of land. This has led to the development of a new type of urban area, the metropolitan area, which is a large area of land surrounding a central city. The metropolitan area is characterized by a high level of economic activity, a high level of social and cultural development, and a high level of population density. The metropolitan area is the result of the process of urbanization, which has led to the concentration of population and economic activity in a small area of land.

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "Mr. J. H. Smith", "Mr. W. B. Jones", and "Mr. C. D. Brown".

34524

G. A. E. KOHLER, doing business
as KOHLER BROTHERS,

Appellant,

v.

IRVING I. STONE,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 629

MR. JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought on February 21, 1928, by plaintiff, G. A. E. Kohler, against defendant, Irving I. Stone, to recover \$5500 claimed to have been loaned by plaintiff to defendant, heard by a jury, resulting in a verdict and judgment in favor of defendant, and a special finding that the transaction was not a loan, and from which plaintiff appealed.

Plaintiff's declaration consisted of the common counts, affidavit of the amount due and bill of particulars stating, "plaintiff seeks to recover from defendant \$5500 loaned by plaintiff to defendant upon his promise to repay the same within a short time, with interest at five per cent per annum." The defendant pleaded non assumpsit and in his affidavit of merits denied that plaintiff at any time loaned him any sum of money whatsoever.

Under the issue made by the pleadings, plaintiff urges that defendant was restricted and limited to proving that the transaction was not a loan. In other words, that affirmative evidentiary facts may not be introduced to support a negative defense. Section 55, Ch. 110, Cahill's Rev. Stats. provides: that where a plaintiff files with his declaration an affidavit of claim, the defendant shall file with his plea, an affidavit of merits, specifying the nature of the defense. Plaintiff testified that he loaned defendant \$5500 and related the circumstances under which he claims he

did so, while defendant in his testimony denied he borrowed the money and he related the circumstances under which he obtained the two checks representing the \$5500. It is not necessary that evidentiary facts be pleaded. Facts constituting a defense are those facts which the evidence upon the trial will prove, and not the facts which will be required to prove the existence of such facts. In Firestone Tire Co. v. Sinsburg, 235 Ill. 132, at p. 136, the court said: "It is not required that the defendant should state the evidence but only the ultimate facts which would give notice of the nature of the defense." We are of the opinion that the court was not in error in permitting defendant to show his affirmative defense by which he claimed that the two checks in question were not a loan.

The evidence discloses that plaintiff is engaged in manufacturing and selling a patented device invented by defendant used by newspaper publishers for feeding paper to presses. Defendant is seventy-five years of age and for many years was mechanical superintendent of the Chicago Daily News, where he has been employed for fifty years, earning \$20,000 a year. On June 13, 1903, he assigned his rights to the invention to plaintiff and in the assignment plaintiff agreed to pay to defendant a royalty of ten per cent of the actual cost of each machine manufactured by plaintiff, and five per cent for engineering advice. This agreement was replaced by another agreement dated July 11, 1907, in which defendant released plaintiff from the obligation to pay any commission as royalty or for engineering advice, for which defendant received \$5000 from plaintiff.

On March 30, 1923, plaintiff received a telephone call from defendant asking him to call and see him. Plaintiff testified that he went to defendant's office where defendant informed him he desired a loan of \$5500, to be repaid shortly, with which to purchase

his son while defendant in his testimony denied he borrowed the money and he retained the circumstances under which he obtained the two checks representing the \$2500. It is not necessary that defendant make any statement. There is no evidence that the facts which the evidence upon the trial will prove, and not the facts which will be required to prove the existence of such facts. In Illinois v. W. H. Smith, 111 Ill. 2d 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The evidence discloses that plaintiff is engaged in manufacturing and selling a patented device invented by defendant used by newspaper publishers for feeding paper to presses. Defendant is seventy-five years of age and for many years was mechanical expert-inventor of the Chicago Daily News, where he has been employed for fifty years, earning \$20,000 a year. On June 12, 1907, he assigned his rights in the invention to plaintiff and in the assignment plaintiff agreed to pay to defendant a royalty of ten per cent of the actual cost of each machine manufactured by plaintiff, and five per cent for engineering advice. This agreement was replaced by another agreement dated July 11, 1907, in which defendant released plaintiff from the obligation to pay any compensation as royalty or for engineering advice, for which defendant received \$2500 from plaintiff. On March 20, 1908, plaintiff received a telephone call from defendant asking him to call and see him. Plaintiff testified that he went to defendant's office where defendant informed him he desired a loan of \$2500, to be repaid shortly, with which to purchase

an automobile; that plaintiff replied, "he did not know whether or not he could make the loan, but he returned to his office and had his auditor prepare a check payable to defendant for \$500, and the auditor delivered the check to defendant." On the reverse side of the check when offered in evidence appeared the word "loan", which defendant indorsed and delivered to Paulman & Company, from whom he purchased the automobiles. The auditor did not testify when he placed the word "loan" on the check, and the defendant in testifying stated that he never saw the word on the back of the check. Plaintiff further testified that on April 3, 1923, he called defendant and requested him to go to Carter's office (plaintiff's attorney). Both parties met there, defendant being accompanied by one Brenner, who was excluded from Carter's office by the plaintiff; plaintiff testified that he told defendant he wanted him to execute an agreement to repay the money; that he did not owe him any money; that he had releases signed by defendant when he (plaintiff) bought the patent in 1907; thereupon defendant got furious; then followed a heated conversation between the parties, but finally plaintiff talked to his attorney and said to him, give him (defendant) the check, as he did not want defendant's enmity; that he told defendant he would give him the check and make the loan, but he (defendant) must repay it, and that defendant did agree to repay it; thereupon the \$5000 check was given to defendant. Carter was not called as a witness. This check was also drawn by plaintiff's auditor and the word "loan" appears thereon. It further appeared that defendant took the check, left Carter's office and entered an elevator; arriving at the street floor, he noticed the word "loan" on the reverse side of the check. At that moment plaintiff came out of another elevator and defendant called his attention to the word "loan", to which plaintiff replied, he was in a hurry and could not stop. Plaintiff further testified that the following

an examination of the exhibits which Plaintiff requested, "he did not know whether or not he could make the loan, but he returned to his office and had his assistant prepare a check payable to defendant for \$500, and the exhibit delivered the check to defendant." At the reverse side of the check when offered in evidence appeared the word "loan", which defendant intended and delivered to defendant as a loan, from whom he purchased the automobile. The exhibit did not specify when he placed the word "loan" on the check, and the defendant in specifying stated that he never saw the word on the back of the check. Plaintiff further testified that on April 3, 1933, he called defendant and requested him to go to Carter's office (Plaintiff's attorney). Both parties met there, defendant being accompanied by one Brunner, who was retained from Carter's office by the Plaintiff; Plaintiff testified that he told defendant he wanted him to execute an agreement to repay the money; that he did not see him any money; that he had refused to sign the agreement when he (Plaintiff) brought the papers in 1933; that when defendant was taken to a hotel conversation between the parties, but finally Plaintiff asked to see money and said to him, give him (defendant) the check, as he did not want to sign and a sum; that he told defendant he would give him the check and take the loan, but he (defendant) would repay it, and that defendant did agree to repay it; that when the \$500 check was given to defendant, Carter was not called as a witness. This check was also drawn by Plaintiff's attorney and the word "loan" appears thereon. It further appeared that defendant took the check, left Carter's office and entered an elevator, arriving at the street floor, he noticed the word "loan" on the reverse side of the check. At that moment Plaintiff came out of another elevator and defendant called his attention to the word "loan", to which Plaintiff replied, he was in a hurry and would not stop. Plaintiff further testified that the following

morning defendant telephoned and advised him that the word "loan" appeared on the check and that that was not right; that he then said, "It makes no difference, it is a loan, whether the indorsement mentions loan or not, you can scratch it out if you wish."

Defendant's version is that on March 30, 1933, he told plaintiff he must have some commission right away; that nothing was said about a loan; that at Carter's office on April 13, 1933, nothing was said about a "loan" to him; that he was in Carter's office claiming that plaintiff owed him money; that immediately after Carter gave defendant the check he (defendant) left. As he was leaving the elevator he noticed the word "loan" on the check and at that moment saw plaintiff leaving another elevator and he said to him, "you have 'loan' on here, it does not belong here." Plaintiff replied he was in a hurry. The next day he called plaintiff and was told by him to scratch it out (referring to the word "loan"). He further testified that the \$5500 was not for any money due him that was earned from July 11, 1907, to May 1, 1910, and that after May 1, 1920, he did not do anything in connection with any installation involving the patent. He also testified that the \$5500 was not a gift.

Among the errors assigned is the claim that defendant's counsel made improper and prejudicial statements during the trial and in argument. In the state of the record in the instant case it was essential that the remarks of counsel should have been kept within proper restrictions and the trial so conducted as not to improperly prejudice the jury for or against either party. In his opening statement defendant's counsel said: " * * * we shall show you that Kohler had made a fortune out of this invention. * * * we shall show you that he made \$1,000,000 * * * Kohler at that time could better afford to pay \$3000 to Stone for an invention than he could afford to antagonize Stone, because the invention was

...and advised him that the word "I am" appeared on the check and that was not right; that he then said, "It makes no difference, it is a loan, whether the bank account mentions loan or not, you can convert it out if you wish."

...a version is that on March 30, 1933, he said Plaintiff at that time had some commission right away that evening was this about a loan; that at Doctor's office on April 15, 1933, regarding was told about a "loan" so that he was in Doctor's office again the next Plaintiff took his money; that immediately after Doctor gave Defendant the check for (defendant) \$100.00 he was leaving the Plaintiff he received the word "I am" on the check and at that moment was Plaintiff having another conversation and he said to him, "you know 'I am' on here, it does not belong here." Plaintiff replied he was in a hurry. The next day he called Plaintiff and was told by him to transfer it out (referring to the word "I am"). He further testified that the \$100.00 was not for any money but that was earned from July 11, 1931, to May 1, 1933, and that after May 1, 1933, he did not do anything in connection with any transaction involving the patent. He also testified that the \$100.00 was not a gift.

...among the errors assigned in the claim that defendant's counsel made improper and prejudicial statements during the trial and in argument. In the state of the record in the instant case it was essential that the position of counsel should have been kept within proper restrictions and the trial so conducted as not to improperly prejudice the jury for or against either party. In his opening statement defendant's counsel said: " * * * we shall show you that Keller had made a fortune out of this invention. * * * we shall show you that he made \$1,000,000 * * * Keller at that time could better afford to pay \$5000 to secure for an invention than he could afford to experiment with, because the invention was

making Kohler so much money. * * * Stone was asserting rights that he claimed were due him from royalties. * * * Kohler, if he had a release, was willing to make a gift of this \$5500 - that he was not willing to antagonize Stone by asserting that release for \$2500 on an invention worth \$1,000,000." To those statements plaintiff's counsel objected and the objections were sustained. During the progress of the trial, the court endeavored to ascertain defendant's defense, and various colloquies took place with the court, and defendant's counsel said: "If as a matter of fact Mr. Kohler at the time of this \$5500 transaction had made \$1,000,000 out of this thing, he gave these two checks to Stone because he would rather concede the truth of what Stone was claiming, namely, that Stone had royalties owing him, than to assert his apparent, so-called rights under the release." And during cross-examination of plaintiff, defendant's counsel said: "I will have to go back and urge that if he had sold 407 reels, as he testified he had done when he was in a case in the District Court, at a net price of \$1,300,000, that is a factor in the case. If he was making money out of it, it would not pay him to assert his rights under ^{this} release." at another place defendant's counsel claimed a fraud had been perpetrated on defendant, and the court again inquired what was the defense, and counsel said, "It was a gift," and immediately followed by saying: "I cannot label things. That Kohler did it for was so as not to antagonize Stone, but with no idea of getting it back. * * * to avoid revealing to Stone that he, Kohler, had gotten Stone's invention, worth over \$1,000,000 for \$500--" A moment later, he said his client obtained the money from plaintiff, "on account of commissions;" and in his closing argument to the jury he said: "He knows that he has got this invention from Stone back in 1900, and knows that it has produced a mint of money. * * * There is evidence here * * * that there were some 300 or 400 of these reels

...that he claimed were the ...
...was willing to make a gift of this \$2500 - that
...he was not willing to ...
...for \$2500 on an investment worth \$1,000,000. To these statements
...plaintiff's counsel objected and the objection was sustained.
...during the progress of the trial, the court indicated to ...
...and defendant's counsel said: "It is a matter of fact that ...
...the time of this \$2500 transaction had made \$1,000,000 out of this
...thing, he gave them the money to ...
...made the trial of what there was claiming, namely, that ...
...testimony owing him, then to ...
...under the ...
...and a counsel said: "I will have to go back and ...
...said to ...
...the District Court, at a ...
...in the case. It was ...
...to ...
...counsel claimed a ...
...and ...
...a gift", and immediately followed by saying: "I cannot label ...
...that ...
...no ...
...\$2500--
...A ...
...the ...
...he said: "We know that he has not ...
...in 1900, and ...
...is ...

sold, at a price of \$4,000 for each reel, which makes an imposing total of \$1,200,000." "Stone, there he is, a lamb in a lion's den. * * * He is a mechanic, a man skilled in inventions, not a man skilled in accounting and business relations. What a comparison! Kohler is in business for himself and has been for years. Kohler keeps meticulous diaries from 1900 - * * * from the whole picture it is evident that what Kohler figured was this: \$5500 paid out in order to make \$100,000 is good business."

In a clear case the court will reverse a judgment because of the improper conduct of counsel. (Wabash Ry. Co. v. Billings, 212 Ill. 37; Chicago Union Traction Co. v. Lauth, 216 id. 176.) It has been held that it is error to refer to the riches and business success of the defendant. (Chicago Union Traction Co. v. Lauth, supra; Kaufman v. Helmick, 212 Ill. App. 10; Williamson v. Hirsch, Stein & Co., 147 Ill. App. 500.)

After mature consideration we have been led to the conclusion that these remarks tended strongly to divert the minds of the jury from the real issue to be determined by them; they were calculated to, and did in our opinion, give rise in the minds of the jury to thoughts prejudicial to the rights of the plaintiff notwithstanding the court had sustained the objections of plaintiff's counsel, and the remarks in the closing argument were not justified by the evidence. Under the evidence in the instant case, the jury might have returned a verdict for either party. Where there is a conflict in the testimony the cause will be reversed if improper and prejudicial argument is made. The effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. (Mattice v. Klawans, 312 Ill. 299.)

The judgment of the Superior Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

which, at a price of \$4,000 for each year, which makes an imposing total of \$1,200,000. "Of course, there is no, a land in a lion's den. * * * He is a mechanic, a man skilled in inventions, not a man skilled in accounting and business relations. What a comparison! He is in business for himself and has been for years. He keeps meticulous books from 1900 - * * * from the whole picture it is evident that what Heiler turned was that \$5000 paid out in order to make \$100,000 in good business."

In a clear case the court will reverse a judgment because of the improper conduct of counsel. (Roberts v. G. T. Williams, 218 Ill. 37; Chicago & North Western Ry. Co. v. City of Chicago, 218 Ill. 170.) It has been held that it is error to refuse to allow a witness to examine the contents of the safe. (Chicago & North Western Ry. Co. v. City of Chicago, 218 Ill. 170.) Illinois v. Williams, 218 Ill. 170; Williams v. City of Chicago, 218 Ill. 170.

After mature consideration we have been led to the conclusion that these remarks tended strongly to divert the minds of the jury from the real issue to be determined by them; they were calculated to, and did in our opinion, give rise in the minds of the jury to thoughts prejudicial to the rights of the plaintiff notwithstanding the court had sustained the objections of plaintiff's counsel, and the remarks in the closing argument were not justified by the evidence. Under the evidence in the instant case, the jury might have returned a verdict for either party. Where there is a conflict in the testimony the court will be reversed if improper and prejudicial argument is made. The effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. (Illinois v. Williams, 218 Ill. 170.)

The judgment of the Superior Court is reversed and the cause is remanded. The court is remanded. The court is remanded.

34619

KAZIMER KELTSAS and ANNA KELTSAS,
Complainants and Appellants.

vs.

THE WHITE EAGLE BUILDING AND LOAN
ASSOCIATION et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

FRANK J. HEITMAN,
Cross-Complainant and Appellee.

262 T.A. 629

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

By this appeal the cross-defendants seek to reverse a decree of the Superior court entered July 8, 1930, as modified July 16, 1930. The amended bill filed by Kazimer Kelpsas and Anna Kelpsas alleges, inter alia, that they are the owners of certain real estate therein described, having acquired title thereto by deed dated June 10, 1912; that after they purchased the real estate they constructed a building thereon and since 1912 they have been in continual, actual possession thereof; that there appears of record a warranty deed purporting to be executed by them conveying to Josef Korczewski on October 4, 1912, the real estate in question; that they never signed it or authorized any other person to sign it and that it is a forgery; that they first learned of the existence of the deed on June 24, 1925; that there also appears of record an alleged trust deed dated October 8, 1912, from Korczewski and wife to Frank J. Heitmann to secure \$3,500; also two alleged mortgages dated January 6, 1913, and June 21, 1920, from Korczewski and wife to The White Eagle Building and Loan Association to secure \$5,200 and \$7,500, respectively; that they never signed any papers or documents to or for The White Eagle Building and Loan Association and never dealt with it and never received any money from Heitmann or from the association, and that said trust deed and mortgages are

SALES OFFICE and
RECORDS and
OFFICE

75

THE WHITE MOUNTAIN
ASSOCIATION OF
MOUNTAIN

WHITE MOUNTAIN
ASSOCIATION
COUNTY, COLORADO

THOMAS J. HELTMAN,
Cross-Complainant and Appellee.

652 T.A. 652

MR. JUSTICE EDWARD BREWER THE WRITING OF THE COURT

By this appeal the cross-complainant seeks to reverse a
decree of the Superior Court entered July 6, 1910, as modified July

16, 1910. The matter was filed by Benjamin Johnson and Anna
Johnson, his wife, as parties, and they are the owners of certain

real estate therein described, having acquired title thereto by
deed dated June 16, 1910; that after they purchased the real estate

they constructed a building thereon and since 1910 they have been
in continuous, actual possession thereof; that there appears to

be a warranty deed purporting to be executed by them conveying
to John Johnson on October 4, 1910, the real estate in question;

that they never signed it or authorized any other person to sign it
and that it is a forgery; that they filed a petition of the estate

of the said John Johnson on June 24, 1910; that they also appear as parties in
the alleged deed dated October 4, 1910, from Johnson and wife

to Frank J. Helman to secure \$7,500; also two alleged mortgages
dated January 6, 1911, and June 21, 1910, from Johnson and wife

to The White Mountain and Loan Association to secure \$5,000
and \$7,500, respectively; that they never signed any papers or

documents to or for The White Mountain and Loan Association
and never took it and never received any money from Helman

or from the association, and that they never sold the real estate

forgeries, and they pray for the removal of the deed to Korczewski and the trust deed to Heitmann and the mortgages to The White Eagle Building and Loan Association as clouds on their title. Frank J. Heitmann answered, denying the deed to Korczewski and the trust deed to him were forgeries and averring that Korczewski desiring to erect a building, procured from the Heitmann Lumber Company a loan of \$3,500 through Bruno F. Kowalewski; that Heitmann Lumber Company sold the notes to Frank J. Heitmann; that the makers of the notes paid all interest up to April 8, 1925; that Korczewski used the proceeds of the loan in the erection of a three-story brick flat building; that the Heitmann Lumber Company and Frank J. Heitmann in paying out the \$3,500 relied upon the faith of the public records of Cook County without any notice of any claim of Kazimer and Anna Kelpas; that since the filing of the bill Heitmann first learned that the Kelpas in June, 1912, had neither money nor credit with which to finance the erection of the building; that on October 4, 1912, the Kelpas conveyed the title to Korczewski to enable him to borrow money; that Korczewski proceeded to erect the building and applied to the Heitmann Lumber Company for a loan of \$3,500; that the loan was made and Korczewski completed the building and turned it over to Kazimer Kelpas and Anna Kelpas. Frank J. Heitmann also filed a cross-bill, praying for a foreclosure of the above stated trust deed. The White Eagle Building and Loan Association also filed a cross-bill, praying for the foreclosure of the mortgage for \$7,500, dated June 21, 1920. The cause was referred to a master, who filed his report and supplemental report, recommending a decree as prayed for in the amended bill and that the cross-bills be dismissed. Objections were filed to the reports by Frank J. Heitmann, which were ordered to stand as exceptions; no objections were filed by The White Eagle Building and Loan Association and it has abandoned its cross-bill. After a hearing the court entered a decree

[illegible]

dismissing the amended bill for want of equity and granted the foreclosure relief prayed for by Heltmann. Kazimer Kelpas and Anna Kelpas prosecute this appeal.

The material facts are that on June 10, 1912, cross-defendants purchased two vacant lots and commenced the construction of a six-flat building on one of them, to cost \$8,700, to be paid out of mortgages which the general contractor was to procure. They were to pay \$2,000 when the building progressed to the second floor. Stanislaw Anuczauski was the general contractor. No money was paid to Anuczauski and he stopped all work when the building was under roof. Cross-defendants were then referred to Bruno F. Kowalewski, a mortgage banker, for the purpose of securing funds for the payment and completion of the building; as they spoke no English they carried on negotiations through their fifteen year old daughter; they arranged with him to take care of the financing, he to pay all the lien claims, they to repay all advancements made by Kowalewski by making monthly deposits at his office. During this visit to Kowalewski's office they executed a deed to the property to Josef Korczewski, who was the mason contractor. The building was completed on December 8, 1912, at which time cross-defendants took possession of the flat building and have remained in possession of it ever since. The contractor and sub-contractors were all paid. On October 16, 1912, there was filed for record a deed, dated October 4, 1912, purporting to be executed by cross-defendants, conveying the property to Korczewski; the deed was signed by the "marks" of the grantors, with two witnesses, and acknowledged before Kowalewski as notary public. On October 5, 1912, Korczewski executed a deed re-conveying the property to cross-defendants, which deed was not delivered to them nor recorded, it being discovered after the death of Kowalewski among his files. On October 11, 1912, a trust deed given to secure a note for \$3,500, dated October 8, 1912, was filed for record. This

including the amount bill for work of repair and painting the
exterior walls of the building. Another witness and
Anna Karpowicz testified this appeal.

The material facts are that on June 10, 1912, George
Karpowicz purchased two vacant lots and commenced the construction
of a six-story building on one of them, to cost \$2,500, to be paid
out of mortgages which the general contractor was to procure. They
were to pay \$2,500 when the building was erected to the second floor.
Karpowicz was the general contractor. He never was paid
for materials and he stopped all work when the building was under
foot. Cross-examination was then referred to James V. Karpowicz,
a mortgage broker, for the purpose of securing funds for the payment
and completion of the building as they spoke no English they con-
sulted on negotiations through their fifteen year old daughter; they
arranged with him to take care of the financing, he to pay all the
loan alone, they to repay all advances made by Karpowicz by
making monthly deposits at his office. During this visit to Karpowicz
his office they executed a deed to the property to local Karpowicz
and who was the main contractor. The building was completed on
January 2, 1912, at which time cross-examination took possession of
the first building and have remained in possession of it ever since.
The contractor and sub-contractors were all paid. On October 10,
1912, there was filed for record a deed, dated October 4, 1912, pur-
porting to be executed by cross-examination, conveying the property
to Karpowicz; the deed was signed by the "names" of the Karpowicz,
with two witnesses, and acknowledged before Karpowicz as notary
public. On October 2, 1912, Karpowicz executed a deed to conveying
the property to cross-examination, which deed was not delivered to
them nor recorded, it being discovered after the death of Karpowicz
among his files. On October 11, 1912, a first deed given to secure a
note for \$2,500, dated October 2, 1912, was filed for record. This

trust deed conveyed the premises in question to Frank J. Heitmann as trustee, as security for the \$3,500 note. The Heitmann Lumber Company, at the solicitation of Kowalewski, advanced \$3,500 on the security of the Korczewski trust deed and note. Before doing so, Frank J. Heitmann examined the records and the property, which was then under construction, but did not interview cross-defendants as he did not know of their interest. Frank J. Heitmann purchased this trust deed and note of the Heitmann Lumber Company six months after their execution. On January 7, 1913, a trust deed given to secure the sum of \$5,200 borrowed from The White Eagle Building and Loan Association, was executed by Korczewski. This trust deed the court in its decree found had been paid and satisfied. After cross-defendants placed the matter in charge of Kowalewski they made regular payments of money to him continuously until his death in 1925. They paid him \$12,000 which was credited in a bank deposit book given them by Kowalewski. It is not clear how much of the money Kowalewski actually applied upon their debts. Kowalewski paid the semi-annual interest on the Heitmann trust deed until April 28, 1925, and made some payments on The White Eagle Building and Loan Association mortgage. Cross-defendants, however, paid Kowalewski more than they ever received credit for.

The evidence also discloses that Kazimer Kelpas and Anna Kelpas claimed that they had executed to Kowalewski only two mortgages, aggregating \$6,500, and no other papers, and that they never signed by "mark," and they denied having executed or authorized the execution of the deed to Korczewski.

The authenticity of the deed to Korczewski is the only disputed question of fact. Counsel for cross-defendants frankly concede that the forgery cannot be proven alone by the testimony of the cross-defendants. Both cross-defendants testified sixteen years

first then conveyed the premises in question to Frank J. Hoffmann as trustee, on security for the \$5,000 note. The Hoffmann Lumber Company, at the solicitation of Kowalski, advanced \$5,000 on the security of the Kowalski first deed and note. Before doing so, Frank J. Hoffmann examined the records and the property, which was then under construction, but did not interview cross-defendants as he did not know of their interest. Frank J. Hoffmann purchased this tract deed and note of the Hoffmann Lumber Company six months after it was executed. On January 7, 1917, a trust deed given to secure the sum of \$5,000 borrowed from The First State Building and Loan Association, was executed by Kowalski. This trust deed was recorded in the books of said bank and retained. After cross-defendants placed the matter in charge of Kowalski they made regular payments of money to him continuously until his death in 1925. They paid him \$10,000 which was credited in a bank book kept by him from then by Kowalski. It is not clear how much of the money Kowalski actually applied upon their debt. Kowalski paid the last annual interest on the Hoffmann Lumber Company note April 30, 1925, and made some payments on the First State Building and Loan Association mortgage. Cross-defendants, however, paid Kowalski more than they ever received credit for. The evidence also discloses that Hoffman, Kowalski and Anna Kowalski claimed that they had executed to Kowalski only two mortgages, aggregating \$4,000, and no other papers, and that they never signed by "Kowalski" and they denied having executed an authentic the execution of the deed to Kowalski. The authenticity of the deed to Kowalski is the only disputed question at issue. Counsel for cross-defendants frankly concede that the testimony cannot be given alone by the testimony of the cross-defendants. Both cross-defendants testified that they

after the alleged occurrence that they could write their respective names and that neither of them ever executed any instrument by "mark," while the evidence shows definitely that Mrs. Kelpsas did on June 10, 1912, in executing the agreement for warranty deed, in pursuance of which they purchased the property, sign her name by "mark." In addition to the testimony of the cross-defendants, one Stanley Lacoas testified that in 1912 he boarded with cross-defendants and that he was present when they talked with Kowalewski; that nothing was said about giving a deed to Korczewski and that they did not sign by "mark," and that no papers were signed except the mortgages. The record also discloses the testimony of a daughter of the cross-defendants, who was fifteen years old in 1912, that she was present at Korczewski's office and that her parents did not sign their names by "mark," and a handwriting expert gave his opinion, based upon a comparison with a genuine "mark" of Mrs. Kelpsas, that she did not place her "mark" on the Korczewski deed. This expert had for comparison only one small cross placed on the June 10, 1912, contract for warranty deed, admitted to be her genuine "mark." Where the name of the person is written by another and he makes a cross mark, there is nothing distinctive to fix its identity. (Watts v. Kilburn, 7 Ga. 356.) In the case of Travers v. Snyder, 38 Ill. App. 379, the court said (p. 382):

"How can simply a mark be recognized as that of any particular person, without any proof of any particular characteristic by which it can be distinguished? And it seems to us that it proves nothing that one cross or mark is like another. It seems to us that it would be very unsafe, and lead to dangerous results, to allow such comparisons to be made and taken as evidence, unless at least some proof were made that the defendant's mark had some established characteristics, like a handwriting, that would enable it to be recognized. A mere cross or mark can not be identified, and it therefore stands for itself alone." (See also Gilliam v. Ferkinson, 4 Rand. (Va.) 323; Jones v. Hough, 77 Ala. 437.)

We have made a careful examination of the record and are of the opinion that the Korczewski deed is the genuine deed of

After the alleged occurrence that they could write their respective names and that neither of them ever executed any instrument by "Mark". While the evidence shows definitely that Mrs. Karpman did not sign the will, in executing the agreement for warranty deed, in the absence of which they purchased the property, with her name by "Mark". In addition to the testimony of the cross-examination, one testimony is given that in 1912 he heard with cross-examination that he was present when that signed with Karpman; that nothing was said about giving a deed to Karpman and that they did not sign by "Mark", and that no papers were signed except the mortgage. The record also discloses the testimony of a daughter of the cross-examination, who was fifteen years old in 1912, that she was present at Karpman's office and that her parents did not sign their names by "Mark", and a handwriting expert gave his opinion, based upon a comparison with a genuine "Mark" of Mrs. Karpman, that she did not place her "Mark" on the Karpman deed. This expert had for comparison only one small cross placed on the 10, 1912, contract for warranty deed, admitted to be her genuine "Mark". Where the name of the person is written by another and he makes a cross mark, there is nothing distinctive to the its identity. (Waller v. Waller, 7 Cal. 2d 585.) In the case of Waller v. Waller, 30 Cal. 2d 579, the court said (p. 585):

"How can it be said that a mark be recognized as that of any particular person, without any proof of any particular characteristics by which it can be distinguished? And it seems to us that it proves nothing that one cross or mark is like another. It seems to us that it would be very unsafe, and lead to dangerous results, to allow such evidence to be made and taken as evidence, unless an expert were present who made that the defendant's mark had some established characteristics, like a handwriting. That would enable it to be recognized. A mere cross or mark can not be identified, and it therefore stands for itself alone. (See also Waller v. Waller, 4 Cal. 2d 585, 32 Cal. 2d 579.)"

We have made a careful examination of the record and are of the opinion that the Karpman deed is the genuine deed of

the cross-defendants, and that it was executed so as to enable Karczewski to borrow money to pay lien claims.

The principal contentions of the cross-defendants are that in equity, payment to the original lender discharges the debt, and that all defenses against the trust deed and notes in the hands of the original taker might be asserted against subsequent purchasers, and cite Gemkow v. Link, 225 Ill. 21, King v. Harpster, 306 Ill. 202, and several other cases that follow the rules stated in those cases. In the instant case Kowalewski was not the mortgagee; he was never the owner of the trust deed and notes, it clearly appearing that after Anuczanski had stopped the work because no money was being paid, the cross-defendants were referred to Kowalewski for the purpose of securing funds, and he, as their agent, negotiated with the Reitzmann Lumber Company for a loan, and the Reitzmann Lumber Company on October 29, 1912, paid to Kowalewski the \$3,500 upon the note of Karczewski, the record not disclosing that Kowalewski up to October 29, 1912, paid any part of the sum represented by the \$3,500 note to Karczewski or for the benefit of the cross-defendants, but it does appear that after the payment of the \$3,500 to Kowalewski the general contractor and all the sub-contractors were paid for materials and labor furnished by them. It further appears that the payments, aggregating \$12,000 above noted, made by the cross-defendants to Kowalewski, commencing with a payment of \$137.50 on October 20, 1913, down to March 16, 1925, are designated in the receipts given by Kowalewski in various ways, such as, "On account of contract;" "To be paid to B. M. C.;" "To be applied on lot;" "On account of building;" "In account with;" "For sundries;" "On account of real estate loans;" clearly showing that all the payments being on the basis of some special contract or arrangement

the cross-defendants, and that it was intended as an attempt
Kowalski to borrow money to pay his claims.
The principal contention of the cross-defendants
are that in equity, payment to the original lender discharges
the debt, and that all defenses against the trust deed and notes
in the hands of the original lender might be asserted against
subsequent purchasers, and also James V. Link, 225 Ill. 21,
King v. Sherry, 308 Ill. 508, and several other cases that
follow the rules stated in those cases. In the instant case
Kowalski was not the mortgagee; he was never the owner of the
trust deed and notes, it clearly appearing that after numerous
had stopped the work because no money was being paid, the cross-
defendants were referred to Kowalski for the purpose of securing
funds, and he, as their agent, negotiated with the National Lumber
Company for a loan, and the National Lumber Company on October 21,
1912, paid to Kowalski the \$5,000 upon the note of Kowalski,
the record not disclosing that Kowalski up to October 20, 1912,
paid any part of the sum represented by the \$5,000 note to
Kowalski or for the benefit of the cross-defendants, but it does
appear that after the payment of the \$5,000 to Kowalski the
General contractor and all the sub-contractors were paid for
materials and labor furnished by them. It further appears that the
payments, aggregating \$12,000 above noted, made by the cross-
defendants to Kowalski, commencing with a payment of \$127.50 on
October 20, 1912, down to March 12, 1913, was designated in the
receipts given by Kowalski in various ways, such as, "on account
of contract," "To be paid to E. M. B.," "To be applied on lot,"
"on account of building," "in account with," "for supplies,"
"on account of real estate loans," clearly showing that all the
payments being on the basis of some existing contract or arrangement

they had with Kowalewski, the precise terms and conditions of which we are unable to say, but after an examination of the entire record we are of the opinion that Kowalewski in receiving the payments was acting as agent for the cross-defendants, and that such payments can not be construed as applying on the Koczewski note, due five years from its date, and that the rule announced in Conner v. Wahl, 330 Ill. 136, that where one of two innocent persons must suffer by reason of the fraud or wrong conduct of another the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong. We have also considered the contention of counsel for cross-defendants that Heitmann was negligent in failing to inquire of the rights of the parties in possession of the property in the instant case and that he be required to suffer the loss sustained by Kowalewski's fraud, and find no merit therein.

The decree of the Superior court will be affirmed.

AFFIRMED.

Scanlan, P. J., and Grädley, J., concur.

they had with themselves, the precise terms and conditions of which
we are unable to say, but after an examination of the entire record
we are of the opinion that Kowalewski is possessing the documents now
acting as agent for the cross-Belundants, and that such documents
can not be considered as applying to the Kowalewski note, due five
years from the date, and that the rule announced in Ex parte
120 Ill. 128, that where one of two innocent persons must suffer
by reason of the fraud or wrong conduct of another the burden must
fall upon him who put it in the power of the wrongdoer to commit
the fraud or do the wrong. We have also considered the contention
of counsel for cross-Belundants that Kowalewski was negligent in
failing to inquire of the title of the parties in possession of
the property in the instant case and that he is required to suffer
the loss sustained by Kowalewski's fraud, and that no merit therein
remains. The decree of the Superior Court will be affirmed.

APPROVED

Given, P. J. and Justice, J. J. consent.

34649

RICHARD E. SCHMIDT, HUGH M. G.
GARDEN and CARL A. ERIKSON, a
copartnership, doing business
as SCHMIDT, GARDEN and ERIKSON,
Appellees,

v.

Y. M. DOODOKYAN,

Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

262 I.A. 630

MR. JUSTICE KEMNER DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought by plaintiffs Richard E. Schmidt, Hugh M. G. Garden and Carl Erikson, against defendant, Y. M. Doodokyan, for professional fees for drawing plans and specifications for alterations and additions to a hospital, heard by a jury, resulting in a verdict and judgment in favor of plaintiffs for \$5000, from which defendant appealed.

Plaintiffs' declaration consisted of the common counts, and the defendant pleaded non assumpsit. There is no denial that the services were rendered, but the defendant contends that the plans and specifications were to be for a hospital to cost not more than \$35,000 to \$40,000. The law is well settled that where the contract for the drawing of plans and specifications provides that the building is not to cost more than a certain sum, the architect is not entitled to compensation where it appears from the evidence that the cost of the building grossly exceeds the sum agreed upon (Ada Street Methodist Episcopal Church v. Garnsey, 66 Ill. 132; Williar v. Nagle, 109 Md. 75; Feltham v. Sharp, 99 Ga. 260; Pierce v. Board of Education, 211 N. Y. Sup. 788; 5 Corpus Juris 262), but if after the plans and specifications are drawn as contemplated by the parties in the first instance, they are changed by the owner as to increase the cost of the build-

2. In March, 1911, a certain
number of men, who were
employed by the Government,
were sent to the
Government of
the United States.

1900

THE UNIVERSITY OF CHICAGO PRESS

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There is an action in assumpsit brought by plaintiff
Edward E. Schmidt, against M. E. Taylor and Carl Wilson, against
defendant, W. M. Beckwith, for professional fees for drawing
plans and specifications for alterations and additions to a
hospital, known as a lady, resulting in a verdict and judgment
in favor of plaintiff for \$5000, from which defendant appealed.
Plaintiff's contention consisted of the common counts,
and the defendant pleaded non assumpsit. There is no denial
that the services were rendered, but the defendant contends that
the plans and specifications were to be for a hospital to cost not
more than \$25,000 to \$40,000. The law is well settled that where
the contract for the drawing of plans and specifications provides
that the building is not to cost more than a certain sum, the
contract is not entitled to compensation where it appears from
the evidence that the cost of the building greatly exceeds the
sum agreed upon (See Street v. Schaefer, 100 Md. 78; Taylor v. Schaefer,
22 Cal. 2d; Taylor v. Board of Education, 211 N. Y. Sup. 708;
Corpus Juris 2d), and if after the plans and specifications
are drawn as contemplated by the parties in the first instance,
they are changed by the owner as to increase the cost of the building

ing, the architect is entitled to compensation. (Williar v. Nagle, 113 Md. 614; Martin v. McMahon, 271 Pac. 1114; Boswell v. Draper, 149 Ia. 725.)

Richard E. Schmidt for plaintiffs, testified substantially that on June 16, 1925, plaintiffs offered their services as architects to defendant for a charge of ten per cent of the cost of the remodeling of defendant's hospital; that they made a sketch of the existing building and the proposed additions; that on September 24, 1925, they wrote defendant that the proposals they received would indicate that the remodeling would cost at least \$55,000 and possibly \$61,000, conditioned on the state of the building market at the time proposals were invited; that defendant replied by asking what kind of material would be used and plaintiffs answered by forwarding to defendant a memorandum of the specifications; that several discussions then followed as to the details of the plans; that on March 5, 1926, she inquired if plaintiffs had a close estimate of the cost and was advised that they did not have a close estimate; that it was impossible to obtain one before working plans and specifications are completed, but they believed their guess was not far from the exact cost; that on April 15, 1926, she telephoned that she had a loan of \$40,000 and that they could proceed with the work on the plans; that on various days between April 25, 1926, and May 27, 1926, she desired changes and additions, which were made and they added to the cost of the hospital; that on July 13, 1926, she was informed the plans and specifications were completed and that plaintiffs were about to request proposals from contractors. Proposals were received on August 3, 1926, and in her presence tabulated, showing the cost of the proposed work at \$86,108. On August 23, 1926, she advised plaintiffs she would be unable to make a decision about the building until the first week of September, and on September 26 she

[illegible]

advised plaintiffs she had decided to delay building until the following April. On cross-examination Richard E. Schmidt further testified that in the first conversation he had with defendant she said she wanted the additions and alterations to cost not more than \$35,000 or \$40,000; that the estimate of September 24, 1925, included all the things talked about at the first conversation; that defendant telephoned the witness in September after the letter of September 24, 1925, but said nothing about the figure being more than \$35,000 or \$40,000, but informed the witness to go ahead with the plans; that other changes were made after September 24, 1925; that the plans were drawn between May 15, 1926, and June 19, 1926; that on August 3, 1926, when the bids were opened, she said: "That's a good deal of money. Won't you see what you can do to get it for less money"; and that she did not say it was over and above the estimate.

The defendant testified substantially that her first conversation with Richard E. Schmidt was in June, 1925, and that she informed him she desired a hospital and told him that her banker promised her a loan of \$25,000; that she had some savings but could not do more than \$35,000 or \$40,000, and that Schmidt said that would be all right; that he was going to make an estimate and tell her exactly how much the hospital was going to cost, and she received a letter from him advising her that the cost of the building would be \$55,000 to \$61,000; that upon receipt of the letter she told Schmidt she had only \$25,000 promised by her banker, and \$15,000 savings, and \$55,000 to \$61,000 is quite big. Schmidt said it might be less when final plans and specifications were made. She told Schmidt that if it is too much she will not go into it, and Schmidt said it might be less than \$61,000. When the bids were opened she told Schmidt the figure was too high and that she could not undertake it; that after the first conversation

advised Schmidt's and had failed to bring building until the following April. On cross-examination Richard H. Schmidt further testified that in the first conversation he had with defendant she said she wanted the addition and alterations to cost not more than \$35,000 or \$40,000; that the estimate of September 24, 1935, included all the things talked about at the first conversation; that defendant telephoned the witness in September after the latter of September 24, 1935, but said nothing about the figure being more than \$35,000 or \$40,000, but informed the witness to be spent with the figure; that other changes were made after September 24, 1935; that the plans were drawn between May 15, 1935, and June 15, 1935; that on August 2, 1935, when the bids were opened, she said: "That's a good deal of money. You'd see what you can do to get it for less money"; and that she did not say it was even and above the estimate.

The defendant testified emphatically that her first conversation with Richard H. Schmidt was in June, 1935, and that she informed him she desired a hospital and told him that her banker promised her a loan of \$25,000; that she had some savings but could not do more than \$25,000 or \$30,000, and that Schmidt said that would be all right; that he was going to make an estimate and tell her exactly how much the hospital was going to cost, and she received a letter from him advising her that the cost of the building would be \$25,000 to \$41,000; that upon receipt of the letter she told Schmidt she had only \$25,000 promised by her banker, and \$15,000 savings, and \$20,000 to \$41,000 in cash. Schmidt said it might be less when final plans and specifications were made. She told Schmidt that it is too much she will not go into it, and Schmidt said it might be less than \$41,000. When the bids were opened she told Schmidt the figure was too high and that she could not undertake it; that after the first conversation

with Schmidt no changes in the plans and specifications were made.

The defendant contends that the plaintiffs agreed to prepare the plans and specifications for the hospital to cost not more than \$35,000 to \$40,000. It is very apparent that the testimony is conflicting, the plaintiffs denying that there was such an agreement, while the defendant's testimony tends to show that there was an understanding that the plans and specifications were to be for a hospital to cost not more than \$35,000 to \$40,000, and consequently it became a question of fact for the jury, who determined in favor of the plaintiffs, and if there is no error in the instructions the judgment must be affirmed. Where an instruction directs a verdict in case the jury finds certain facts, the instruction must contain all the facts. (Pardridge v. Cutler, 168 Ill. 504; Illinois Iron & Metal Co. v. Weber, 196 id. 526; National Importing Co. v. Bear & Co., 324 id. 346.) By plaintiffs' instruction No. 5 the jury was instructed that if they believe from the evidence that the defendant employed the plaintiffs as architects, and the plaintiffs rendered services in pursuance of such employment, then plaintiffs are entitled to recover; and by plaintiffs' instruction No. 2 the jury was instructed that if they believe from the evidence that defendant requested the plaintiffs to make, etc., working plans, etc., and that plaintiffs did furnish such plans, etc., then plaintiffs will be entitled to recover, etc. The defendant had conceded that plaintiffs had prepared the plans and specifications and had rendered services to defendant, Giving these instructions in this form substantially directed the jury to find for the plaintiffs. The instructions ignored the defense of the defendant, as the jury was not, by these instructions, instructed that they must consider the element of the cost of the

with Schmidt no changes in the plans and specifications were made.
The defendant contends that the plaintiff agreed to
prepare the plans and specifications for the hospital to cost not
more than \$30,000 to \$40,000. It is very apparent that the plan-
tiff is contending, the plaintiff's testimony being that there was such an
agreement. While the defendant's testimony tends to show that there
was an understanding that the plans and specifications were to be
for a hospital to cost not more than \$30,000 to \$40,000, and con-
sequently it became a question of fact for the jury, who determined
in favor of the plaintiff, and if there is no error in the in-
structions the judgment must be affirmed. Where an instruction
directs a verdict in case the jury finds certain facts, the in-
struction must contain all the facts. Wheeler v. Wheeler, 188
Ill. 201; Illinois Trust & Loan Co. v. Trust Co., 188 Ill. 201.
Instruction No. 8 the jury was instructed that if they believe
from the evidence that the defendant employed the plaintiff as
architect, and the plaintiff rendered services in preparation of
such employment, then plaintiff is entitled to recover; and if
plaintiff's Instruction No. 8 the jury was instructed that if they
believe from the evidence that defendant requested the plaintiff
to make, etc., working plans, etc., and that plaintiff did not
make such plans, etc., then plaintiff will be entitled to recover.
etc. The defendant had conceded that plaintiff had prepared the
plans and specifications and had rendered services as defendant,
giving these instructions in this form substantially directed the
jury to find for the plaintiff. The instructions ignored the
defense of the defendant, as the jury was not, by these instructions
instructed that they must consider the amount of the cost of the

and this was agreed to by the defendant and the plaintiff
that the cost of the plans and specifications should not exceed \$30,000 to \$40,000

hospital in relation to the limitation of cost claimed to have been agreed upon by the plaintiffs and the defendant. The error thus committed was not cured by the giving of any other instruction. (Centwell v. Harding, 249 Ill. App. 354.)

The judgment of the Circuit court will be reversed and the cause will be remanded and it is so ordered.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

present in relation to the limitation of your claims to have
been agreed upon by the defendant and the plaintiff. The court
has concluded that the claim is not valid for the reason of the above mentioned.

(Exhibit A, Affidavit, Jan. 11, 1911.)

The judgment of the court is hereby affirmed.

and the case will be remanded and it is so ordered.

WITNESSES AND JUDGES.

Respectfully,
J. L. and J. L., Attorneys.

THE COURT OF THE DISTRICT OF COLUMBIA
DOES hereby certify that the within and foregoing
is a true and correct copy of the original
as the same appears from the records of the court.
GIVEN UNDER MY HAND AND SEAL OF OFFICE
THIS 11th DAY OF JANUARY, 1911.
J. L. and J. L., Attorneys.

34688

EVA BOITANO,
Appellee,

v.

INLAND SUPPLY COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

2621A.630^L

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Eva Boitano, sued the Inland Supply Company and Emma Bayer, for personal injuries received as the result of a collision between the automobile in which she was a passenger, driven by defendant Bayer, and the automobile truck of the defendant, Inland Supply Company. During the trial, on motion of plaintiff, the suit was dismissed as to Emma Bayer. There was a trial before a jury and a verdict and judgment in favor of the plaintiff for \$12,500, from which the defendant appealed.

Plaintiff testified that on December 4, 1923, at about 8 a. m., she was invited to ride in an automobile driven by Emma Bayer; she sat in the front seat next to the driver. The automobile proceeded south on Columbian avenue toward Division street, Oak Park, Illinois, at about 15 to 18 miles an hour. Arriving at the corner of Division street she saw a truck 125 feet west of Columbian avenue on the south side of Division street, coming east just north of the south curb. Mrs. Bayer slowed down when she got to Division street and as she started to cross the street she increased her speed, and when her automobile was in the middle of Division street plaintiff said, "Oh, oh, see that truck - hurry, see that truck." When Mrs. Bayer's attention was called to the truck she stepped on the gas and tried to get across. The truck was traveling at the rate of thirty miles or more. It struck the automobile and plaintiff was

1930

BY THE COURT

1

IN THE COURT OF THE COMMON PLEAS
FOR THE COUNTY OF COLUMBIA

2021 A. 630

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Mrs. Beyer, sued the Island Supply Company and James Beyer, for personal injuries received as the result of a collision between the automobile in which she was a passenger, driven by defendant Beyer, and the automobile truck of the defendant, Island Supply Company. During the trial, an action of plaintiff, the suit was dismissed as to James Beyer. There was a trial before a jury and a verdict and judgment in favor of the plaintiff for \$12,500, from which the defendant appealed.

Plaintiff testified that on December 4, 1928, at about 8 a. m., she was invited to ride in an automobile driven by James Beyer; she sat in the front seat next to the driver. The automobile proceeded south on Columbia avenue toward Division street, Park, Illinois, at about 10 to 15 miles an hour. Arriving at the corner of Division street she saw a truck 175 feet west of Columbia avenue on the south side of Division street, coming east just north of the south curb. Mrs. Beyer slowed down when she got to Division street and as she started to cross the street she increased her speed, and when her automobile was in the middle of Division street plaintiff said, "Oh, oh, see that truck - hurry, see that truck." When Mrs. Beyer's attention was called to the truck she stopped on the gas and tried to get across. The truck was traveling at the rate of thirty miles an hour. It struck the automobile and plaintiff was

thrown across the street. On cross-examination she testified that she entered Mrs. Bayer's automobile one block and a-half north of Division street. Neither she nor Mrs. Bayer talked as the automobile was driven toward Division street. It was driven along at a moderate rate of speed until it approached Division, then slowed down somewhat. At the corner of Division street and Columbian avenue she looked to the west half way down the block and there was nothing coming. When they had started across the street she was attracted by the truck coming pretty fast, and when they were at the center of the street she said "Look out for the truck." It was then that Mrs. Bayer increased her speed. The truck did not slacken its speed. It came right on and struck the right rear of Mrs. Bayer's automobile. Mrs. Bayer's automobile was on the right-hand side of Columbian avenue, and the truck was on the right-hand side of Division street. When she first saw the truck Mrs. Bayer's automobile was on the north side of Division street and the truck was on Division street 125 feet west of Columbian avenue. On the northwest corner of Division street and Columbian avenue is a vacant lot more than fifty feet wide. Division street is sixty feet wide and there is a parkway eight feet wide between Division street and the sidewalk which is five or six feet wide. Mrs. Bayer's automobile was two or three feet north of the sidewalk when she slackened her speed as she approached Division street, and it was then she saw the truck 125 feet west of Columbian avenue, but paid no attention to it until Mrs. Bayer's automobile was in the middle of the street and she saw that the driver of the truck had no intention of slowing down or stopping that she called Mrs. Bayer's attention to the truck.

Elizabeth Goedert testified that she was walking south on the west side of Columbian avenue, between twenty-five and fifty feet north of Division street, and saw the Bayer automobile pass her

through across the street. On cross-examination she testified that she entered Mrs. Beyer's automobile one block and a-half north of Division street. Between one Mrs. Beyer called on the automobile was driven toward Division street. It was driven along at a moderate rate of speed until it approached Division, then slowed down somewhat. At the corner of Division street and Columbia avenue she looked to the west half way down the block and there was nothing coming. She then had started across the street she was attracted by the truck coming pretty fast, and when they were at the corner of the street she said "Look out for the truck." It was then that Mrs. Beyer in- creased her speed. The truck did not slacken its speed. It came right on and struck the right rear of Mrs. Beyer's automobile. Beyer's automobile was on the right-hand side of Columbia avenue, and the truck was on the right-hand side of Division street. When she first saw the truck Mrs. Beyer's automobile was on the north side of Division street and the truck was on Division street and the two west of Columbia avenue. On the northwest corner of Division street and Columbia avenue is a yard; for more than fifty feet wide. Division street is sixty feet wide and there is a parkway eight feet wide between Division street and the sidewalk which is five or six feet wide. Mrs. Beyer's automobile was one or three feet north of the sidewalk when she slackened her speed as she approached Division street and it was then she saw the truck less than fifty feet west of Columbia avenue. She paid no attention to it until Mrs. Beyer's automobile was in the middle of the street and she saw that the driver of the truck had no intention of slowing down or stopping and she called Mrs. Beyer's attention to the truck. Elizabeth Goggin testified that she was walking north on the west side of Columbia avenue, between twenty-five and fifty feet north of Division street, and saw the Beyer automobile pass her

very slowly. She did not see the collision but heard the crash and looked up and saw a body going through the air. She did not see the truck before the accident and heard no horns blown or any sounds until the crash.

Emma Bayer, called as a witness by the plaintiff, testified that she saw plaintiff standing near the St. Giles church a block and a-half north of Division street and invited her into the automobile; that she started south very slowly, at about fifteen miles an hour; arriving at Division street she looked west, did not see the truck, then started across the street, and when she arrived in the middle of the street plaintiff said, "Look out, there is a truck;" that she then looked and saw the truck coming east on Division street, twenty five feet away from the automobile, coming very fast. The truck struck the automobile. When the automobile stopped she was fifty feet south of Division street and the truck stopped on the southeast corner of Division street and Columbian avenue, having run upon the sidewalk and against a fire plug. The rear bumper and fender of her automobile were smashed. On cross-examination she testified: Columbian avenue and Division street are each thirty feet wide. It was snowing that day; there was no fog or steam on the window of her automobile. When she arrived at the north curb of Division street she looked and could see 125 feet west on Division street, but did not see the truck.

David Hey testified for the defendant that on December 4, 1928, he was driving a one-ton truck east on Division street on the extreme south side of the street just before reaching Columbian avenue at eighteen or twenty miles an hour. When three car lengths from Columbian avenue he noticed a Chevrolet coach in the center of the street, heading south, and as he entered the intersection the other automobile gained speed, it seemed to swerve to the left.

very slowly. She did not see the defendant but heard the crash and looked up and saw a body being thrown through the air. She did not see the truck before the accident and heard no horns blown or any sounds until the crash.

Edna Rogers, called as a witness by the plaintiff, testified that the car plaintiff was driving was a 1928 Buick sedan and a half north of Division street and invited her into the automobile and that she started south very slowly, at about fifteen miles an hour, arriving at Division street and looked west. She did not see the truck, then started across the street, and when she arrived in the middle of the street plaintiff said, "Look out, there is a truck." Then she then looked and saw the truck coming east on Division street, twenty five feet away from the automobile, coming very fast. The truck struck the automobile. When the automobile stopped she was fifty feet south of Division street and the truck stopped on the southeast corner of Division street and Columbia avenue, having run upon the sidewalk and against a fire pump. The rear bumper and fender of her automobile were smashed. On cross-examination she testified: Columbia avenue and Division street are each thirty feet wide. It was raining that day; there was no fog or steam on the window of her automobile. Then she arrived at the north curb of Division street and looked and saw the truck west on Division street, but did not see the truck.

David Ray testified for the defendant that on December 4, 1928, he was driving a one-ton truck east on Division street on the extreme south side of the street just before reaching Columbia avenue at eighteen or twenty miles an hour. When these car leaving from Columbia avenue he noticed a Chevrolet coach in the center of the street, heading south, and as he entered the intersection the other automobile gained speed. It seemed as though he were to the left.

The accident happened south of the Division street line and east of the Columbian avenue line about fifteen feet from the curb on the southeast corner. His truck traveled about twenty feet and stepped on the corner with a third of the truck in the street. On cross-examination he testified that when he saw the automobile it was directly in front of him, and that he applied the brakes at the west curb of Columbian avenue. The pavement was wet and slippery. As he approached Columbian avenue he was looking ahead and saw no automobile passing over the intersection. He was about thirty-five feet west of the west curb of Columbian avenue when he saw the Bayer automobile, and at that time the Bayer automobile was about twelve feet from the west curb of Columbian avenue, in the middle of Columbian avenue going south, twenty or twenty-five miles an hour. The truck struck the rear fender and bumper of the Bayer automobile. The Bayer automobile traveled thirty-two to thirty-five feet from the first time he saw it until it was struck.

It is the contention of the defendant that the plaintiff has not proven that she was in the exercise of ordinary care on her part and that she was guilty of contributory negligence, and it bases its contention on the fact that when the automobile arrived just north of the sidewalk on Columbian avenue plaintiff saw the truck coming east on the south side of Division street, 125 feet west of Columbian avenue, and took no action when in this position until the automobile arrived in the middle of the street when she said, "Hurry, see that truck"; that Mrs. Bayer was negligent and that her negligence will be charged to plaintiff, and plaintiff knowing that fact negligently permitted herself to be placed in danger. Plaintiff had the burden of affirmatively showing that she was in the exercise of due care and caution for her own safety at the time of the accident. If her negligence contributed to the injury she cannot recover. (Wilson v. Ill. C. & N. Co., 210 Ill.

603.) It is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right, because someone else is driving, to omit reasonable and prudent efforts on his own part to avoid danger. (Flynn v. C. C. Ry. Co., 250 Ill. 460; Pienta v. C. C. Ry. Co., 282 id. 246; Opp v. Fryer, Dee v. City of Peru, 343 id. 36.) 294 id. 538; When there is any evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (Pienta v. C. C. Ry. Co., supra.) To determine whether there is any evidence tending to support the cause of action, the court must examine the record. (Winchcliffe v. Benig Farming Co., 274 Ill. 417.) After an examination of the record in the instant case, we are of the opinion that under the uncontroverted facts there was no approaching danger for the plaintiff, in the exercise of ordinary care to learn of, and no opportunity for the plaintiff, in the exercise of ordinary care, to do anything to prevent the driver of the truck from bringing about the collision. The degree of care which a plaintiff in a given case is bound to exercise, depends upon the relative rights or position of the parties at the time the injury complained of happened, and a passenger is not obliged, in the exercise of ordinary care, to anticipate negligence on the part of the driver, and if the passenger assumes the driver will not be negligent and acts accordingly, he will not, for that reason alone, be negligent. The question of contributory negligence is usually a question for the jury. It only becomes one of law when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution.

It is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right to become someone else is driving, to omit reasonable and prudent efforts on his own part to avoid danger. (Wright v. City of Bern, 343 A.2d 36.)

After an examination of the record in the instant case, we are of the opinion that under the circumstances there was no approaching danger for the plaintiff, in the exercise of ordinary care to learn of, and he is not entitled to recover. In the exercise of ordinary care, to be entitled to prevent the driver of the truck from bringing about the collision. The degree of care which a plaintiff in a given case is bound to exercise, depends upon the relative rights or positions of the parties at the time the injury complained of happened, and a passenger is not obliged, in the exercise of ordinary care, to anticipate negligence on the part of the driver, and if the passenger assumes the driver will not be negligent and acts accordingly, he will not, for that reason alone, be negligent. The question of contributory negligence is usually a question for the jury. It only becomes one of law when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured, and would have been avoided by the use of reasonable precaution.

(Mueller v. Phelps, 352 Ill. 630.) Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury. (I. C. T. Co. v. Anderson, 164 Ill. 294; Pienta v. C. C. Ry. Co., 284 id. 246; Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 69; St. Clair National Bank v. Monaghan, 256 Ill. App. 471.) We are also of the opinion under the uncontroverted facts in this case that the plaintiff at the time of the accident and just prior thereto was, as a matter of law and as a matter of fact, in the exercise of ordinary care for her own safety, and she was exercising such care as the exigencies of the situation required.

In connection with the question of negligence the defendant invoked the statute on the subject of right of way providing that all vehicles shall give the right of way to those approaching along intersecting highways from the right. In Salmon v. Wilson, 227 Ill. App. 233, at page 236, the court said:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection."

This court held to the same effect in Darling & Co. v. Yellow Cab Co., 233 Ill. App. 326; Heidler v. Wilson & Bennett, *supra*; Schwartz v. Lindquist, 251 Ill. App. 320.

Preceding the testimony of the plaintiff and Elizabeth Goedert a Roentgenologist and two physicians testified and the plaintiff then rested. The defendant thereupon presented a motion for a directed verdict, which the court overruled. The plaintiff's counsel then asked leave to introduce another witness, which motion

over defendant's objection was allowed, and Emma Bayer testified. In view of what we have said above there was no error in overruling the motion for a directed verdict, and it was discretionary with the trial court to allow additional testimony to be heard.

The defendant next contends that it was error to permit plaintiff to introduce over defendant's objections four skiagraphs, purporting to represent certain pathology alleged to be the result of injuries sustained, on the ground that they were not properly taken and identified. Dr. Maximilian John Hubeny testified that he was a practicing physician and surgeon devoting himself to the special line of work as Roentgenologist for nineteen years exclusively; that he had made several thousand plates each year; that he took X-ray pictures of plaintiff on March 6, 1930; that the machine was in proper working order and that he developed the pictures himself in the usual customary manner and that they were correct representations, and that they are in the same condition they were in at the time they were originally taken, and he then related what the pictures showed. There was no error in admitting the skiagraphs. (See Licks v. Cuneo-Henneberry Co., 319 Ill. 344.)

It is next contended that plaintiff's attorney in his argument to the jury committed reversible error. In his argument he stated: "They were both brought into court and both were charged with negligence and both were given an opportunity, and as the evidence developed, the court took the view that Emma Bayer - Mr. Raber: I object to that, that the court took the view. The attorneys took the view. The Court: Yes." That the attorney for the plaintiff was about to say about the court's view was never said. Plaintiff's attorney then proceeded to discuss the relative rights of the parties under the statute giving the right of way to automobiles approaching an intersection from the right. Defendant's attorney argues that plaintiff's attorney misstated the law and cite the case of

every defendant's objection was allowed, and then before reaching
in view of what we have said above there was no error in overruling
the motion for a directed verdict, and it was discretionary with
the trial court to allow additional testimony to be heard.
The defendant next contends that it was error to permit
plaintiff to introduce over defendant's objections two photographs,
purporting to represent certain pathology alleged to be the result
of injuries sustained, on the ground that they were not properly
taken and identified. Dr. Hamilton John Henry testified that
he was a practicing physician and surgeon availing himself to the
special line of work as Roentgenologist for nineteen years exclusively
that he had made several thousand plates each year; that he took X-ray
pictures of plaintiff on March 2, 1930; that the machine was in
proper working order and that he developed the pictures himself in
the usual ordinary manner and that they were correct representations
and that they are in the same condition they were in at the time they
were originally taken, and he then related what the pictures showed.
There was no error in admitting the photographs. (See also *v. Jones*

REMARKS BY THE COURT.

It is well understood that plaintiff's attorney in his
argument to the jury submitted verbatim notes. In his argument he
stated: "They will help you to see that the court was wrong
with negligence and will give you an opportunity, and on the
evidence developed, the court took the view that James Jones - Mr.
Robert: I object to that, that the court took the view. The attorney
took the view. The Court: Yes." That the attorney for the plaintiff
was about to say about the court's view was never said. Plaintiff's
attorney then proceeded to discuss the relative rights of the parties
under the statute giving the right of way to automobiles proceeding
an intersection from the right. Defendant's attorney argued that
plaintiff's attorney misstated the law and also the case of

Vecke v. City of Chicago, 208 Ill. 192, where the court held that it was not the function of counsel to instruct the jury in argument or otherwise as to the law applicable to a given state of facts. We find no merit in these contentions. The jury, at defendant's request, were instructed as to the right-of-way law; and they were fully and clearly instructed by the court as to the law they must apply to the facts as found.

It is next urged that the court erred in instructing the jury. The jury were told that they were not required to lay aside their common knowledge, observation and experience, but they should weigh the evidence and determine the facts in the light of their knowledge, observation and experience in the affairs of ordinary life. The objection to the instruction, as contended for by defendant, is that the jury under the instruction might do with the facts as they pleased, regardless of the instruction of the court as to the law, and that this instruction did not advise the jury that they must decide the question of facts from the evidence under the guidance of the court in its instructions. It is not necessary that such rules for the guidance of the jury should be stated in each instruction. (C. C. Ry. Co. v. Beach, 180 Ill. 174.) They were sufficiently advised in the instructions that they must find the facts from the evidence under the instructions of the court.

It is finally urged that the amount of the judgment is excessive. Immediately after plaintiff was injured she was taken to a hospital; she was unconscious and so remained for forty-eight hours; she remained in the hospital four weeks and four days, after which she was taken to her home and remained in bed six weeks and was then taken to Florida. The injuries consisted of fracture of the third, fourth, fifth, sixth, eighth and ninth ribs in the anterior axillary line, and a similar fracture of the second, fourth and

People v. City of Chicago, 203 Ill. 192, where the court held that it was not the function of counsel to instruct the jury in arguments or otherwise as to the law applicable to a given state of facts. We find no merit in these contentions. The jury, as defendants' request, were instructed as to the right-of-way law and they were fully and clearly instructed by the court as to the law they must apply to the facts as found.

It is next urged that the court erred in instructing the jury. The jury were told that they were not required to lay aside their common knowledge, observation and experience, but they should weigh the evidence and determine the facts in the light of their knowledge, observation and experience in the affairs of ordinary life. The objection to the instruction, as contended for by defendant, is that the jury under the instruction might be misled by the facts as they appeared, regardless of the instruction of the court as to the law, and that this instruction did not advise the jury that they must follow the question of facts from the evidence under the guidance of the court in the instructions. It is not necessary that each witness for the plaintiff or the jury should be stated in each instruction. Id. v. People, 203 Ill. 192. They were sufficiently advised in the instructions that they must find the facts from the evidence under the instructions of the court. It is finally urged that the amount of the judgment is excessive. Immediately after plaintiff was injured who was taken to a hospital; she was unconscious and so remained for forty-eight hours; she remained in the hospital four weeks and four days, after which she was taken to her home and remained in bed six weeks and was then taken to Florida. The injuries consisted of fracture of the right femur, right elbow, right arm and right leg in the upper extremity line, and a similar fracture of the forearm, radius and

fifth ribs in the posterior axillary line. The fifth and sixth ribs were sticking through the pleura, causing a hemorrhage into the lungs; the fractures have united but there is a malposition of certain of the fractures. She has a permanent disability in her chest and has pain at times. She was a real estate broker and in some years had earned as high as \$10,000 a year. The expenses incidental to the treatment of her injuries were heavy. The amount of damages to be allowed is peculiarly a question for the jury, and we will not disturb a verdict unless it is clearly excessive or inadequate, indicating passion or prejudice on the part of the jury. After a careful examination of all the evidence we are satisfied that the amount of the verdict is not excessive.

The judgment of the Superior court should be and it is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

34706

ST. JOHN CANTIUS BUILDING AND
LOAN ASSOCIATION, a corporation,
(Plaintiff) Appellant,

v.

KASIMIR PARDAN,
(Defendant) Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 630³

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

The St. John Cantius Building and Loan Association sued Kasimir Pardan in a first-class action upon a promissory note. Tried before a jury, verdict and judgment in favor of defendant, from which plaintiff appealed.

The statement of claim sets forth that the claim is upon a promissory note for the sum of \$5,000, dated July 16, 1924, payable on demand to plaintiff's order, with interest at 6 per cent per annum, executed by Kasimir Pardan and Stanley Pitera; that \$1,200 has been paid on account of the note, leaving a balance of \$3,800 with interest. The affidavit of merits admits defendant signed the note, but avers it was never delivered; that it was given without any consideration whatsoever; that at and before the time of the execution of the note, the plaintiff was a building and loan association, organized under the laws of the State of Illinois; that Stanley Pitera was its secretary; that the execution of the note was obtained from the defendant by the plaintiff and Stanley Pitera by the use of fraud and circumvention; that is to say, the plaintiff and Stanley Pitera colluded to injure and defraud defendant and on July 16, 1924, falsely and fraudulently represented to the defendant that the said supposed note was a surety bond for the purpose of indemnifying the plaintiff from any defaults or miscarriages of Pitera thereafter to be incurred or to be suffered during his term of office as secretary of plaintiff from the

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time of the execution of said writing to the expiration of said term of office; and thereupon the defendant confiding in the false and fraudulent representations and promises aforesaid, executed the said writing as a surety for the default and miscarriage of Pitera as secretary of plaintiff corporation for his faults or miscarriages thereafter to be incurred to be suffered during his term of office, and not otherwise.

On the trial, plaintiff offered the note and the testimony of four witnesses; only one, namely, Stanley J. Smoczynski, testified to the making or signing of the note. Defendant testified and gave his version of the signing of the note, the substance of his testimony being, that on July 16, 1934, Pitera, who was the secretary of the plaintiff, informed the defendant, in the presence of Stanley J. Smoczynski, assistant secretary and a member of the board of directors of plaintiff, that the board of directors of the plaintiff, wanted him (Pitera) to put up some kind of surety bond, and he (Pitera) pulled out of his pocket a blank paper and the witness signed it; that nothing was said by anyone that Pitera was short in his accounts.

The principal contention of plaintiff's counsel is, that the verdict and judgment are manifestly against the weight of the evidence. It does not appear from the bill of exceptions that any motion for a new trial was made by the plaintiff or that the trial court made any ruling on such a motion. In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict, it is necessary that the losing party make a motion for a new trial, and upon its being overruled, except to such ruling, and include such motion, and order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Yarber v. C. & A. P.R. Co., 235 Ill. 589; Greenwell v. Hess, 298 Id. 459; C. B. & Q. R. R. Co. v. Hanselwood, 194 Id. 69; People v. Gabrys, 329 Id. 101, and People v. Leonard, 338 Id. 177.) While this

time of the execution of said writing to the execution of said
 term of office; and whereas the defendant containing in the false
 and fraudulent representation and promises aforesaid, executed the
 said writing as a proxy for the defendant and misappropriated
 an entirety of plaintiff's corporation for his family or misappropriated
 therefor to be inserted to be inserted under his term of office,
 and not otherwise.

On the trial, plaintiff offered the note and the testimony
 of four witnesses; only one, namely, Henry J. Macdonald, testified
 to the making or signing of the note. Defendant testified and gave
 his version of the signing of the note, the substance of his testimony
 being, that on July 18, 1904, plaintiff, who was the secretary of the
 plaintiff, informed the defendant, in the presence of Henry J.
 Macdonald, assistant secretary and a member of the board of directors
 of plaintiff, that the board of directors of the plaintiff, wanted
 him (plaintiff) to put up some kind of security bond, and he (plaintiff)
 pulled out of his pocket a blank paper and the witness signed it;
 that nothing was said by anyone that there was error in his account.
 The principal contention of plaintiff's counsel is, that
 the verdict and judgment are manifestly against the weight of the
 evidence. It does not appear from the bill of exceptions that any
 motion for a new trial was made by the plaintiff or that the trial
 court made any ruling on such a motion. In order to bring before
 this court for review the question of the sufficiency of the evidence
 to sustain the verdict, it is necessary that the moving party make a
 motion for a new trial, and upon its being overruled, except in such
 ruling, and include such motion, and order overruling the same and
 exceptions thereon, together with the evidence, in a bill of excep-

State v. J. A. R. Co., 228 Ill. 522; Greenwald v. Greenwald,
228 Ill. 522; Greenwald v. Greenwald, 194 Ill. 522; People v.
Greenwald, 228 Ill. 522, and People v. Greenwald, 228 Ill. 522.

contention need not be considered by us, we have nevertheless, examined the record, and are of the opinion that the record amply sustains the verdict.

It is also contended, that the court erred in instructing the jury. The court instructed the jury orally. After the reading of the instructions, the bill of exceptions shows that plaintiff's counsel made several suggestions which were adopted by the court, and the court then said: "Both sides except to all instructions of the other counsel." It does not, however, appear from the record which of the instructions complained of were given by the defendant and which by the plaintiff. Moreover, a general exception to the whole charge is not sufficient. (Haskins v. Haskins, 67 Ill. 446.) Objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire. (Grellman v. Lake Geneva Piano Steel Co., 147 Ill. app. 332; Baldwin Co. v. Paley, 161 id. 300; Howe v. Fulton, 225 id. 589, and Pecararo v. Halberg, 246 Ill. 95.) We have, however, considered the court's charge and are of the opinion that on the real issues of fact in the case the jury were fairly and sufficiently instructed and that no error was committed by the court in its charge to the jury.

It is assigned as error, that the court admitted improper evidence, in that defendant was permitted to show that Pitera, as secretary of the plaintiff corporation, had executed a bond for the faithful performance of his duties as such secretary and that Stanley J. Smoczynski, the only witness who testified for the plaintiff to the making of the note, was one of the sureties. This would not warrant a reversal of the instant case.

It is also argued that the action of the court in admonishing plaintiff's counsel was prejudicial. After a number of objections made by plaintiff's counsel were overruled, the court

said: "I wish I did not know anything about it and then I would not feel so bad." This remark of the court would not warrant a reversal, especially in view of the fact that the court in instructing the jury said, the court did not by any ruling of his, on objections, or his conduct toward either of the attorneys, intend to voice any opinion as to who is liable in the case.

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

reversal of the judgment and accordingly it is affirmed.
The chief clerk of the district court called for a
statement in order to explain to the jury in the case.
On objection, an affidavit was read which in the absence
of objection, the court said, the court did not by any ruling of this
reversal, especially in view of the fact that the court in its
not feel so bad. This remark of the court would not warrant a
comment. I wish I had not known anything about it when I would

34724

CLARA D. WATSON,
Defendant in Error.

vs.

EDWARD TRINZ and
ROSALIE K. TRINZ,
Plaintiffs in Error.

WRIT OF ERROR TO REVERSE
JUDGMENT OF COOK COUNTY.

262 I.A. 630

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Clara D. Watson sued the Marigold Garage Company, a corporation, Edward Trinz and Rosalie K. Trinz, to recover damages for personal injuries sustained by her. In a trial before a jury Marigold Garage Company was found not guilty, and there was a verdict and judgment against the defendants, Edward Trinz and Rosalie K. Trinz, for \$42,500. Edward Trinz and Rosalie K. Trinz, hereafter referred to as defendants, sued out a writ of error to reverse said judgment.

The declaration consisted of four counts. The first count alleged that the defendants were possessed of and had charge and control of a certain automobile which was, then and there, through their agent and servant, operated in a northerly direction on Sheridan road at its intersection with Cornelia street; that it was the duty of the defendants to use ordinary care to guide, control, manage and operate the automobile; that the defendants so carelessly and negligently and improperly drove the automobile that it struck the plaintiff while she was crossing Sheridan road in a westerly direction, at or near Cornelia street. The second count is like the first except that it alleges the car was being driven at a high and dangerous rate of speed, namely at the rate of forty miles an hour. The third count alleges that the defendants wilfully, wantonly and maliciously drove their automobile, and as a direct result of the wilful, wanton and malicious conduct

STATE OF TEXAS,
COUNTY OF DALLAS.
In the District Court of the County of Dallas,
State of Texas.
vs.
JAMES E. WATSON,
Defendant in Error.

3581A.030

MR. JUSTICE KERRAN DELIVERED THE OPINION OF THE COURT.

CLARA D. WATSON and the Marietta Garage Company, a corporation, Edward Tyne and Rosalie E. Tyne, as recover damages for personal injuries sustained by her. In a trial before a jury Marietta Garage Company was found not guilty, and there was a verdict against Edward Tyne and Rosalie E. Tyne, for \$10,000. Edward Tyne and Rosalie E. Tyne, hereafter referred to as defendants, took out a writ of error to reverse said judgment.

The declaration consisted of four counts. The first count alleged that the defendants were possessed of and had charge and control of a certain automobile which was then and there, through their agent and servant, operated in a northernly direction on Western Road at its intersection with Cornelia Street; that it was the duty of the defendants to use ordinary care to guide, control, manage and operate the automobile; that the defendants so carelessly and negligently and improperly drove the automobile that it struck the plaintiff while she was crossing Western Road in a westerly direction, at or near Cornelia Street. The second count is like the first except that it alleges the car was being driven at a high and dangerous rate of speed, namely at the rate of forty miles an hour. The third count alleges that the defendants willfully, wantonly and maliciously drove their automobile and as a direct result of the willful, wanton and malicious conduct

of the defendants, and each of them, the plaintiff was knocked down to the ground and injured. The fourth count charges the defendants with conscious indifference to surrounding circumstances and conditions and then and there wilfully, wantonly and maliciously drove the automobile at a high, dangerous and excessive rate of speed, at forty miles an hour, within the limits of an incorporated city, and wantonly and maliciously drove the same against and struck the plaintiff with great force and violence. The Marigold Garage Company and Edward Trinz jointly pleaded the general issue and that they did not own, operate or control the automobile, and Rosalie K. Trinz separately pleaded the general issue and that she did not own, operate or control the automobile. The accident happened on April 1, 1928, at about 11:30 in the evening on Sheridan road and Cornelia avenue. The plaintiff was walking west across Sheridan road, when the automobile in question coming from the south, driven by one Smith, an employee of the Marigold Garage Company, struck the plaintiff and she was very severely injured.

To reverse the judgment the defendants are urging (1) there is no evidence in the record connecting them or either of them with the negligence, if any, of the driver; (2) there is no evidence which can hold both Edward Trinz and Rosalie K. Trinz; (3) error in the admission and rejection of evidence; and (4) errors in instructions.

The first reason urged for a reversal of the judgment is that the defendants were not the master of the driver of the automobile. Edward Trinz, called as a witness for the plaintiff, testified that he was the owner of the automobile and that his wife, Rosalie K. Trinz, did not own it, and that on April 1, 1928, he drove the automobile to the Marigold Garage, picked up Smith, an employee of the Marigold Garage, then drove to his home, alighted from the automobile and gave it to Smith, telling him to drive it

of the witnesses, and each of them, the plaintiff was injured
down to the ground and injured. The fourth count charges the de-
fendants with conscious indifference to surrounding circumstances
and malicious and wantonly and recklessly and maliciously
drove the automobile at a high, dangerous and excessive rate of
speed, at forty miles an hour, within the limits of an incorporated
city, and wantonly and maliciously drove the same against and into
the plaintiff with great force and violence. The plaintiff George
Company and Edward T. Tins jointly pleaded the general issue and that
they did not see, operate or control the automobile, and Rosalie E.
Tins separately pleaded the general issue and that she did not
see, operate or control the automobile. The accident happened on
April 1, 1928, at about 11:30 in the evening on Madison road and
between the plaintiff and the defendant. The plaintiff was driving west
bound, when the automobile in question coming from the south, driven
by one Smith, an employee of the Harbison Garage Company, struck
the plaintiff and she was very severely injured.

To reverse the judgment the defendants are urging (1)
there is no evidence in the record connecting them or either of them
with the negligence, if any, of the driver; (2) there is no evidence
which can hold both Edward Tins and Rosalie E. Tins; (3) error in
the admission and rejection of evidence; and (4) error in instruct-
ions.

The first reason urged for a reversal of the judgment
is that the defendants were not the master of the driver of the
automobile. Edward Tins, called as a witness for the plaintiff,
testified that he was the owner of the automobile and that his wife
Rosalie E. Tins, did not own it, and that on April 1, 1928, he
gave the automobile to the Harbison Garage, picked up Smith, an
employee of the Harbison Garage, then drove to his home, alighted
from the automobile and gave it to Smith, telling him to drive it

to the Marigold Garage; that he kept the automobile in the Marigold Garage regularly for about one year prior to the accident; that Smith had on numerous times driven the car from Trinz's home to the garage. He further testified that he had talked with one bloom, manager of the Marigold Garage, when he took the automobile to the garage and made arrangements to service the car, wash the car, take him to his home and bring the car to his home, when he called for it. The employee of the Marigold Garage was not paid by him, though he tipped him once in a while; that he did not hire or discharge the employee and had nothing to do with paying him, as he was not his employee; that he paid the Marigold Garage \$25 a month for these services, which services included washing the car once a week, driving the car to his home and returning it to the garage. It was not always the same employee who drove the automobile to the garage but Smith drove the automobile as frequently as any other employee. He further testified that he frequently used the automobile and had other members of his family in it, but his wife was not in the automobile that night. There is no evidence that she ever drove the automobile.

G. W. Plumb, secretary and treasurer of the Marigold Garage Company, testified that Smith was in the employ of the Marigold Garage, was hired, paid and discharged by the Marigold Garage Company; his duties were to polish cars, pump gasoline, and miscellaneous things; customers frequently request that they be driven home, which he does; the Marigold Garage had five men employed who called for and delivered cars and had possibly fifteen customers to whom they gave that service of calling for and delivering cars. Edward Trinz had his car in the Marigold Garage for about one year and during that time the employees of the Marigold Garage frequently took him home at night. The Marigold Garage had an understanding with him (Edward Trinz) that for \$25 per month Trinz's car was to

to the service station; that he kept the automobile in the garage
 during regularly the above one year prior to the accident; that Smith
 had an automobile license given the car from Smith's home to the garage
 He further testified that he had talked with the driver, however
 of the service station, when he took the automobile to the garage
 and made arrangements to service the car, when the car, when he took it to
 his home and bring the car to his home, when he called for it. The
 employee of the service station was not paid by him, though he
 tipped him once in a while; that he did not tip or otherwise the
 employee and had nothing to do with paying him, as he was not his
 employee; that he paid the service station \$25 a month for these
 services, which services included washing the car once a week,
 driving the car to his home and returning it to the garage. It
 was not until the next morning that he took the car to the
 garage and left the automobile as previously in any other
 employee. He further testified that he frequently used the auto-
 mobile and had other members of his family in it, but his wife was
 not in the automobile that night. There is no witness that she
 ever drove the automobile.

A. W. Finch, secretary and treasurer of the service
 station company, testified that Smith was in the employ of the ser-
 vice station, was hired, paid and discharged by the service station
 company; his duties were to police cars, pump gasoline, and mis-
 cellaneous things; customers frequently request that they be driven
 home, which he does; the service station had five men employed who
 called for and delivered cars and had possibly fifteen customers to
 whom they gave that service of calling for and delivering cars.
 Edward Trine had his car in the service station for about one year
 and testified that since the employee of the service station
 took his car at night. The service station had an automobile
 with the license plate that the car would have been in

receive a wash a week, cleaned each night, car stored and he would be taken home at night, and the employees after delivering him to his home would return the car to the garage.

Charles J. Rea testified that he was an investigator; that he had a conversation with Edward Trinz on December 12, 1926, in which Trinz said he had no arrangement about delivering the car or taking him home, although he frequently stopped at the garage and had someone take him home.

It further appears from the evidence that on November 29, 1927, Rosalie E. Trinz applied for a license on a Pierce Arrow Maroon sedan (it is conceded that this is the automobile Smith was driving at the time he struck the plaintiff), naming herself as the owner, and a license for 1928 was issued in her name for the automobile. There is no other evidence in the record tending to show her ownership of the automobile in question. There is no evidence in the record that she made any contract with the Mari-gold Garage or that she kept the automobile at that garage or that she knew that it was kept there or that she ever had anything to do with garaging the automobile.

The defendants contend that the driver of the automobile was not their servant, but rather the servant of the Mari-gold Garage Company. There are a great many cases in which this question has been involved and expressions are to be found in the course of these opinions, when taken out of the decisions and considered as abstract propositions apart from the facts involved in the cases in which they have been used, that would appear to be irreconcilable. That condition, however, largely disappears when the facts presented in these cases are carefully examined. It would be quite impossible, within the limits of this opinion, to make any extended reference to even a part of these cases. "It is

received a week or more, always each night, and stated and he would
be taken home at night, and the employees after delivering him
to his home would return the car to the garage.

Witness 1. Has testified that he was an investigator
for; that he had a conversation with Edward Tamm on December 11,
1935, in which Tamm said he had an arrangement about delivering
the car to taking him home, although he frequently stopped at the
garage and had someone take him home.

It further appears from the evidence that on November
20, 1937, Donald M. Tamm applied for a license on a license plate
number 2024 (it is conceded that this is the automobile with
which he was driving at the time he struck the plaintiff), having received
the same, and a license for 1938 was issued in his name for the
automobile. There is no other evidence in the record tending to
show that ownership of the automobile is in question. There is no
evidence in the record that she made any contact with the car
Garage or that she kept the automobile at that garage or
that she knew that it was kept there or that she ever had anything
to do with covering the automobile.

The defendant contends that the driver of the auto-
mobile was not their servant, but rather the servant of the Mary-
land Garage Company. There are a great many cases in which this
question has been involved and discussions are to be found in the
course of those opinions, when taken out of the decisions and con-
sidered as abstract propositions about the facts involved in
the cases in which they have been used, that would appear to be
irresolvable. That condition, however, largely disappears when
the facts presented in these cases are carefully examined. It
would be quite impossible, within the limits of this opinion, to
make any extended reference to even a part of these cases. It is

impossible to lay down a hard and fast general rule or to state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors. 'Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative but all must be considered together.' " (Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 22.) No absolute or arbitrary rule can be laid down by which it can be plainly seen in every case whether a person is the servant of the agent or special master, as these terms are used in the decisions. The special facts of each case must be looked to in order to reach a proper conclusion. (Harding v. St. Louis Stock Yards, 242 Ill. 444.) The relation of master and servant does not exist unless the person sought to be held as the master has the control of the alleged servant, which involves the power to discharge, and hence the relation does not exist unless the power to discharge exists. (Connolly v. People's Gas Light Co., 260 Ill. 162; Poster v. Wadsworth-Howland Co., 168 Id. 314; Pioneer Construction Co. v. Hansen, 176 Id. 100.) In this State it has been held, and in line with the weight of authority, that the right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor. (Decatur Ry. Co. v. Industrial Com., 276 Ill. 472.) The test of relationship is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent. (Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385). The law, however, recognizes that a servant in the general service of one, may be transferred, under contract or otherwise, to the service of another so as to become for the time being the latter's servant, with all the legal consequences of

...to lay down a rule and that general rule or in case
...by which the status of men working and contracting
...in all cases as employees or
...on the one hand.
...is determinative but all
...must be considered together." (Ex parte ...)
...10, 22.) No absolute or arbitrary rule can be laid
...it can be finally seen in every case whether a per-
...of the agent or special master, as these forms
...is the decision. The special master of each case must be
...in order to render a proper conclusion. (Ex parte ...)
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...and a servant or agent. (Ex parte ...)
...However, recognized that a servant
...may be transferred, must contract
...as to become for the
...the latter's servant, with all the legal consequences of

that relationship. (Schweitzer v. Thompson & Morris Co., 229 N.Y. 97; Delaware & Hudson River R. R. Co. v. Van Derpool, 292 Fed. 688; The P. C. & St. L. R. R. v. Boyard, 223 Ill. 176; Harding v. St. Louis Stock Yards, supra.). In Draxton v. Mendelson, 233 N. Y. 122, it was said:

"Was the servant whose negligence injured a third party performing work for his master within the scope of his employment or was he loaned by his master to another to do the latter's business? In the one case the general employer is liable for his torts. In the other he is not. But while the rule is clear its application is often difficult. The true relationship between master and servant may be obscured by circumstances seemingly contradictory."

In the instant case there is some testimony tending to sustain the theory of the plaintiff. Where the facts are undisputed the existence of the relationship of master and servant is for the court. (Woods v. Bowman, 200 Ill. App. 612, and cases cited.) Under the pleadings and the evidence in the instant case, it was^a question for the jury. (Kirn v. Chicago Journal Co., 195 Ill. App. 197; Shannon v. Sightingale, 321 Ill. 166.)

It is next contended that there is no evidence in the record which can hold both defendants. The only theory on which the defendants could be held in the instant case is that Smith was their servant or agent in the course of their employment at the time of the accident. There is no evidence in the record tending to show that Rosalie K. Trinz was the owner of the automobile except the application that she made for a license, in which she named herself as the owner; there is no evidence that she kept or knew that the automobile was kept at the Marigold Garage or that she ever made any contract with Marigold Garage or ever had anything to do with that company. The introduction of the application for a license was prima facie evidence of ownership (P. Ft. W. & C. Ry. Co. v. Callaghan, 157 Ill. 406; East St. Louis Con. Ry. Co. v. Altgen, 210 id. 213; Dansby v. Bartlett, 318 id. 616, 624), and in

1962, 12 was said:

[illegible]

maintain the theory of the plaintiff. Where the facts are undisputed the existence of the relationship of master and servant is a question of law. (See, e.g., *Smith v. Smith*, 100 Ill. App. 3d 100, 101, 102, and cases cited.) Under the pleadings and the evidence in the instant case, it was proper for the jury. (*See* *Smith v. Smith*, 100 Ill. App. 3d 100, 101, 102, and cases cited.)

It is not contended that there is no evidence in the record which can raise both questions. The only theory on which the defendant could be held in the instant case is that during the time of the accident, there is no evidence in the record tending to show that Rosalie E. Tins was the owner of the automobile except the application that she made for a license, in which she named herself as the owner; there is no evidence that she kept or knew that the automobile was kept at the Matigold Garage or that she ever made any contract with Matigold Garage or ever had anything to do with that company. The introduction of the application for a license was given in evidence at the hearing (Ex. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 8

the absence of other proof would create a presumption of ownership as of the date of the accident. Prima facie evidence may be overcome by proof of positive facts (Densby v. Bartlett, supra), but presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered the presumption vanishes entirely. (Osborne v. Osborne, 325 Ill. 231.) Taking all the evidence together, and after considering it with great care, we are impelled to the conclusion that the verdict as to the ownership of the automobile and the operation of the automobile as to Rosalie K. Trinz was manifestly against the weight of the evidence. Whether or not any liability exists as against Edward Trinz is a matter about which we can express no opinion at this time. The judgment against the defendants is a joint one. A judgment in an action in trespass is a unit as to all defendants against whom it is rendered, and if it must be reversed for error as against one it must be reversed as to all. (South Side Elevated R. R. Co. v. Leavig, 214 Ill. 463, 469; Singer v. Cross, 257 Ill. App. 42, 44.) Plaintiff urges, however, that this contention of the defendants is at variance with the theory on which counsel for the defendants tried the case in the court below, and he cites cases holding that it is elementary that one is not permitted to try a case upon one theory in the trial court and, when defeated, shift his position in a court of review. We are mindful of the rule, but this rule is not applicable to the instant case. Rosalie K. Trinz filed her separate plea denying that she owned, operated or controlled the automobile, and she has consistently throughout the trial contended that she did not own it.

Complaint is also made by the defendants that the trial

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court committed error in the admission and rejection of evidence and in the giving of instructions. We have examined into the complaint and find merit in this contention, but as we have reached the conclusion that this case must be reversed and remanded, it will not be necessary, as it is not likely that these errors will occur on a retrial, to enlarge on this opinion.

The judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

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MARY HARVEY SENDORF O'DAY,
administratrix of the estate
of VICTOR J. O'DAY, deceased,
(Plaintiff),

Appellee,

v.

THE CITY OF CHICAGO, a
Municipal corporation,
(Defendant),

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

262 I.A. 630⁵

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought under the statute by Mary Harvey Sendorf O'Day, as administratrix of the estate of Victor J. O'Day, deceased, for the benefit of the next of kin, against the City of Chicago for wrongfully causing the death of Victor J. O'Day. Tried before a jury, plaintiff recovered judgment for \$4,000, and the defendant appealed.

The death was caused by drowning in the North Branch of the Chicago River. On August 24, 1926, about 8 p. m., the decedent was a passenger in a launch driven by his son, and while being so driven a cable used in turning the bridge at Ogden avenue, operated and controlled by defendant, rose to the surface of the river, capsizing the launch and decedent was thrown into the river. The suit was brought upon the ground that defendant had negligently operated and controlled the bridge, which negligence caused the cable to overturn the launch.

It is contended by defendant that the judgment should be reversed because there is no evidence that defendant was negligent and that the evidence shows that the son of decedent and one of the beneficiaries in the suit operating the launch was guilty of negligence which contributed to bring about the accident. If

MAY 20, 1934
ADMINISTRATIVE OF THE
OF VICTOR J. O'DAY, deceased,
(Plaintiff),

Defendant,

ASSAULT WITH A DEADLY
WEAPON, BOON COUNTY.

THE CITY OF CHICAGO, a
municipal corporation,
(Defendant),

Appellant.

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THE JURY HAS RENDERED THE VERDICT OF THE COURT.

This was an action on the case brought under the statute
of May Harvey O'Day, an administrator of the estate of
Victor J. O'Day, deceased, for the benefit of the next of kin,
against the City of Chicago for allegedly causing the death of
Victor J. O'Day. Tried before a jury, plaintiff recovered judgment
for \$4,000, and the defendant appealed.

The death was caused by drowning in the North Branch of
the Chicago River. On August 24, 1933, about 8 P. M., the defendant
was a passenger in a launch driven by his son, and while being so
driven a cable used in turning the bridge at Ogden Avenue, operated
and controlled by defendant, rose to the surface of the river,
causing the launch and defendant was thrown into the river. The
suit was brought upon the ground that defendant was negligently
operated and controlled the bridge, which negligence caused the cable
to overturn the launch.

It is contended by defendant that the judgment should
be reversed because there is no evidence that defendant was negligent
and that the evidence shows that the son of defendant and one of the
negligence in the suit operating the launch was guilty of
negligence which contributed to bring about the accident. If

the son is guilty of negligence the instant case would be controlled by Hazel v. Hoopston Bus Co., 310 Ill. 38, in which it was held that the negligence of one of the beneficiaries which contributed to the injury is a defense in an action for wrongful death even though the decedent was not negligent.

The evidence discloses that Frank O'Day, eighteen year old son of decedent, at about 7 p. m., entered a motor launch at Belmont avenue and the North Branch of the Chicago River, which river runs north and south. In the launch at the time were his father and his grandmother. The launch was twenty feet in length and seven feet wide. While the son was operating the launch southward, after it left Belmont avenue, the father and grandmother sat in the rear of the son. He had proceeded southward about four miles, was traveling at about seven or eight miles an hour and was approaching Ogden avenue. A bend exists in the river just north of Ogden avenue and as he turned the bend, he being at that time about one block north of the bridge, he saw the bridge in its natural position. It was then eight o'clock, daylight saving time. He gave one blast as a signal of his approach, started to go under the bridge, and as he was passing under it a cable arose out of the water, upset the launch and the three occupants were thrown into the river. He discarded his shoes and swam toward his grandmother and dragged her back to the cable where he remained until they were rescued. He first saw the cable when the launch was a foot from it as it rose from the water. It was greasy, dark, dirty, and one and one-half inch in diameter. As he approached the bridge just before the cable struck the launch, the bridge was still closed and it opened away from the launch, that is, toward the south. The bridge tender gave no signal. The bridge spanning the river was a temporary structure attached to the east bank of the river upon a turntable and the west end rested upon the west

the son is guilty of negligence the instant case would be controlled by Harrel v. Harrel, 120 Ill. 25, in which it was held that the negligence of one of the beneficiaries which contributed to the injury is a defense in an action for wrongful death even though the deceased was not negligent.

The evidence discloses that Frank O'Day, eighteen years old son of deceased, at about 7 p. m., entered a motor launch at Belmont Avenue and the North Branch of the Chicago River, which river runs north and south. In the launch at the time were his father and his grandmother. The launch was twenty feet in length and seven feet wide. While the son was operating the launch southward, after it left Belmont Avenue, the father and grandmother and in the rear of the son. He had previously secured about four miles per hour at about 10 miles per hour and was approaching Ogden Avenue. A boat exists in the river just north of Ogden Avenue and as he rounded the bend, he being at that time about one block north of the bridge, he saw the bridge in its natural position. It was then eight o'clock, daylight saving time. He gave one blast on a signal of his apartment, started in to under the bridge, and as he was passing under it a cable came out of the water, struck the launch and the three occupants were thrown into the river. He described his shock and when beyond his grandmother he struggled but back to the cable where he remained until they were rescued. He knew saw the cable when the launch was a foot from it as it rose from the water. It was green, dark, fifty, and one and one-half inch in diameter. As he approached the bridge just before the cable struck the launch, the bridge was still closed and it opened away from the launch. The bridge toward the north. The bridge tender gave no signal. The bridge opened the river was a temporary structure erected in the usual manner of the river upon a trestle and the west end rested upon the west

bank of the river. A pontoon floating in the river was attached by a superstructure to the bridge. The bridge was in charge of one George Bial, employed by the defendant as a bridge operator. To open the bridge for the passage of boats the west end was raised from its resting point by pumping water from the tanks located in the pontoon, thus causing the pontoon and the bridge span to rise in the water. The west end of the bridge was swung to the south across the river and against the east bank by means of a cable running from the east bank of the river to a motor-driven drum located in the pontoon. This cable was designed to lay on the bottom of the river when the bridge was closed. There was no signal of any kind designating the point where the cable was fastened. There was sufficient space left between the bridge and the river bank to permit small boats to pass, if the cable was in its proper position. The cable drums located in the pontoon were equipped with brakes which enable the operator to hold the cable at any desired position. The bridge had been opened and closed some time before the accident.

About the time that the launch was approaching Ogden avenue from the north, one Ellis, in charge of a tug, was propelling the tug north and after it had passed Halsted street just before reaching Ogden avenue he signalled to the bridge tender he desired the Ogden avenue bridge to open so as to enable his tug to proceed to the north. Ellis was then some 150 to 200 feet south of Ogden avenue, and as the bridge commenced to open he saw the launch. The evidence further discloses that after the bridge operator received Ellis' signal to open the bridge, he locked both ways but did not see the launch. There was nothing to obstruct his view and he did see a full thousand feet in either direction. He set one of the drums in motion which started to wind up the cable which caused it to rise from the river bed.

Under this state of the record we would not be warranted

bank of the river. A pontoon floating in the river was attached by a superstructure to the bridge. The bridge was in charge of one George Hill, employed by the Government as a bridge operator. He opened the bridge for the passage of boats the west end was raised from its resting point by pumping water from the tanks located in the pontoon. This raised the pontoon and the bridge span to rise in the water. The west end of the bridge was swung to the north across the river and against the east bank by means of a cable running from the east bank of the river to a motor-driven drum located in the pontoon. This cable was designed to lay on the bottom of the river when the bridge was closed. There was no signal of any kind indicating the point where the cable was fastened. There was sufficient space left between the bridge and the river bank to permit small boats to pass if the cable was in its proper position. The cable drum located in the pontoon were equipped with cranes which enable the operator to hold the cable at any desired position. The bridge had been opened and closed some time before the accident.

About the time that the launch was approaching Ogden Avenue from the north, one Hill, in charge of a tug, was propelling the tug north and after it had passed related street just before reaching Ogden Avenue he signalled to the bridge tender to descend the Ogden Avenue bridge to open so as to enable his tug to proceed to the north. Hill was then some 150 to 200 feet south of Ogden Avenue, and as the bridge commenced to open he saw the launch. The tug was further distances than after the bridge operator received Hill's signal to open the bridge, he looked both ways but did not see the launch. There was nothing to obstruct his view and he did not see a full movement foot in either direction. He saw one of the drums in motion which started to wind up the cable which caused it to rise from the river bed.

Under this state of the record no would not be warranted

in holding that the son of decedent was guilty of contributory negligence. It was a question of fact for the jury. (Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan, 157 Ill. 406.) The question as to whether the defendant was guilty of the negligence charged in the declaration is also one of fact for the jury, and only becomes one of law when the evidence clearly shows that the accident resulted from the negligence of the injured party. If there is any difference of opinion so that reasonable minds may not arrive at the same conclusion then it is a question of fact for the jury. (Bale v. Chicago Junction Ry. Co., 259 Ill. 476; Louthan v. Chicago City Ry. Co., 198 Ill. 329.) In determining whether the verdict should be set aside on the ground that defendant was not guilty of the negligence charged, the rule is that if there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that the material averments of the declaration had been proved, the case should go to the jury. (Libby, McNeill & Libby v. Cook, 222 Ill. 206.) In our opinion there is evidence in the instant case fairly tending to prove the negligence of defendant as charged in the declaration.

It is next contended that the court committed reversible error in giving to the jury an instruction tendered by plaintiff, in which the jury were told that they should not take into consideration in mitigation of damages, if any, the fact that the widow of the deceased has remarried subsequent to the death of Victor J. O'Day. The court did not err in so instructing the jury. This identical instruction met with the approval of the court in Chicago & Eastern Illinois Railroad Co. v. Driscoll, 207 Ill. 9.

It is finally claimed that the damages assessed by the jury are excessive. The amount allowed was \$4,000. At the time of the death of Victor J. O'Day, he was 38 years old, in good health, earning between \$35 and \$38 a week. He left him surviving a widow, a son

in holding that the son of defendant was guilty of contributory negligence. It was a question of fact for the jury. (Litchford v. ... 127 Ill. 408.) The question as to whether the defendant was guilty of contributory negligence in the collision is also one of fact for the jury, and only becomes one of law when the evidence clearly shows that the accident resulted from the negligence of the injured party. If there is any difference of opinion as to what reasonable minds may not arrive at the same conclusion there is a question of fact for the jury. (Litchford v. ... 127 Ill. 408.) In determining whether the verdict should be set aside on the ground that defendant was not guilty of the negligence charged, the rule is that if there is in the record any evidence from which it is seen that the jury could, without acting unreasonably in the eye of the law, find that the material elements of the decision had been proved, the case should go to the jury. (Litchford v. ... 127 Ill. 408.) In our opinion there is evidence in the instant case fairly tending to prove the negligence of defendant as charged in the declaration.

It is next contended that the court committed reversible error in giving to the jury an instruction framed by plaintiff, in which the jury were told that they should not take into consideration in mitigation of damages, if any, the fact that the widow of the deceased had remarried subsequent to the death of Victor J. O'Day. The court did not err in so instructing the jury. This instruction was with the approval of the court in Litchford v. ... 127 Ill. 408.

It is finally claimed that the damages assessed by the jury are excessive. The amount allowed was \$4,000. At the time of the death of Victor J. O'Day, he was 38 years old, in good health, earning between \$25 and \$30 a week. He left him surviving a widow, a son

13 years of age and a daughter 15 years old. The jury was instructed, at the request of defendant, as to all the elements to be considered by them. In Chicago & Alton Ry. Co. v. Shannon, 43 Ill. 338, 347, the court said:

"How this pecuniary damage is to be measured, - in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of the jury. The law provides, that 'they are to give such damages as they shall deem a fair and just compensation.' That the life of one person is worth, in a pecuniary sense, to another, is a question incapable, from its nature, of exact determination. Although the wealth or poverty of the deceased may be important elements, they are not the only ones that enter into the problem. If the deceased was poor, the loss may consist in the fact, that his personal exertions can no longer support those dependent upon him. If rich, the loss may be nearly as great, in the deprivation of the care and management of his business or estate. In creating this right of action the legislature have confided to the jury a subject, that does not lie within the limits of exact proof. But, in this, as in all other actions, the court must so far supervise the verdict as to see that it is not the result of unreasoning prejudice or passion."

In the case of Economy Light & Power Co. v. Stephen, 37 Ill. App. 220, it appeared that the deceased was strong and healthy, about middle-aged, capable of earning \$3.50 a day, and that he left a widow and two children. The verdict of \$5,000 was held not to be excessive. In Smith v. Chicago, P. & St. Louis Ry. Co., 143 Ill. App. 128, a verdict of \$10,000 was held not excessive when it appeared that the deceased at the time of his death was of the age of 38 years, in good health, earning from \$125 to \$130 a month, and left him surviving a widow and a child seven years of age. Under the evidence and the principles announced in the above cases we would not be justified in holding the verdict excessive.

Not finding any reversible error the judgment is hereby affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

34739

TIMOTHY MOJONNIER,
Appellee,

vs.

EMIL GEEST,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

262 I.A. 631

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On March 6, 1930, a judgment by confession was rendered in favor of plaintiff Timothy Mojonnier and against defendant Emil Geest for \$2182.50. It was based upon a promissory note, with the usual power of attorney to confess judgment. The note was dated April 25, 1929, payable six months after its date, to the order of Julius L. Marks, with interest at.....per cent per annum after date until paid. On March 21, 1930, a motion was made by defendant to vacate the judgment, which was continued to May 3, 1930. In support of this motion defendant filed an affidavit made by Irving L. Kruger as agent for defendant, in which it was averred, inter alia, that the said note is one of a series of five notes, executed by defendant, totalling \$11,500; that defendant actually received \$9,430 as the proceeds of the series of the said notes; that defendant has paid a total of \$9,500 on account of said notes; that the difference between \$11,500, the amount of said notes, and \$9,430, the amount repaid by defendant, was usurious interest charged by plaintiff; that plaintiff is only entitled to recover the principal sum actually borrowed by defendant and as defendant has repaid \$9,500 he is not indebted to plaintiff in any sum whatsoever; that Julius L. Marks, named as payee in the note, was not the actual lender of the money borrowed, but merely acted as the agent for plaintiff, who was the actual lender of the sum of \$9,400. The court upon a hearing of the motion to open up the judgment and to

24712

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2621 A. 631

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

On March 1, 1929, a judgment by the court was rendered in favor of plaintiff against defendant and against the latter's surety. The judgment was for the sum of \$10,000, with interest at the rate of 6% per annum from the date of the judgment until paid. On March 1, 1930, a motion was made by defendant to set aside the judgment, which was granted on May 1, 1930. In support of this motion defendant filed an affidavit made by Irving L. Karpis, an agent for defendant, in which it was averred, inter alia, that the said note is one of a series of five notes, executed by defendant, totaling \$11,500; that defendant actually received \$5,450 on the proceeds of the series of said notes; that defendant has paid a total of \$9,500 on account of said notes; that the difference between \$11,500, the amount of said notes, and \$9,450, the amount repaid by defendant, was numerous interest charged by plaintiff; that plaintiff is only entitled to recover the principal sum actually borrowed by defendant and no defendant has repaid \$9,500 he is not indebted to plaintiff in any way whatsoever; that Julius L. Karpis, named as payee in the note, was not the actual lender of the money borrowed, but merely acted as the agent for plaintiff, who was the actual lender of the sum of \$9,450. The court upon a hearing of the motion to open up the judgment and to

grant defendant leave to plead, overruled the motion; thereupon this appeal followed.

It is contended by plaintiff, that the affidavit does not set forth facts showing a meritorious defense. In considering motions of this character the trial court has considerable discretion, but in applying its discretion the controlling question is, whether the defendant has shown an equitable reason why his motion should be allowed. (Mumford v. Tolman, 157 Ill. 258; Moyes v. Schendorf, 238 id. 232.) An affidavit of this sort is strictly construed against the pleader, and it must be examined with this rule in mind. If the affidavit presented facts establishing an equitable reason why the motion should be allowed, the court must permit the defendant to plead to the merits. In our opinion, the affidavit, if true, did set up a defense. The affidavit is positive and unequivocal of the fact that the note is one of a series of five notes, totalling \$11,500; that the payee in the note was not the actual lender of the money, but acted as agent for the plaintiff, who was the actual lender, and that but \$9,400 was paid upon said five notes and that \$9,500 has been repaid.

It is also contended by plaintiff that the motion to vacate the judgment was not made in apt time. Where judgment by confession is entered against an individual he must, of course, promptly take steps to set it aside, and what is apt time will depend upon the facts in each particular case. In the instant case the judgment was entered on March 6, 1930. The motion to vacate the judgment was made on March 21, 1930; the first notice plaintiff had of the entry of the judgment was on March 12, 1930, when he was served with an execution. We are of the opinion that the motion was made in apt time. (Mutual Life of Illinois v. Little, 227 Ill. App. 436.)

In view of the allegations of the affidavit, we are of

Grant defendant leave to amend, overruled the motion; thereupon this appeal follows.

It is contended by plaintiff, that the affidavit does

not set forth facts showing a meritorious defense. In considering

motion of this character the trial court has considerable discre-

tion, but in applying the discretion the controlling question is,

whether the defendant has shown an excuse to reason why his motion

should be allowed. (Winters v. Johnson, 187 Ill. 528; Harvey v.

Shannon, 235 Ill. 528.) An affidavit of this sort is strictly con-

sidered against the pleader, and it must be examined with this rule

in mind. If the affidavit presented facts establishing an equitable

reason why the motion should be allowed, the court must permit the

defendant to amend to the motion. In our opinion, the affidavit, if

true, did set up a defense. The affidavit is positive and unquali-

cal of the fact that the note is one of a series of five notes,

totaling \$11,000; that the paper in the note was not the actual

paper of the maker, but acted as agent for the plaintiff, who was

the actual lender, and that but \$5,000 was paid upon said five notes

and that \$5,000 has been repaid.

It is also contended by plaintiff that the motion to

vacate the judgment was not made in due time. Where judgment by

confession is entered against an individual no must, of course,

promptly take steps to set it aside, and what is due time will be

fixed upon the facts in each particular case. In the instant case

the judgment was entered on March 6, 1930. The motion to vacate the

judgment was made on March 31, 1930; the first notice plaintiff had

of the entry of the judgment was on March 18, 1930, when he was

served with an execution. We are of the opinion that the motion was

made in due time. (Winters v. Johnson, 187 Ill. 528.)

the opinion that the court erred in refusing to open up the judgment. The judgment of the Circuit court is reversed and the cause remanded with directions to sustain the motion of the defendant to open up the judgment and for leave to plead.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.

34749

AHLBELL BATTERY CONTAINER
CORPORATION, a corporation,
Plaintiff in Error,

v.

SNYDER & HAY, Inc., a
corporation,
Defendant in Error.

ORDER TO CIRCUIT COURT,
GOOK COUNTY.

262 I.A. 631

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

The complainant, here the plaintiff in error, filed its bill for injunctive relief, against defendant, here the defendant in error. The cause was referred to a master, who heard the evidence and filed his report, exceptions to which were overruled and the bill dismissed on April 13, 1929, for want of equity. In the decree it was ordered that the complainant pay the costs of suit and that defendant have execution therefor. The master's report contained no certificate or statement of the master's costs, and at no time was any order entered by the court determining the amount of the master's fees or taxing the master's fees as costs. More than a year after the entry of the decree, the clerk of the Circuit Court taxed the sum of \$325 as master's fees against the complainant. Complainant filed a petition to retax the costs, which was denied, and plaintiff sued out this writ of error.

In the petition for retaxing the costs, it is alleged, inter alia, that after objections to the master's report had been overruled, it was stipulated that the master be allowed the sum of \$325 as and for his master's fees; that at the time the master filed his report he did not include in it any certificate or statement as to his costs, nor did the master or defendant make application to the court to determine the amount of the master's fees and at no time

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In re: [illegible]

v.

THE NEW YORK LIFE INSURANCE COMPANY
[illegible]

262 I.A. 631

NO. 10-1100 [illegible] THE COURT OF THE DISTRICT

The complaint, now on file in error, filed in
bill for injunctive relief, against defendant. Here the defendant
in error. The case was referred to a master, who heard the evi-
dence and filed his report, exceptions to which were overruled and
the bill dismissed on April 13, 1939, for want of equity. In the
deceit it was ordered that the complainant pay the costs of said
and that defendant have execution therefor. The master's report
contained no certificate of statement of the master's costs, and
at no time was any order entered by the court determining the amount
of the master's fees or taxing the master's fees as costs. More than
a year after the entry of the decree, the clerk of the Circuit Court
forwarded the sum of \$325 as master's fees against the complainant.
Complainant filed a petition to reopen the costs, which was denied,
and plaintiff sued on this writ of error.
In the petition for taxing the costs, it is alleged,
inter alia, that after objection to the master's report had been
overruled, it was stipulated that the master be allowed the sum of
\$325 as and for his master's fees; that at the time the master filed
his report he did not include in it any certificate or statement as
to his costs, nor did the master or defendant make application to the
court to determine the amount of the master's fees and at no time

was there any finding as to the amount of fees to be paid the master; that notwithstanding there was no determination by the court of the amount of the master's fees, the clerk of the court arbitrarily and without warrant of law taxed the costs against petitioner for \$325. No answer was filed to the petition and no evidence was heard. The propriety of the action of the chancellor in denying the motion to retax is here for review.

The fees which a master may lawfully charge depends upon the terms of the statute and such statute must be strictly construed (Rehnadt v. Davis, 188 Ill. 476), and the master's certificate or statement as to his costs and fees must be properly itemized. (Wirzbicki v. Braniski, 235 Ill. 106.) Under the statute relating to the fees of masters, the fees for examining the issues and reporting conclusions are wholly within the court's discretion and the solicitors have no power to bind the court by stipulation as to the amount of such fees. (Polakow v. Leafgreen, 178 Ill. App. 566; Metropolitan Trust & Savings Bank v. Ferry, 194 Ill. App. 277; Runne v. Cooke, 197 Ill. App. 422; Eushnis v. Augustin, 222 Ill. 31.)

We are of the opinion that evidence should be heard to determine the extent and value of the master's fees and as to the reasonableness of his fees, and for the reasons indicated the order of the Circuit Court is reversed and the cause remanded for such proceedings as equity and justice may require consistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.

was there any finding as to the amount of loss to be paid the master; that notwithstanding there was no determination by the court of the amount of the master's loss, the clerk of the court arbitrarily and without warrant of law taxed the costs against petitioner for \$100. No answer was filed to the petition and no evidence was heard. The propriety of the action of the chancellor in denying the motion to return is here for review.

The loss which a master may lawfully charge depends upon the terms of the statute and such statute must be strictly construed (*Johnson v. Lewis*, 100 Ill. 476), and the master's certificate or statement as to his loss and loss must be properly examined. (*Winters v. Winters*, 238 Ill. 100.) Where the statute relating to the loss of master, the loss for examining the papers and reports and conclusions are wholly within the court's discretion and the arbitrators have no power to bind the court by arbitration as to the amount of such loss. (*Johnson v. Lewis*, 100 Ill. 476; *Winters v. Winters*, 238 Ill. 100.)

Winters v. Winters, 238 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

REVEREND AND HONORABLE WITH RESPECTS ONE.
Honorable, P. J., and Bishop, J., common.

34768

CHRISTIAN GROSS,
(Complainant) Defendant in Error.

vs.

VIRGINIA H. GROSS,
(Defendant) Plaintiff in Error.

ERROR TO SUPREME
COURT OF COCK COUNTY.

262 I.A. 631

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Complainant, Christian Gross, filed his bill for divorce against the defendant, Virginia H. H. Gross, on the ground of desertion, containing the usual allegations with reference to marriage, children, and the conduct of the parties, and prayed that the bond of matrimony existing between them be annulled and that complainant may have the sole care, custody and education of their children. Service was had on the defendant by publication, the affidavit of non-residence filed by complainant reciting that the defendant resided in Paris, France. The default of the defendant was entered and the cause heard ex parte, and a decree was entered on August 8, 1930, granting the complainant a divorce and in the decree the chancellor adjudged that a "pretended separation agreement entered into between the complainant and defendant was illegal and void and against public policy." To review only that part of the decree decreeing that the separation agreement was illegal and void, the defendant sued out a writ of error.

On August 21, 1930, during the term at which the decree was entered, defendant made a written motion under a special and limited appearance to set aside that part of the decree adjudging that the separation agreement was illegal and void. The validity of the decree, to the extent that it granted the complainant a divorce from the defendant, is not questioned. In the view we take of the instant case it will be necessary to consider only one of the grounds urged for a reversal of the decree. The bill filed by

COMPLAINT (Complainant)

VIRGINIA R. GROSS (Defendant) Plaintiff in Error

Settled

THE JUDICIAL BRANCH DELIVERED THE DECISION OF THE COURT

Complainant, Christian Gross, filed his bill for

divorce against the defendant, Virginia R. Gross, on the grounds of desertion, containing the usual allegations with reference to adultery, cohabitation, and the conduct of the parties, and averred that the basis of matrimony existing between them be annulled and that complainant may have the sole care, custody and education of their children. Service was had on the defendant by publication, the affidavit of non-resistance filed by complainant testifies that the defendant resided in Texas, Kansas. The details of the defendant's life and the same heard of earlier, and a decree was entered on August 6, 1930, granting the complainant a divorce and in the decree the chancellor adjudged that a "separated support agreement" had been entered into between the complainant and defendant was illegal and void and against public policy. To review only that part of the decree concerning that the separated support agreement was illegal and void, the defendant took out a writ of error.

On August 21, 1930, during the term at which the decree was entered, defendant made a written motion under a special and limited agreement to set aside that part of the decree adjudging that the separated support agreement was illegal and void. The validity of the decree, so the extent that it granted the complainant a divorce from the defendant, is not questioned. In the view of the court at the instant case it will be necessary to consider only one of the grounds urged for a reversal of the decree. The bill filed by

the complainant made no reference to any separation agreement and asked for no relief other than a divorce and the custody of the children. A certificate of evidence containing the testimony of three witnesses in support of the allegations of the bill was filed on the day of the entry of the decree. It contained no evidence relating to a pretended separation agreement.

In the case of Lewis v. Lewis, 316 Ill. 447, 450, the court said:

Under section 17 of the Divorce act the court may compel a conveyance of property held by one party belonging to the other upon such terms as it shall deem equitable, but such relief can be obtained only by proper allegations in the bill. (Meyer v. Meyer, 255 Ill. 436.) Relief can be granted only in accordance with the allegations of the bill, sustained by proof."

And in the case of Finegan v. Goldberg, 329 Ill. 507, 511, the court said:

"A finding in a decree as to matters not involved in the litigation between the parties is a nullity. (Yeates v. Briggs, 95 Ill. 79.) The allegations of the bill, the proof and the findings of the decree must correspond." (See also Czarnocki v. Czarnocki, 341 Ill. 629; Holinitis v. Holinitis, 535 Id. 260; Giesler v. Giesler, 336 Id. 410.

Neither the bill nor the evidence mentions any separation agreement. The decree was, therefore, erroneous in decreeing that the separation agreement was illegal and void.

Accordingly the decree of the Superior court, so far as it decreed that a pretended separation agreement entered into between the complainant and the defendant is illegal and void and against public policy, will be reversed and the cause will be remanded with directions for its modification as herein outlined.

REVERSED AND REMANDED WITH DIRECTIONS
FOR MODIFICATION OF THE DECREE.

Scanlan, P. J., and Gridley, J., concur.

the complaint made no reference to any separation agreement and asked for no relief other than a divorce and the custody of the children. A certificate of evidence containing the testimony of three witnesses in support of the allegations of the bill was filed on the day of the entry of the decree. It contained no evidence relating to a protracted separation agreement.

In the case of Marriage v. Smith, 215 Ill. 447, 230, the court said:

"Under section 17 of the divorce act the court may compel a conveyance of property held by one party belonging to the other when such seems to be equal, deemed equitable, but such relief can be obtained only by proper allegations in the bill. (Marriage v. Smith, 230 Ill. 447, 230.) Relief can be granted only in accordance with the allegations of the bill, sustained by proof."

And in the case of Marriage v. Johnson, 235 Ill. 307, 311, the court said:

"A finding in a decree as to matters not involved in the litigation between the parties is a nullity. (Marriage v. Johnson, 235 Ill. 307, 311.) The allegations of the bill, the proof and the findings of the court must correspond. (See also Marriage v. Johnson, 235 Ill. 307, 311.)" Marriage v. Johnson, 235 Ill. 307, 311.

Neither the bill nor the evidence mentions any separation agreement. The decree was, therefore, erroneous in deciding that the separation agreement was illegal and void.

Accordingly the decree of the superior court, so far as it decreed that a protracted separation agreement entered into between the complainant and the defendant is illegal and void and against public policy, will be reversed and the cause will be remanded with directions for its modification as herein outlined.

TESTED AND RECORDED WITH INDEXES
THE NOTARY PUBLIC OF THE STATE

Witness, J. L. and William, J., clerks.

At the County Court in and for the County of Cook, Illinois, this 1st day of May, 1911.

34785

CITY OF CHICAGO,
(Plaintiff),

Appellee,

v.

THOMAS MURGATROYD,
(Defendant),

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 T A 631⁴

MR. JUSTICE KENNER DELIVERED THE OPINION OF THE COURT.

The City of Chicago brought a quasi criminal action against the defendant to recover the maximum penalty provided by a city ordinance claimed to have been violated by the defendant. A jury was waived and at the conclusion of the evidence the court found the defendant had violated section 1453 of the Chicago Municipal Code of 1922, imposing a fine of \$100 and this appeal followed.

The charge against the defendant, as alleged in the complaint, was that the defendant on April 28, 1930, did wilfully and unlawfully sell or furnish LeRoy Kejenski, a minor child, one box of 32 caliber revolver cartridges which did contain explosive substance.

From the evidence it appears that for twenty years the defendant has operated a hardware business in the City of Chicago under a license granted by the City of Chicago. LeRoy Kejenski testified that he was sixteen years old on November 24, 1929, and on April 28, 1930, he purchased of the defendant 32 cartridges, paying 90 cents for them. The defendant denied he ever sold LeRoy Kejenski any cartridges at any time.

The defendant contends that the evidence does not show he was guilty of violating the ordinance in question. Section 1453

CITY OF CHICAGO
(Plaintiff)

vs.

JOHN J. LEECH
(Defendant)

Appellant

APPEAL FROM MUNICIPAL COURT

OF CHICAGO

25971-1-887

THE FOLLOWING IS THE OPINION OF THE COURT.

The City of Chicago brought a writ of habeas corpus against the defendant to remove the defendant from the custody of the City of Chicago. The defendant claims to have been released by the City of Chicago on April 22, 1930, and to have been arrested by the City of Chicago on April 23, 1930. The defendant claims to have been released by the City of Chicago on April 22, 1930, and to have been arrested by the City of Chicago on April 23, 1930. The defendant claims to have been released by the City of Chicago on April 22, 1930, and to have been arrested by the City of Chicago on April 23, 1930.

The Chicago Police Department, as alleged in the complaint, was that the defendant on April 22, 1930, was arrested and voluntarily sold to the Chicago Police Department, a minor child, one son of 10 called together together which the certain explosive

From the evidence it appears that the Chicago Police Department has operated a business in the City of Chicago under a license granted by the City of Chicago, Chicago Police Department testified that he was arrested upon on November 24, 1929, and on April 22, 1930, he purchased of the defendant 12 cartridges, paying 50 cents for each. The defendant denied he ever sold Leach any cartridges at any time.

The defendant contends that the evidence does not show he was guilty of violating the ordinance in question. The evidence is

is as follows:

"It is hereby declared to be unlawful for any person, firm or corporation to sell, deliver or give to any minor under eighteen years of age any black powder, dynamite, nitro-glycerine, gun cotton or other dangerous explosive. Any person, firm or corporation violating any provisions of this section shall be fined not less than sixty dollars nor more than two hundred dollars for each such offense."

The instant case being in the nature of a penal action, it was incumbent upon the plaintiff to prove every step in the chain of facts upon which its right to recovery rested (Bull v. City of Quincy, 9 Ill. App. 127, and cases cited), and plaintiff must prove clearly that the defendant violated the ordinance. (City of Chicago v. Gall, 195 Ill. App. 41; Hitchcock v. City of Chicago, 72 Ill. App. 196.)

In the instant case the cartridges alleged to have ^{been} sold to LeRoy Kejencki were not introduced in evidence and there was no evidence showing that the cartridges purchased by the minor contained black powder, dynamite, nitroglycerine, gun cotton or other dangerous explosive. The plaintiff urges, that it was not necessary to prove the cartridges contained black powder, dynamite, nitroglycerine, gun cotton or other dangerous explosive, for the reason that it is common knowledge that a cartridge is a container of black powder or gun cotton. We cannot agree with this contention. The ordinance under which this action is brought is to recover a penalty and it is well settled that in such an action the plaintiff must prove every fact necessary to make out his title to the penalty demanded. Every fact necessary to constitute an offense must be clearly proven, and no intendments are allowed in favor of the plaintiff. We might no doubt conjecture, that the cartridges contained black powder or gun cotton but to do so would be in violation of the defendant's rights.

Other questions raised by the defendant need not be discussed in this opinion as no doubt a somewhat different record will be made upon another trial of the case.

The judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P.J., and Gridley, J., concur.

is as follows:

"It is hereby declared to be unlawful for any person, firm or corporation to sell, deliver or give to any minor under eighteen years of age any black powder, dynamite, nitro-glycerine, ammonium or other dangerous explosive. Any person, firm or corporation violating any provision of this section shall be fined not less than sixty dollars nor more than five hundred dollars for each such offense."

The instant case being in the nature of a penal action, it was incumbent upon the plaintiff to prove every step in the chain of facts upon which the right to recovery rested (Bill v. City of Quincy, 9 Ill. App. 187, and cases cited), and plaintiff must prove clearly

that the defendant violated the ordinance. (City of Chicago v. Hall, 105 Ill. App. 411; Mitchell v. City of Chicago, 98 Ill. App. 180.)

In the instant case the ordinance alleged to have been violated by the defendant was not introduced in evidence and there was no evidence

showing that the cartridges purchased by the minor contained black powder, dynamite, nitro-glycerine, ammonium or other dangerous explosive.

The plaintiff argues, that it was not necessary to prove the cartridges contained black powder, dynamite, nitro-glycerine, ammonium or other

dangerous explosive, for the reason that it is common knowledge that a cartridge is a container of black powder or dynamite. We cannot agree

with this contention. The ordinance under which this action is brought is to recover a penalty and it is well settled that in such an action

the plaintiff must prove every fact necessary to make out his case. The penalty demanded. Every fact necessary to constitute an offense

must be clearly proven, and no inferences are allowed in favor of the plaintiff. We might go down to the minutest detail of the

black powder or dynamite but it is well settled that in such an action the plaintiff must prove every fact necessary to make out his case.

Other questions raised by the defendant need not be discussed in this opinion as no doubt a competent attorney would be able to

upon another trial of the case. The judgment of the municipal court is reversed and the case remanded for a new trial.

34799

R. I. DAVIS and CHARLES A.
KORPKE, as Trustees,
Complainants,

CHICAGO TITLE & TRUST COMPANY,
as Receiver,
Appellee,

v.

CHARLES HEIMAN et al.,
Defendants.

LOUIS W. MACK,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

262 I.A. 632'

MR. JUSTICE KORNER DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis W. Mack (hereafter called appellant), one of the defendants in a foreclosure suit, from an order entered on August 13, 1930, directing him as a tenant of the property involved to pay \$2500 to the receiver who had been appointed May 3, 1927, the amount of the rent accrued to the date of the entry of the order, and finding appellant guilty of contempt of court and punishing him therefor.

The original proceeding was brought by the complainants to foreclose the lien of a trust deed. A cross-bill was filed by Fred Marshall and Gustav Helm to foreclose certain notes secured by the same trust deed. On motion of the cross-complainants, the Chicago Title & Trust Company (hereafter called appellee), was appointed receiver of the property. On August 26, 1927, appellant was ordered to pay \$125 a month as rent for the premises and on July 2, 1929, an order was entered finding the sum of \$875 due the appellee and directing appellant to pay the same. He prayed an appeal to this court and the order was affirmed in case No. 33778, 256 Ill. App. 607 (opinion not published in full). On July 25, 1930, appellee filed a petition in which it set forth that the rent

34792

CHICAGO TRUST & TRUST COMPANY,
as Receiver.
Appellee.

STATE OF ILLINOIS
COUNTY OF COOK

ON THE 12th day of May,

LEWIS V. BARKER,

Appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 12th day of May, 1937.

This is an appeal by Lewis V. Barker (hereinafter called

appellant), one of the defendants in a foreclosure suit, from

an order entered on March 12, 1937, directing him as a receiver

of the property involved to pay \$2500 to the receiver who had been

appointed May 3, 1937, the amount of the bond secured to the debt

at the entry of the order, and finding appellant guilty of contempt

of court and punishing him therefor.

The original proceeding was brought by the complainant

to foreclose the lien of a trust deed. A show-bill was filed by

First National and Trust Company (hereinafter called receiver)

on March 12, 1937, and notice of the proceedings was given to

Chicago Title & Trust Company (hereinafter called appellee), who

appeared as receiver of the property. On March 22, 1937, appellant

was ordered to pay \$1000 a month as rent for the premises and on July

2, 1937, an order was entered finding the sum of \$2500 due the

appellee and directing appellant to pay the same. He moved and

appealed to this court and the order was affirmed in case No. 1237.

The 11th day of May, 1937, appellant was punished in jail.

1937, appellant filed a petition in which it was shown that the

accrued under the order of August 26, 1927, amounted to \$2500; that appellant refuses to pay the rent and prayed that he be adjudged in contempt of court. Appellant filed an answer in which he admitted that the amount claimed was due; that he was financially able to pay, but refused to pay the rent because the order appointing the receiver was null and void.

It appears from the record that the cross-bill filed by Fred Marshall and Gustav Helm, was not sworn to by either of them and that on May 3, 1927, a petition for the appointment of a receiver, verified upon information and belief, was presented to the chancellor and the appellee was appointed receiver of the property and cross-complainants were excused, for good cause shown, from filing a bond. It further appears that appellant was duly served with process, entered his appearance and filed answers to both the original bill and cross-bill of complaint, and that he did not appeal from the order appointing the receiver.

It is appellant's contention that the order appointing the receiver was a void order and therefore a nullity and that the subsequent orders directing the payment of the rent to the receiver are also void and may be attacked at any time. A party charged with contempt for violation of a judgment, order or decree may acquit himself by showing that such judgment, order or decree is a nullity.

(Armour Grain Co. v. Railroad Co., 320 Ill. 156, and cases cited.)

If the court had jurisdiction to make any order at law concerning the subject matter, its judgment, though erroneous, could not be collaterally attacked and could only be set aside by a direct proceeding. (Oakman v. Small, 282 Ill. 360.) Jurisdiction is the authority to hear and determine, and if a court has jurisdiction of the subject matter and the parties, its orders and judgments must be obeyed until reversed and set aside. (People v. Lee, 311 Ill. 652.)

received under the order of March 20, 1937, amounted to \$2000.

That applicant refused to pay the rent was proven and he is

adjudged in contempt of court. Applicant filed an answer in which

he admitted that the amount claimed was due; that he was financially

able to pay, but refused to pay the rent because the other apartment

the receiver was null and void.

It appears from the record that the answer was filed by

Irvin Karmali and Gustav Klein, was not sworn to by either of them

and that on May 8, 1937, a petition for the appointment of a receiver,

verified upon information and belief, was presented to the chancellor

and the applicant was appointed receiver of the property and assets

complaints were entered, the first such showing, then filing a bond.

It further appears that applicant was duly served with process, entered

his appearance and filed answers to both the original bill and cross-

bill of complaint, and that he did not appeal from the order appointing

the receiver.

It is applicant's contention that the order appointing the

receiver was a void order and therefore a nullity and that the same

does not affect the payment of the rent to the receiver and

also void and may be attached at any time. A party charged with

contempt for violation of a judgment, order or decree may accept

himself by showing that such judgment, order or decree is a nullity.

(People v. Karmali, 201 Ill. App. 2d 111, 112, and cases cited.)

It is said that jurisdiction to make any order as law concerning

the subject matter, the judgment, order or decree, could not be

voluntarily accepted and could only be set aside by a direct pro-

ceeding. (People v. Karmali, 201 Ill. App. 2d 111, 112.) Jurisdiction is the

authority to hear and determine, and if a court has jurisdiction of

the subject matter and the parties, the order and judgment must be

obeyed until reversed and set aside. (People v. Karmali, 201 Ill. App. 2d 111, 112.)

It is said that the order appointing the receiver was a void order and

Where a court has jurisdiction both of the subject matter and the necessary parties its appointment of a receiver cannot be assailed in a collateral proceeding, however erroneous it may be. (Richards v. People, 31 Ill. 551.) By this appeal appellant questions the order appointing the receiver. A similar collateral attack on like grounds was made in the case of Vandalia v. St. Louis, Vandalia and Terre Haute R. R. Co., 209 Ill. 73, where the court said (p. 82): "However erroneous such an order may be, it is binding not only on the parties, but everywhere, until reversed by superior authority." In the opinion of this court in the case of Davis v. Beckman, supra, we said:

"There can be no doubt that the court here had jurisdiction of the parties and the subject matter, both of which were recognized in appellant's pleadings; and under the facts pleaded a case was also presented under which the appointment of a receiver was authorized by law. The proper way to raise these questions was on appeal from the order of appointment. No such appeal was taken.

It is not only apparent, therefore, that appellant cannot question the appointment of the receiver by this collateral attack but that the only question that can be raised under his appeal is whether or not the sum of \$875 was the balance due for rent. As to that, there seems to have been no dispute. The record discloses no attempt to meet the merits of the only pertinent question of fact that arose on the rule entered upon appellant, but merely an attempt to use the occasion for such collateral attack."

On the hearing of appellees' petition appellant offered to show that at the time the order appointing the receiver was entered, a full hearing was not had; that the court did not have good cause shown to it for the appointment of a receiver without bond; that notice was not given, and that there was no cause for the appointment of a receiver. It was not proper for the court to hear any evidence on the question of the propriety of the order appointing the receiver. (Ward v. Farwell, 97 Ill. 593.)

The order of the Circuit court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

34801

MINNIE OLSON HOGERT, as
administratrix of the estate
of KENNETH OLSON HOGERT,
deceased, (plaintiff),
Appellee,

v.

AGATA BOJNOWSKI, (defendant),
appellant.

25A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 332²

MR. JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

Minnie Olson Hogert, as administratrix of the estate of Kenneth Olson Hogert, deceased, sued Agata Bojnowski to recover damages for negligently causing the death of her thirteen year old son, who was struck by an automobile operated by defendant. The case was tried before a jury and a verdict and judgment in favor of plaintiff for \$3,000, from which the defendant appealed.

The proof shows that the accident occurred at the northeast corner of 41st place and Kedzie avenue, Chicago, Illinois. 41st place runs in an easterly direction, and is intersected by Kedzie avenue, a north and south street. Testimony offered by the plaintiff, given by six witnesses, was to the effect that on July 30, 1929, at about 6:45 p. m., the deceased and Walter Gembala were walking north on the east side of Kedzie avenue, arriving at 41st place they walked across 41st place and when about three or four feet from the curb on the north side of 41st place heard a horn; the automobile struck Kenneth as he was about to step onto the curb at the northeast corner, and he was crushed against a fire plug, which was ^{eleven} and one-half feet east of the east curb of Kedzie avenue and three feet north of the north curb of 41st place. The injury inflicted caused his death. The automobile was being operated by defendant north on Kedzie avenue at about fifteen to

MINNIE OLSON HOGERT, as
Administratrix of the Estate
of KENNETH OLSON HOGERT,
Plaintiff,
vs.
JAMES B. HOGERT, (Defendant),
Appellee.

APPEAL FROM DECISION
JURY, COOK COUNTY.

222 I.A. 632

THE FOLLOWING FACTS WERE PRESENTED TO THE COURT:

MINNIE OLSON HOGERT, as administratrix of the estate
of Kenneth Olson Hogert, deceased, and Agata Johnson as recovery
damages for negligently causing the death of her thirteen year
old son, who was struck by an automobile operated by defendant.
The case was tried before a jury and a verdict and judgment in
favor of plaintiff for \$10,000.00 was returned. The court
found that the defendant was negligent in the operation of
his car at that place and time, and that the plaintiff
also found that an accident occurred, and in testimony of
Katie Jensen, a nurse and nurse anesthetist. Testimony offered by
the plaintiff, given by his witnesses, as to the effect that
on July 30, 1933, at about 6:45 p. m., the defendant and sister
Gemma were walking north on the east side of Katie Avenue.
Arriving at that place they walked across that place and then about
three or four feet from the curb on the north side of that place
heard a noise; the automobile struck Kenneth as he was about to step
onto the curb at the northwest corner, and he was crushed against a
the sign, which was one and one-half feet east of the curb and at
Katie Avenue and three feet north of the curb at that place.
The injury inflicted caused his death. The automobile was being
operated by defendant north on Katie Avenue at about 6:45 p. m.

eighteen miles an hour and when it arrived at 41st place it turned east.

Bernice Bojnowski, defendant's daughter, was the only witness offered by defendant, and testified that defendant was driving her automobile north on Kedzie avenue, arriving at 41st place she turned east. At that moment the deceased and Walter Gembala were on the southeast corner of 41st place and Kedzie avenue; that defendant honked her horn and the boys started running north across the street and she tried to get away from the boys, but the boys kept going the same way.

It can probably be said that there was some evidence tending to show a want of due care on the part of the deceased, if the evidence of the daughter is true that the deceased, after defendant had honked the horn, ran across the street in the path of the approaching automobile, and it can also be said that there was evi- tending to show negligence on the part of defendant. There is a direct conflict in the evidence as to the acts of the deceased and the defendant. The jury could not believe the witnesses for the plaintiff and also Bernice. They had to reject the one and to credit the other in order to determine where the truth lay. In this state of the record it was essential that the remarks of counsel should have been kept within proper restrictions.

Counsel for plaintiff in arguing the case to the jury, said: "Gentlemen, I want to tell you something about that witness. She is not corroborated by any other testimony in this case, * * *. There is no corroboration of her testimony to any extent and one significant fact stands forth in this case, that this defendant has not taken the stand. Counsel did not offer her as ^a witness in this case." To which statement defendant's counsel objected and the objection was overruled and an exception preserved, and the plaintiff's counsel continued: "This witness, gentlemen, was not offered

direction either on foot and when it arrived at that place it turned

back.

Defendant's daughter, was the only

witness offered by defendant, and testified that defendant was

driving her automobile north on Main Avenue, arriving at that

place and turned back.

Defendant was on the southeast corner of that place and North Avenue;

that defendant reached her home and the boys drove towards north

across the street and she tried to get away from the boys, but the

boys kept going the same way.

It was probably he said that there was some evidence

leading to show a want of due care on the part of the defendant, if

the witness of the fact that the defendant, after taking

and had reached the house, ran across the street in the path of the

approaching automobile, and it was also he said that there was evi-

dence to show negligence on the part of defendant. There is a

direct conflict in the evidence as to the fact of the defendant and

the defendant. The jury could not believe the witness for the

plaintiff and also believe. They had to reject the one and to credit

the other in order to determine where the truth lay. In this state

of the record it was essential that the remarks of counsel should

have been kept within proper restrictions.

Counsel for plaintiff in arguing the case to the jury.

Witness, I want to tell you something about that witness.

He is not corroborated by any other testimony in this case.

There is no corroboration of his testimony to any extent and no

slightest fact comes from his own mouth, that this defendant has

not taken the stand. Counsel did not offer her as a witness in this

case. It was defendant's counsel who offered her and the

evidence was controverted and was rejected by the jury.

by counsel as a witness in her own behalf. She brought this action one year ago and summoned her into this court to tell her story as to how this thing happened, to defend herself. She comes here with her counsel, she remains silent. You gentlemen no doubt would have been interested to know what her defense was in this case." Defendant's counsel again objected and moved the court to instruct the jury to disregard the argument on the ground that the defendant was incompetent to testify, which motion was denied. In a clear case the court will reverse a judgment because of the improper conduct of counsel. (Wabash Railway v. Billings, 212 Ill. 37, and Chicago Union Traction Co. v. Lauth, 216 id. 176.) It has been held that it is error for the attorney for a complainant in a will contest case to refer in his argument to the failure of a witness, who was the attorney for the chief beneficiary of the will, to testify, when he knows he is not a competent witness. (Ravenscroft v. Hull, 280 Ill. 406.) In another part of his argument plaintiff's counsel said: "You had a right to offer her and I would not have objected to it." Defendant's counsel moved the court to instruct the jury to disregard this argument, which motion was denied. It was error for counsel to suggest to the jury that he would have waived objection to incompetent testimony if opposing counsel had offered it. (Blaisdell v. Davis, 72 Vt. 295; Mattice v. Alawans, 312 Ill. 299, 300.) In the case of Sandberg v. Chicago Railways Co., 191 Ill. App. 199, which was an action by an administrator to recover damages caused by the negligent act of the defendant, counsel for plaintiff in that case commented on defendant's failure to produce witnesses who appeared to be available, the court said: "This was not fair nor proper argument and should not have been permitted, * * *. The approval of such argument by the court warranted an inference by the jury that defendant's proof, if introduced, would be unfavorable to it." By the argument in the instant case counsel not only told the jury that an inference

unfavorable to the defendant might be drawn from her failure to testify, but that plaintiff had done all she could to compel the defendant to testify. In the argument he said: "We brought this action one year ago and summoned her into this court to tell her story as to how this thing happened, to defend herself. She comes here with her counsel, she remains silent." It was improper to make such an argument.

It is urged, however, by plaintiff's counsel that the court in its written instructions told the jury that the suit was brought by the plaintiff as administratrix and that defendant was not competent to testify as a witness. It has repeatedly been held that even though the trial court may have sustained objections to improper argument, rebuked the counsel making the same, and instructed the jury to disregard the argument, that still such improper argument may be ground for reversal of a judgment. (Chicago Union Traction Co. v. Lauth, supra; Appel v. Chicago City Railway Co., supra.) In the case of Ravenscroft v. Stull, 289 Ill. 406, the court said (p. 413):

"The court gave an instruction to the jury that for an attorney to testify was a reprehensible practice and the jury should not indulge any presumption against the validity of the will because the attorney interested in the outcome of the suit did not testify. The instruction was directly contrary to the ruling of the court, and at any rate did not meet the serious error committed in not promptly sustaining the objection and stopping the course of argument."

And in the Sandberg v. Chicago Railways Co. case, supra, the court said:

"At defendant's request, the court instructed the jury 'that the fact that the defendant has introduced no evidence by way of defense is not to raise a presumption in your mind of the guilt of said defendant;' but, in the present case, that instruction did not cure the mischief done by that kind of argument."

In the instant case under the evidence the jury might have returned a verdict for either party. Where there is a conflict in the testimony the cause will be reversed if improper and prejudicial argument is made. The effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. (Mattice v. Klawans,

unfavorable to the defendant might be drawn from her failure to testify, but that plaintiff had done all she could to compel the defendant to testify. In the argument he said: "We brought this action one year ago and summoned her into this court to tell her story as to how this thing happened, to defend herself. The answer here with her counsel, who remains silent." It was improper to make such an argument.

It is urged, however, by plaintiff's counsel that the words in the written instructions told the jury that she was brought by the plaintiff as administrative and that defendant was not supposed to testify as a witness. It has repeatedly been held that even though the trial court may have sustained objections to improper arguments, rebutted the counsel making the same, and instructed the jury to disregard the argument, that still such improper argument may be ground for reversal of a judgment. (Harris v. Twining, 100 F. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

of Patterson v. Smith, 250 Ill. 406, the court said (p. 413):
"The court gave an instruction to the jury that for an attorney to testify was a reprehensible practice and the jury should not indulge any presumption against the validity of the will because the attorney interested in the outcome of the suit did not testify. The instruction was directly contrary to the ruling of the court, and as my wife did not want the witness to testify in not promptly sustaining the objection and stopping the course of argument."

and in the Patterson v. Smith case, the court said:
"As defendant's request, the court instructed the jury that the fact that the defendant had introduced no evidence by way of defense is not to raise a presumption in your mind of the validity of said defendant's will. In the present case, that instruction did not turn the matter into a presumption of the validity of the will."

In the instant case under the evidence the jury might have returned a verdict for either party. There is a conflict in the testimony the case will be reversed if improper and prejudicial argument is made. The effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. (Harris v. Twining, 100 F. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

312 Ill. 299.)

The judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

[illegible]

THE UNIVERSITY OF CHICAGO

[Faint, illegible handwritten text]

34805

THEODORE HAWKINS,
(Plaintiff),

Appellant,

v.

HAWKINS & LOOMIS COMPANY,
(Defendant),

Appellee.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

267
353 I.A. 632²

MR. JUSTICE KERNES DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought by plaintiff, Theodore Hawkins, against Hawkins & Loomis Company, to recover \$4,000 salary claimed to be due plaintiff. Heard before the court without a jury, issues found in favor of defendant, judgment on the finding, from which plaintiff appealed.

Defendant's declaration alleged that on January 8, 1929, plaintiff and defendant entered into an agreement whereby defendant employed plaintiff as president for a period of one year from January 1, 1929, to December 31, 1929, and promised to pay plaintiff \$12,000 per annum, payable in monthly installments, and on December 31, 1929, at the rate of six per cent per annum on any unpaid balance of salary installments; that plaintiff from January 1, 1929 to December 31, 1929, pursuant to said contract, acted and performed the duties of president; that defendant failed to pay the salary agreed upon and there is due him \$4,000 etc. Defendant filed a plea of non assumpsit and an affidavit of merits in which it is alleged, that defendant has a good defense to the whole of plaintiff's demand; that the nature of said defense is as follows: Defendant denies that it ever entered into an agreement whereby it employed plaintiff as president for a period of one year, and denied it promised to pay plaintiff \$12,000 per annum for said services; denied plaintiff

THE COURT OF APPEALS
(First Division)

Appellant

v.

THE BANK OF AMERICA
(Respondent)

Appellee

THE COURT OF APPEALS

First Division

232 I.A. 632

MR. JUSTICE KEENE DELIVERED THE OPINION OF THE COURT.

This is an action in rem brought by plaintiff.

Theresa Hawkins, against Hawkins & Son's Company, to recover

\$4,000 salary claimed to be due plaintiff. Heard before the

court without a jury, issues found in favor of defendant, judgment

on the finding, from which plaintiff appealed.

Defendant's declaration alleged that on January 6, 1933,

plaintiff and defendant entered into an agreement whereby defendant

employed plaintiff as president for a period of one year from

January 1, 1933, to December 31, 1933, and promised to pay plaintiff

\$12,000 per annum, payable in monthly installments, and on December

31, 1933, at the rate of six per cent per annum on any unpaid balance

of salary installment; that plaintiff from January 1, 1933 to

December 31, 1933, pursuant to said contract, acted and performed the

duties of president; that defendant failed to pay the salary agreed

upon and there is due him \$4,000 etc. Defendant filed a plea of non

assumpsit and an affidavit of merits in which it is alleged, that

defendant has a good defense to the whole of plaintiff's demand; that

the nature of said defense is as follows: Defendant denies that it

ever entered into an agreement whereby it engaged plaintiff as

president for a period of one year, and denied it promised to pay

plaintiff \$12,000 per annum for said services; denied plaintiff

was employed for any definite period, and averred that under an agreement between plaintiff and defendant, plaintiff was to receive merely \$500 a month for his services for the months of August and September, 1929, and for the balance of said year he was to receive \$1 a month. The decision of this case depends upon whether the contract of employment was for the period of one year, or was for an indefinite period.

The evidence discloses that the plaintiff is a director and stockholder of defendant corporation; that on January 8, 1929, at an annual meeting of the directors a motion was duly made, seconded and carried, that the following men be elected officers of the company to hold office: Theodore Hawkins, president; Robert H. Loomis, vice president, and Edward L. Loomis, secretary-treasurer. Thereupon, a motion was duly made and seconded, that the officers' salaries be fixed as follows: Theodore Hawkins, president, \$12,000 per annum; Robert H. Loomis, vice president, \$2,600 per annum; Edward J. Loomis, secretary-treasurer, \$3,000 per annum; all of the salaries to be credited on the books of the company in twelve monthly installments. Interest at the rate of six per cent per annum to be credited on any unpaid balance at the end of each calendar year. The plaintiff acted as president of the defendant corporation during the calendar year 1929 and received \$8,000. Section 1 of the by-laws of the defendant corporation provided that officers, when elected, should hold office for a term of one year, and also provided that all officers, agents or employees of the corporation should be subject to removal at any time by the affirmative vote of a majority of the board. On August 5, 1929, at a meeting of the board of directors of the defendant corporation, called to discuss ways and means of lowering expenses and overhead during the month of August, by resolution of the board of directors all officers' salaries were reduced 50 per cent for the month of August, 1929, and on September 9, 1929,

was employed for any definite period, and received that under an
agreement between plaintiff and defendant, plaintiff was to
receive weekly \$500 a month for his services for the month of
April and September, 1929, and for the balance of said year he
was to receive \$1 a month. The condition of this last agreement was
whether the contract of employment was for the period of one year,
or not for an indefinite period.

The evidence discloses that the plaintiff is a director
and shareholder of defendant corporation; that on January 5, 1929,
at an annual meeting of the directors a motion was duly made, seconded
and carried, that the following men be elected officers of the
company to wit: officers: Theodore Hawkins, president; Robert H.
Loomis, vice president, and Edward L. Loomis, secretary-treasurer.
Thereupon, a motion was duly made and seconded, that the officers'
salaries be fixed as follows: Theodore Hawkins, president, \$10,000
per annum; Robert H. Loomis, vice president, \$5,000 per annum;
Edward L. Loomis, secretary-treasurer, \$5,000 per annum; all of
the salaries to be credited on the books of the company in twelve
monthly installments. Interest at the rate of six per cent per
annum to be credited on any unpaid balance at the end of each calendar
year. The plaintiff acted as president of the defendant corporation
during the calendar year 1929 and received \$5,000. Section 1 of the
by-laws of the defendant corporation provided that officers, when
elected, should hold office for a term of one year, and also provided
that all officers, agents or employees of the corporation should be
subject to removal at any time by the affirmative vote of a majority
of the board. On August 6, 1929, at a meeting of the board of directors
of the defendant corporation, called to discuss ways and means of
increasing expenses and overhead during the month of August, by
resolution of the board of directors all officers, including the plaintiff,
were removed from the month of August, 1929, and on September 2, 1929,
he was not for the month of August, 1929, and on September 2, 1929,

by resolution of the board of directors, the salaries to be paid to the president and secretary-treasurer thereafter were fixed at the rate of \$1 per annum until further action of the board. The plaintiff voted against the adoption of these resolutions. No claim is made that plaintiff was guilty of any misconduct in the performance of his duties as president.

The plaintiff contends that the adoption of the resolution of January 28, 1929, constituted a contract binding upon the parties for a term of one year, and cites cases in support of his contention. It must be admitted there is a conflict of authorities, upon the question involved in the instant case. The trial court held that the plaintiff was not employed for any specified time. In this we are of the opinion he was not in error. Plaintiff was elected under the provisions of the by-laws of the defendant, subject to the power of removal vested in the board of directors, of which power he must be assumed to have notice, and under the terms of which he must be presumed to have accepted the office with its emoluments.

"Officers of a corporation are presumed to know the by-laws adopted before their appointment or election and are bound by them as to their tenure of office." (Ginter v. Heco Envelope Co., 316 Ill. 183 (p. 186)).

It is the duty of the board of directors to control corporate affairs and they have the power to reduce the salary of an officer when he is not employed for any specific time. (Hall v. Woods, 325 Ill. 114.)

It is, however, urged by plaintiff that he was employed for a specific time, that is, for the calendar year of 1929. There is no evidence as to the hiring except the resolution of January 8, 1929. By this resolution the salary of the president was fixed at \$12,000 per annum. It is proof only of the fact that the rate of compensation was fixed at that amount. It was not an undertaking on the part of the defendant to retain plaintiff for any definite period. It is true, the by-laws provided that the officers should hold office for a period of one year,

by resolution of the Board of Directors, the salaries to be paid to the President and Secretary-Treasurer were fixed at the rate of \$1 per annum until further action of the Board. The Plaintiff voted against the adoption of these resolutions. No claim is made that Plaintiff was guilty of any misconduct in the performance of his office as President.

The Plaintiff contends that the adoption of the resolution of January 22, 1922, constituted a contract binding upon the parties for a term of one year, and also acted in support of his contention. It must be admitted there is a conflict of authorities upon the question involved in the instant case. The trial court held that the Plaintiff was not employed for any specific time. In this view one of the opinions he was not in error. Plaintiff was elected under the provisions of the by-laws of the defendant, subject to the power of removal vested in the Board of Directors, of which power he must be assumed to have notice, and under the terms of which he must be presumed to have accepted the office with its limitations.

"Article of a corporation are presumed to know the by-laws and the appointment of officers and the board of directors as to their terms of office." (Hill v. Board of Directors, 212 Ill. 123 (1901).)

It is the duty of the Board of Directors to remove corporate officers and they have the power to remove the salary of an officer when he is not employed for any specific time. (Hill v. Board of Directors, 212 Ill. 123.) It is, however, urged by Plaintiff that he was employed for a specific time, that is, for the calendar year of 1922. There is no evidence as to the fixing except the resolution of January 22, 1922. By this resolution the salary of the President was fixed at \$12,000 per annum. It is great only of the fact that the rate of compensation was fixed at that amount. It was not an undertaking on the part of the defendant to retain Plaintiff for any definite period. It is true, the by-laws provide that the officers should hold office for a period of one year.

but they also provided that the officers should be subject to removal at any time by the affirmative vote of a majority of the board of directors. The burden of proving that he was employed for a fixed period was on the plaintiff (Odell v. Chicago Great Western R. R. Co., 212 Ill. App. 816; Fuchs v. Feibert, 233 Ill. App. 536,) and no presumption arises merely for the fixing of a rate of compensation. On the contrary, an employment upon an annual salary, if no period is otherwise stated or approved for its continuance, is presumed to be a hiring at will, which either party may at any time terminate. (Pfund v. Immerman, 29 Ill. 269, and Orr v. Ward, 73 Ill. 318.) In Chadwick v. Morris & Co., 179 Ill. 569, at p. 579, the court said: "The plaintiff testified: 'I told him (Borders) that the least I would go for was fifteen hundred a year; and he said 'all right.' This can in no way be construed into a definite hiring for one year." In the case of Martin v. New York Life Ins. Co., 42 N. Y. 416, at p. 417, the court said:

"With us, the rule is inflexible that a general or indefinite hiring is, prima facie, a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."

A contract for service, at a salary of \$2,500 per annum, is not a contract for any definite time, and at a fixed price, the complete performance of which is a condition precedent to a right to compensation. It is but a stipulation of the rate at which the employee is to be compensated for the services performed. (Harvey v. Caldwell, 35 Ark. 156. See also Stein v. Kooperstein, 102 N. Y. Sup. 878, and The Pokanoket, 186 Fed. 241.) It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.

It is assigned as error that the resolutions of August 8

the following of which were used and delivered in the year 1900:

and to which a few other persons are also known to have been

Some have not had just authority to a great extent. Others to a lesser

THE UNIVERSITY OF CHICAGO PRESS

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1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the plan to ensure that the problem is being addressed effectively.

... ..

and however, an understanding of history and its

1990年 1月 1日 星期一 晴 1月 2日 星期二 晴 1月 3日 星期三 晴 1月 4日 星期四 晴 1月 5日 星期五 晴 1月 6日 星期六 晴 1月 7日 星期日 晴 1月 8日 星期一 晴 1月 9日 星期二 晴 1月 10日 星期三 晴 1月 11日 星期四 晴 1月 12日 星期五 晴 1月 13日 星期六 晴 1月 14日 星期日 晴 1月 15日 星期一 晴 1月 16日 星期二 晴 1月 17日 星期三 晴 1月 18日 星期四 晴 1月 19日 星期五 晴 1月 20日 星期六 晴 1月 21日 星期日 晴 1月 22日 星期一 晴 1月 23日 星期二 晴 1月 24日 星期三 晴 1月 25日 星期四 晴 1月 26日 星期五 晴 1月 27日 星期六 晴 1月 28日 星期日 晴 1月 29日 星期一 晴 1月 30日 星期二 晴 1月 31日 星期三 晴

1992年1月1日

.....

2. 1990年12月1日以前，在《民法通则》施行以前，民事行为已经发生，但当时没有法律、法规规定的，适用民事行为发生时的法律、法规；没有法律、法规规定的，适用《民法通则》的规定。

.....

[illegible][illegible][illegible]

... ..

... ..

1. 凡在本行开立存款账户的客户均可申请。

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

Figure 1. The effect of the concentration of the solution on the adsorption of the dye.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

1950年10月1日 星期日 晴 10月1日 星期日 晴

• 2000 年 4 月 20 日 星期三 晴

James is considerably older than we are as James is 42

and September 9, 1929, were inadmissible, because they did not tend to establish the defense set forth in the affidavit of merits. Section 55, ch. 110, Cahill's Rev. Stats., provides that where a plaintiff files with his declaration an affidavit of claim, the defendant shall file with his plea, an affidavit of merits specifying the nature of the defense. Facts constituting a defense are those facts which the evidence upon the trial will prove, and not the facts which will be required to prove the existence of such facts. In Firestone Tire Co. v. Ginsburg, 283 Ill. 132 (p. 136), the court said: "It is not required that the defendant should state the evidence but only the ultimate facts which would give notice of the nature of the defense." Plaintiff, in his affidavit of claim, based his claim upon a contract at a certain salary for a definite period of time. This was denied by defendant. No motion was made to strike the affidavit of merits and under this state of the pleadings defendant had the right to show affirmative evidentiary facts to support its negative defense and we can see no error in admitting the resolutions.

It is also urged that the resolutions of August 5 and September 9, 1929, were passed too late to affect plaintiff's salary for the months of August and September, 1929. It appears from the evidence that plaintiff himself drew the checks for his salary, and to the end of July, 1929, he had withdrawn \$7,000 from the defendant and on August 2, he drew a check for \$500 and on September 3, he drew another check for \$500. We think under the state of facts in this case the resolutions were not passed too late to affect plaintiff's salary for these months.

Finally it is contended that it was error to exclude plaintiff's offer in rebuttal to prove that plaintiff had been employed as president of the corporation since its inception and had drawn a salary of \$12,000 for three or four years prior to January 1, 1929.

and September 9, 1937, were immaterial, because they did not tend to establish the balance due to the plaintiff of money.

Question 11. On May 1937, the plaintiff's lawyer stated that there was a plaintiff filed with his declaration on affidavit of claim, the defendant shall file with his plea, on affidavit of money repaying the nature of the defense. These constituting a defense are those facts which the evidence upon the trial will prove, and not the facts which will be required to prove the existence of such facts.

In Williams vs. W. J. Williams, 205 Ill. 102 (p. 103), the court said: "It is not required that the defendant should state the affirmative but only the ultimate facts which would give notice of the nature of the defense." Plaintiff, in his affidavit of claim, posed his claim upon a contract as a certain salary for a definite period of time. This was denied by defendant. He motion was made to strike the affidavit of notice and under this state of the pleadings defendant had the right to show affirmative evidence. It is admitted that the negative defense and we can see no error in admitting the resolution.

It is also urged that the resolutions of August 1 and September 9, 1937, were passed too late to affect plaintiff's salary for the months of August and September, 1937. It appears from the evidence that plaintiff himself drew the check for his salary, and at the end of July, 1937, he had withdrawn \$7,000 from the defendant and on August 2, he drew a check for \$500 and on September 2, he drew another check for \$500. The check under the state of facts in this case the resolutions were not passed too late to affect plaintiff's salary for those months.

Finally, it is contended that in our error is evident plaintiff's error in refusing to prove that defendant had been employed as president of the corporation since its inception and had drawn a salary of \$12,000 for three or four years prior to January 1, 1937.

and that at no time during the history of the corporation had the board of directors ever decreased the salary of an officer. We have considered the arguments of counsel and are of the opinion that the court did not abuse its discretion in refusing to admit this evidence.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Seanlan, F. J., and Gridley, J., concur.

and that at no time during the history of the corporation had
the Board of Directors ever discussed the sale of an officer.
We have considered the arguments of counsel and are of the opinion
that the court did not abuse its discretion in refusing to admit
this evidence.

The judgment of the Superior Court is affirmed.

APPROVED: _____

IN WITNESS WHEREOF

Testimony of _____

Subscribed and sworn to before me

Notary Public for the State of _____

My commission expires _____

the _____ day of _____

Notary Public for the State of _____

My commission expires _____

the _____ day of _____

Notary Public for the State of _____

My commission expires _____

the _____ day of _____

Notary Public for the State of _____

My commission expires _____

the _____ day of _____

Notary Public for the State of _____

My commission expires _____

34811

GREGORY WALKER, administrator
of the estate of Donald E. Bush,
deceased, (plaintiff),

Appellee,

v.

CITY OF CHICAGO, a Municipal
corporation, (defendant),
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

262 I.A. 632¹

MR. JUSTICE KEENER DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estate of Donald E. Bush, deceased, sued the City of Chicago to recover damages for the benefit of the next of kin for the wrongful death of Donald E. Bush. The case was tried before the court with a jury, verdict and judgment against defendant for \$4,500 and this appeal followed.

The declaration consisted of three counts. The first alleged in substance that on August 24, 1923, the defendant was in possession and control of a certain wire used for the transmission of large and dangerous quantities of electricity, sufficiently large to cause death to persons coming in contact with said wire, stretched in Harper avenue and 65th street; that it was the duty of defendant to properly insulate and protect said wire so that in case persons in the public street there, should they come in contact with said wire, would not be injured thereby; that defendant negligently and carelessly failed and neglected properly to insulate or protect said wire, but allowed said wire to be and remain without sufficient protection whatsoever; that plaintiff's intestate, who was rightfully in said public street, a boy ten years of age, exercising ordinary care for a person of his age and experience, came in contact with said

3501

ADMINISTRATOR
OF THE ESTATE OF DONALD E. BUSH
PLAINTIFF,
vs.
APPEAL.

CHIEF CLERK
COUNTY, COOK COUNTY

CITY OF CHICAGO, a Municipal
Corporation, (Defendant),
vs.
Appellant.

3501 A.A. 682

MR. JUSTICE ... DELIVERED THE OPINION OF THE COURT.

Plaintiff, an administrator of the estate of Donald E. Bush, deceased, and the City of Chicago to recover damages for the benefits of the work of him for the wrongful death of Donald E. Bush. The case was tried before the court with a jury, who did not and judgment against defendant for \$4,000 and this appeal followed.

The decision consisted of three counts. The first alleged in substance that on August 24, 1924, the defendant was in possession and control of a certain wire used for the transmission of large and dangerous quantities of electricity, sufficiently large to cause death to persons coming in contact with said wire, stretched in Harper Avenue and 53rd Street; that it was the duty of defendant to properly insulate and protect said wire so that in case persons in the public street there, should they come in contact with said wire, would not be injured thereby; that defendant negligently and carelessly failed and neglected properly to insulate or protect said wire, but allowed said wire to be and remain without sufficient protection whatsoever; that Plaintiff's intestate, who was negligently in said public street, a few feet from the wire, was negligently and let a person of his age and experience, come in contact with said

wire and received a current of electricity through his body and was killed. The second count alleges that at the place in question, was a tree, the branches of which were so arranged that it was easy for children playing in the street, to climb said tree; that children were accustomed to climb said tree and that said tree presented an invitation to children to climb upon it and was an attractive place for children to play and climb, all of which was known to defendant. The third count is like the second except that it alleges that it was easy for children of tender years to climb said tree, and for a long time children were in the habit and custom of climbing into said tree, playing in, about and upon said tree, all of which was known to defendant. The defendant pleaded the general issue and that it did not own, possess, control or have custody of the electric wire.

The undisputed evidence shows that Donald E. Bush, ten years old on October 22, 1927, a normal boy, whose eyesight, hearing and health were good, and in school had passed the sixth grade, lived with his mother on the southeast corner of Harper avenue and 65th street, Chicago, was killed at about 8 o'clock in the evening on August 24, 1928, by coming in contact with an electric wire belonging to the defendant. A poplar tree was growing in the parkway space between the sidewalk and the curb on the west side of Harper avenue a few feet north of 65th street. It was about 35 feet in height, about 2 feet in circumference at its base, its lowest limb or branch was about 12 feet from the ground; adjoining and bolted to the tree was a mail box 4 or 5 feet in height and adjoining the mail box was a wooden fence along the edge of the parkway next to the sidewalk, which was about 22 inches in height. Through this tree and within six to twelve inches of the trunk about 23 feet from the ground, the defendant maintained an electric wire used in the lighting of the streets. The voltage of the electricity in the wire was about 3250. This wire had originally been covered with a weatherproof

wire and received a current of electricity through his body and was killed. The second count alleges that at the place in question was a tree, the branches of which were so arranged that it was easy for children playing in the street, to climb said tree; that children were accustomed to climb said tree and that trees presented an invitation to children to climb upon it and was an attractive place for children to play and climb, all of which was known to defendant. The third count is like the second except that it alleges that it was easy for children of tender years to climb said tree, and for a long time children were in the habit and custom of climbing into said trees, playing in, about and upon said tree, all of which was known to defendant. The defendant placed the general issue and that it did not own, possess, control or have custody of the electric wire. The undisputed evidence shows that Donald E. Bush, ten years old on October 22, 1907, a normal boy, whose eyesight, hearing and health were good, and in normal had passed the sixth grade, lived with his mother on the westmost corner of Harper Avenue and 22nd Street, Chicago, was killed at about 5 o'clock in the evening on August 24, 1908, by coming in contact with an electric wire belonging to the defendant. A poplar tree was growing in the parkway space between the sidewalk and the curb on the west side of Harper Avenue a few feet north of 22nd Street. It was about 25 feet in height, about 2 feet in circumference at its base, the lowest limb or branch was about 12 feet from the ground, extending and joined to the tree was a well box 4 or 5 feet in height and joining the well box was a wooden fence along the edge of the parkway next to the sidewalk, which was about 22 inches in height. Through this tree and within six to twelve inches of the ground about 12 feet from the ground, the defendant maintained an electric wire used in the lighting of the streets. The voltage of the electricity in the wire was about 1000. This wire had originally been covered with a weatherproof

covering which was primarily for the purpose of preventing the wire from corroding and was not intended to, nor did it prevent the escape of electricity. It had a covering of cotton and tar compound and with the compound thereon was about 5/16ths of an inch in diameter. The trunk at the point where the wire passed the branches of the tree, was 4 inches in diameter. For many months prior to August 24, 1938, this covering of the wire had been worn off for a distance of 3 feet opposite the trunk where it passed through the tree, and within 6 inches of the trunk, and many people in the neighborhood for months, and in some cases for years, before the accident, had at times seen sparks escaping from the wire where it passed through the tree, and one witness testified she had called a police station in the neighborhood and told them of the condition of the wire but no repairs to the wire were made. For a long time prior to the accident in question children of plaintiff's intestate's age, and younger, had been in the habit of climbing this tree; they had no trouble in climbing the tree; it was easy to climb; they had never heard anybody tell the boys to get out of the tree or to be careful or that it was dangerous up there in the tree. On this evening Donald and other boys were playing around this corner. They had recently seen a moving picture called the "Gorilla" and started a game in which Donald was supposed to be a gorilla and the other boys were endeavoring to capture him. He climbed up the tree, first stepping upon the fence and from there climbed up on the mail box and grabbed hold of the lowest branch of the tree and then kept grabbing hold of branches going up further to where the wire passed through the branches of the tree and came in contact with the wire.

Defendant contends that there is no evidence to support the cause of action; that the plaintiff failed to prove that the defendant was negligent in the construction, maintenance and operation

covering which was previously for the purpose of preventing the wire from corroding and was not intended to, nor did it prevent the escape of electricity. It had a covering of cotton and was composed and with the segments between was about 1/16th of an inch in diameter. The wires at the point where the wire passed the branches of the tree, was 4 inches in diameter. For many months prior to August 22, 1933, this covering of the wire had been worn off for a distance of 5 feet opposite the place where it passed through the tree, and within 6 inches of the trunk, and many people in the neighborhood for months, and in some cases for years, before the accident, had at times seen sparks coming from the wire where it passed through the tree, and one witness testified that he called a police station in the neighborhood and told them of the condition of the wire but no repairs to the wire were made. Way a long time prior to the accident in question attention of electricity inspectors' and men, and they in the night at midnight this tree! they had no trouble in climbing the tree; it was easy to climb; they had never heard anybody tell the boys to get out of the tree or to be careful or that it was dangerous up there in the tree. On this evening boys and other boys were playing around this corner. They had recently seen a moving picture called the "Cavill" and started a game in which Cavill was supposed to be a cavill and the other boys were and evening to capture him. He climbed up the tree first stepping upon the lower and then they climbed up on the next bar and grabbed hold of the lower branch of the tree and then kept grabbing hold of branches going up further so where the wire passed through the branches of the tree and came in contact with the wire. Attention is directed that there is no witness to suggest the cause of accident that the Cavill called to prove that the

disturbance was negligible in the neighborhood, maintenance and operation

of the wire and that plaintiff's intestate was killed solely because he was a trespasser on the tree, without being lured or invited thereon by an attractive nuisance.

As we view this case the controlling question is: Did the defendant exercise that degree of care in the maintenance of the electric wire that the law imposes upon it? Persons handling the dangerous and deadly agency of electricity are bound to know the dangers incident to its use in a public street and to guard against accidents by a degree of care commensurate with the degree of danger. (Hausler v. Commonwealth Electric Co., 240 Ill. 204.) In the case of Burns v. City of Chicago, 338 Ill. 89, 96, the court cited with approval the language in the case of Graves v. Interstate Power Co., 189 Ia. 227, and said:

"Courts have generally held that it is the duty of those engaged in erecting and maintaining wires conveying a deadly current of electricity to properly insulate the same where they pass through shade trees, which, it should be reasonably anticipated, might be climbed by children of immature years and without knowledge of the danger involved."

Other recent cases involving wires running through trees in which a similar position had been taken by the courts are Shannon v. Kansas Light & Power Co., 315 Mo. 1136; Stark v. Hotliacian, 90 Fla. 207; Cooper v. North Coast Power Co., 117 Ore. 384. The deceased in the instant case was not a trespasser as the injury occurred in a tree in a public street (Stedwell v. City of Chicago, 297 Ill. 486; Reming v. City of Chicago, 321 id. 341; Welczek v. Public Service Co. of Northern Illinois, 342 id. 482, 494; Holmberg v. City of Chicago, 244 Ill. App. 505, 513,) and whether the tree located in the parkway of a public street was so attractive as to suggest the probability of such an accident as occurred, and whether the defendant was negligent in maintaining the wire as it did, were questions for the jury. (Stedwell v. City of Chicago, *supra*.) Moreover, we are of the opinion that the evidence establishes a cause of action and that

of the wire and that plaintiff's intestate was killed while he-
cause he was a trespasser on the fence, without being injured or
invited thereon by an attractive nuisance.

As we view this case the controlling question is: Did
the defendant maintain that degree of care in the maintenance of
the electric wire that the law imposes upon it? Between defendant
the dangerous and deadly agency of electricity and human life
the danger itself and to its use in a public street and to connect
against negligence by a degree of care commensurate with the degree
of danger. Wheeler v. Commonwealth Electric Co., 200 Ill. 206.
In the case of Wheeler v. City of Chicago, 200 Ill. 206, the court
held with approval the language in the case of Wheeler v. Chicago
Electric Co., 199 Ill. 207, and said:

"Plaintiff's own negligence is to the duty of those
engaged in installing and maintaining wires connecting a deadly current
of electricity to property located in the case where they have
charge thereof, which is shown to be negligently anticipated, might be
eliminated by children of immature years and without knowledge of the
danger involved."

Other recent cases involving wires running through streets in which a
similar position has been taken by the courts are Wheeler v. Chicago
Electric Co., 199 Ill. 207; Wheeler v. Chicago Electric Co., 199 Ill. 207;
Wheeler v. City of Chicago, 199 Ill. 207. The doctrine in the
instant case was not a departure from the injury occurred in a case
in a public street (Wheeler v. City of Chicago, 199 Ill. 207; Wheeler
v. City of Chicago, 199 Ill. 207; Wheeler v. Chicago Electric Co., 199
Ill. 207; Wheeler v. City of Chicago, 199 Ill. 207). The doctrine of
the App. 200, 215, and whether the tree located in the pathway of
a public street was an attractive or an obstructive the probability of
such an accident as occurred, and whether the defendant was negligent
in maintaining the wire as it did, were questions for the jury.
(Wheeler v. City of Chicago, 199 Ill. 207). However, we are of the
opinion that the plaintiff established a case of negligence and that

it is sufficient to justify the jury in finding the defendant guilty of negligence.

The defendant contends that the verdict of the jury cannot be sustained on the theory of an attractive nuisance and cites in support of his contention Burns v. City of Chicago, 138 Ill. 99. In that case the boy climbed to the top of a tubular steep pole 26 feet high to which an electric wire was attached and was electrocuted, which he climbed in accepting a challenge, and when about three-fourths of the way up, was told to come down, that it was dangerous; he did not heed the advice but went on to the top, seized the wire and fell to the ground. The court held it was not the attraction of the pole, but it was the desire to do something unusual, hazardous, difficult and heroic, that induced the boy to undertake his reckless and dangerous feat. In the instant case while it is true the declaration alleged, and the proof tended to show that the tree by reason of the adjoining fence and mail box was attractive to boys for climbing, plaintiff's cause of action is not predicated upon the theory of an attractive nuisance, but each count contained other charges of negligence, and in our judgment, even if it be held that the tree was not an attractive nuisance, under the pleadings and the evidence in the case, the plaintiff made out a clear case of negligence against the defendant.

There being no ground upon which the judgment of the Superior court should be reversed, it is accordingly affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

34825

BERTHA ANDERSON,
(Plaintiff), Appellee,

v.

COSMOPOLITAN LIFE INSURANCE
COMPANY, a corporation,
(Defendant), Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 333'

MR. JUSTICE KREMER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago on a life insurance policy in which Earl A. Anderson, her husband, was the insured. The cause was heard by the court without a jury. Judgment was entered against the defendant for \$1,069 and this appeal followed.

Defendant in its affidavit claimed as a defense to the policy that it was null and void because the statements made by the insured in his application pertaining to his occupation and to his state of health were false, and that he had also been guilty of fraud in making the claimed false statements, and that defendant believed and relied upon the truthfulness of the statements.

The record discloses that on May 7, 1927, Earl A. Anderson made an application to American Benefit Life Insurance Company of Springfield, Illinois, for a life insurance policy for \$1000, payable upon his death to plaintiff, his wife. In the application he signed a statement in which he warranted that he was in good mental and physical condition and had not suffered or had not been treated for a large number of diseases, mentioned in the application, and his occupation was given as that of a tailor. Policy No. E75990 was thereupon issued without a medical examination of the applicant. This policy remained in force until August 30,

Page 1

WESTERN LIFE INSURANCE COMPANY, INC. (Plaintiff)
vs.
JAMES H. HARRIS (Defendant)
Appellate
Circuit Court of Appeals
Chicago, Illinois

8821A.033

MR. JUSTICE HENRY WILLIAMS THE CHIEF OF THE COURT.

Plaintiff sued defendant in the Municipal Court of

Chicago on a life insurance policy in which Harry A. Harrison, her husband, was the insured. The cause was heard by the court without a jury. Judgment was entered against the defendant for \$1,000 and this appeal followed.

Defendant in his affidavit claimed as a defense to the policy that it was null and void because the statements made by the insured in his application pertaining to his occupation and to his state of health were false, and that he had also been guilty of fraud in making the alleged false statements, and that defendant believed and relied upon the truthfulness of the statements.

The record discloses that on May 7, 1927, Harry A. H.

Harrison made an application to Western National Life Insurance Company of Springfield, Illinois, for a life insurance policy for \$1,000, payable upon his death to plaintiff, his wife. In the application he signed a statement in which he warranted that he was in good mental and physical condition and had not suffered or had not been treated for a large number of diseases, mentioned in the application, and his occupation was given as that of a caller. Policy No. 27590 was thereupon issued without a medical examination of the applicant. This policy remained in force until August 20,

1929, when the insured received from the defendant, by mail, the policy sued on, to which was attached a photostatic copy of the original application for a policy in the American Benefit Life Insurance Company. Accompanying this policy was a letter in which the defendant advised the insured that he had been reinsured in the defendant company, and that everything in the policy is guaranteed and can never be changed. The insured accepted the policy and made payments of premiums up to December 23, 1929, the date of his death. The record further shows that he was in good health at the time the application for the original policy was made.

Plaintiff in her statement of claim, sets up the issuance of the original policy, the fact that at the time of its issuance the insured was in good health, the substitution of the policy sued on, the payment of premiums, the death of the insured and the filing by the beneficiary with the defendant of the necessary proofs of claim and its acceptance by the defendant. The defendant did not deny the payment of the premiums, nor the death of the insured, nor the fact that proofs of claim had been filed and accepted by the defendant.

Over the defendant's objection the original insurance policy issued by the American Benefit Life Insurance Company was received in evidence. It is contended this was error. We might have disposed of this contention by saying that defendant is in no position to raise this question, for the reason that the abstract does not show the policy which it is claimed was erroneously admitted. We have, however, considered the contention. The original application, signed by the insured, was a part of the original policy and a photostatic copy of it was attached to the policy sued on. The defendant offered no evidence whatsoever and in view of this state of the record, we have reached the conclusion that no harm came to the defendant by the introduction of this policy.

1920, when the insured received from the defendant, by mail, the policy and on, to which was attached a photostatic copy of the original application for a policy in the Western Benefit Life Insurance Company. Accompanying this policy was a letter in which the defendant advised the insured that he had been returned in the defendant company, and that everything in the policy is guaranteed and can never be changed. The insured accepted the policy and made payments of premiums up to December 31, 1929, the date of his death. The record further shows that he was in good health at the time the application for the original policy was made. Plaintiff is not concerned at claim, sets up the insurance at the original policy. The fact that at the time of the insurance the insured was in good health, the consideration of the policy was on the payment of premiums, the death of the insured and the killing by the beneficiary with the defendant at the necessary proofs of claim and the acceptance by the defendant. The defendant did not deny the payment of the premiums, nor the death of the insured, nor the fact that proofs of claim had been filed and accepted by the defendant. Over the defendant's objection the original insurance policy issued by the Western Benefit Life Insurance Company was received in evidence. It is contended this was error. It might have disposed of this contention by saying that defendant is in no position to raise this question, for the reason that the abstract does not show the policy which is claimed was erroneously admitted. To have, however, emphasized the contention. The original application, signed by the insured, was a part of the original policy and a photostatic copy of it was attached to the policy sent on. The defendant offered no evidence whatever and in view of this state of the record, we have reached the conclusion that no harm came to the defendant by the introduction of this policy.

It is finally contended that the trial court erred in refusing leave to defendant to amend its affidavit of merits. When the case was called for trial the defendant asked leave of court to file an amended affidavit of merits, which was denied. This proposed amended affidavit of merits does not appear in the bill of exceptions and the only information that we have of its contents is what we are able to gather from the colloquy between counsel and the court, from which it appears that defendant's counsel desired to urge as an additional defense, that the application attached to the policy sued on was not signed by the insured. Whenever a party has so framed his bill of exceptions as to leave room for presumptions, such presumptions must be indulged in as will support the judgment of the court below. (Barger v. Hobbs, 67 Ill. 592.) We will, therefore, sustain the action of the court in refusing to allow said affidavit of merits to be filed, upon the presumption that it was insufficient in form, or substance, or both.

We are of the opinion that the grounds for reversal presented in this case are so clearly without merit, that we are warranted in concluding that the appeal was sued out for the purpose of delay. In such circumstances, this court is, under the decisions of our Supreme court, entitled to assess statutory damages. The judgment of the Municipal court will be affirmed with statutory damages at five per cent.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

It is finally suggested that the trial court acted in
refusing leave to defendant to amend his affidavit of merits.
When the case was called for trial the defendant asked leave to
amend so that he could amend his affidavit of merits, which was denied.
This proposed amended affidavit of merits does not appear in the
bill of exceptions and the only information that we have of its
contents is what we are able to gather from the colloquy between
counsel and the court, from which it appears that defendant's
counsel asked to write an additional defense, that the
amendment attached to the policy used on was not signed by the
insured. However a party has no right to his bill of exceptions
as to leave upon for promissory, such promissory must be included
in as will support the judgment of the court below. Hammer v. Hammer
27 Ill. 328. We will, therefore, sustain the action of the court
in refusing to allow said affidavit of merits to be filed, upon the
assumption that it was insufficient in form or substance, or both.
We are of the opinion that the grounds for reversal
presented in this case are so clearly without merit, that we are
warranted in concluding that the appeal was taken out for the
purpose of delay. In such circumstances, this court is, under
the doctrine of our supreme court, entitled to assess statutory
damages. The judgment of the Municipal court will be affirmed
with statutory damages of five per cent.

APPEAL.

Reversed. P. J., and G. J., 11. common.

34834

W. J. RAY, assignee of F. E. HUMMELL,
Trustee in Bankruptcy of V. M. KIMBALL,
doing business as LAKE SHORE ELECTRIC
CO., (plaintiff),

Appellee.

v.

M. HYD, (defendant),

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHIC. CO.

262 I.A. 633

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Plaintiff, W. J. Ray, assignee of F. E. Hummell, trustee in bankruptcy of V. M. Kimball, doing business as Lake Shore Electric Company, sued defendant, M. Hyd, in a fourth class case in the Municipal court of Chicago and obtained a judgment for \$75.67, from which defendant appealed. The plaintiff has not appeared or filed a brief in this court.

The statement of claim sets forth that the claim is for a balance of \$75.67 due for a radio and supplies sold to defendant by V. M. Kimball, doing business as Lake Shore Electric Company, in the amount of \$108.67, upon which defendant has paid \$33. Plaintiff further alleges that V. M. Kimball, was adjudged a bankrupt in the United States District Court at Chicago, and that on May 14, 1930, pursuant to an order entered by the referee in bankruptcy, the said indebtedness was assigned to the plaintiff by F. E. Hummell, as trustee of the estate of said Kimball. The affidavit of claim was made by Guy C. Baltz, who stated that he is the agent for the plaintiff and has knowledge of the facts; that the said cause is a suit upon contract for the payment of money; that the nature of plaintiff's demand is as stated, and that there is due the plaintiff from the defendant, after allowing to defendant all credits, \$75.67. There is no bill of exceptions in the instant case.

W. J. RAY, assigned to V. W. HUMPHREY,
Trustee in bankruptcy of V. W. HUMPHREY,
doing business as LANE MARK COMPANY
Cell (plaintiff).

W. J. RAY

HUMPHREY COMPANY

OF CHICAGO

2621 A. 633

M. WARD, (defendant),
Appellant

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

Defendant, W. J. RAY, assigned to V. W. HUMPHREY, Trustee

in bankruptcy of V. W. HUMPHREY, doing business as LANE MARK COMPANY, which company was defendant, M. Ward, in a former case in the
Municipal court of Chicago and obtained a judgment for \$75.00, from
which defendant appealed. The plaintiff has not appeared on filed
a writ in this court.

The statement of claim sets forth that the claim is for

a balance of \$75.00 due for a trade and supplies sold to defendant

by V. W. HUMPHREY, being defendant as LANE MARK COMPANY.

in the amount of \$100.00, upon which defendant has paid \$25.00. It is

the further alleged that V. W. HUMPHREY, was assigned a bankruptcy in

the United States District Court at Chicago, and that on May 14, 1920,

payment to an order issued by the trustee in bankruptcy, the said

indebtedness was assigned to the plaintiff by V. W. HUMPHREY, as trustee

of the estate of said HUMPHREY. The affidavit of claim was made by

RAY C. BATES, who stated that he is the agent for the plaintiff and

has knowledge of the facts that the claim arose in a suit upon contract

for the payment of money; that the nature of plaintiff's demand is as

stated, and that there is due the plaintiff from the defendant, after

allowing to defendant all credits, \$75.00. There is no bill of

complaint in the instant case.

The error assigned is that the assignee of a chose in action suing in his own name must allege by his affidavit that he is the actual bona fide owner thereof, and set forth how and when he acquired title.

Section 18, Ch. 110 of Cahill's Rev. Stat. of Illinois, provides in part as follows:

"The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title," etc.

While there has not been entire uniformity in the decisions bearing upon the question involved in the instant case, their recent trend seems to be that where it does not appear that a defendant in an action of the fourth class in the Municipal court has been deprived of any right with respect to the pleadings required under its rules in such a case, and he sees fit to go to trial without objection to the sufficiency of the statement of claim, he will be presumed to understand its nature and will not be permitted after trial to question its sufficiency for the first time, unless it clearly appears from the proceedings that he was so misled thereby as not to be able to present a legal defense he might have to the actual claim sought to be prosecuted against him. (Emberg v. City of Chicago, 271 Ill. 404; Lyons v. Kanter, 235 Ill. 336.) In the instant case the statement of claim did set forth facts from which it appears that plaintiff was the bona fide owner of the chose in action and how he acquired the title and the affidavit of merits made by his agent stated that he, the agent, had knowledge of the facts as set forth in the statement of claim, and that the facts were as set forth in the statement of claim, and the defendant proceeded to trial upon this state of the pleadings and evidence was heard by the court, and no motion having been made by the defendant to strike the statement of claim or the affidavit of merits for failure

The error assigned is that the assignment of a share in action being in his own name made illegal by his affidavit that he is the actual owner thereof, and not forth how and when he acquired title.

Section 11, Ch. 111 of the Civil Code, R.S. 1899, is as follows:

"The assignee and assignor and bona fide owner of any share in action not negotiable, or negotiable by statute, may sue thereon in his own name, and he shall in his pleading set out, or by affidavit, where pleading is not required, allege that he is the actual owner thereof, and set forth how and when he acquired title, etc."

While there has not been entire unanimity in the decisions bearing upon the question involved in the instant case, there seems to be no doubt that it does not appear that a defendant in an action of the kind filed in the instant case has been deprived of any right with respect to the plea being required under the Code in such a case, and he need file as to what without objection to the sufficiency of the statement of claim, he will be presumed to

understand the nature and will not be permitted upon trial to question the sufficiency for the first time, unless it clearly appears from the proceedings that he was so misled thereby as not to be able to present a legal defense he might have to the actual claim sought to be presented against him. (Hubert v. City of Chicago, 221 Ill. 605; Young v.

Hubert, 220 Ill. 326.) In the instant case the statement of claim did not forth facts from which it appears that plaintiff was the bona fide owner of the share in action and how he acquired the title and the affidavit of notice made by his agent stated that he, the agent, had knowledge of the facts as set forth in the statement of claim, and that the facts were as set forth in the statement of claim, and the defendant proceeded to trial upon this state of the pleadings and evidence was heard by the court, and no motion having been made by the defendant to strike the statement of claim or the affidavit of notice for failure

to comply with section 18, he evidently understood the nature of the demand and will be precluded after trial from contending that he did not, and we shall presume, as we must, in the absence of a bill of exceptions, that the plaintiff proved the claim set forth in the statement of claim. Moreover, we think this statement of claim and affidavit was a substantial compliance with the statute.

For the reasons stated the judgment of the Municipal court is affirmed.

AFFIRMED.

Scanlon, P. J., and Gridley, J., concur.

to comply with section 10, as well as to maintain the status of
the claim and will be prosecuted after trial from continuing the
no due and no small process, as we must, in the absence of a
bill of particulars, that the plaintiff proved the claim and force
in the statement of claim. However, we will not consider of
claim and plaintiff was a substantial compliance with the statute.
The defendant asked the judgment of the court.

There is no
in the record
which is correct

Section 10, and plaintiff, E. J. Jones.

35200

ADOLPH LINDSTROM CO.,
a Corporation, Appellee,

vs.

ELMGATE MANOR BUILDING CORPORATION,
a Corporation, et al.

On Appeal of HERMAN HARBOMM and
CHARLES LAMONT,
Co-Defendants and Appellants.

3 / 7
APPEAL FROM INTERLOCUTORY
ORDER OF THE SUPERIOR COURT
OF COOK COUNTY APPOINTING
A RECEIVER.

262 I.A. 633

MR. PRESIDING JUSTICE WATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from an interlocutory order appointing a receiver after notice. March 3, 1931, a bill was filed to foreclose a trust deed executed September 1, 1927, whereby the owner transferred to the State Bank of Chicago the premises described in the bill to secure an indebtedness evidenced by a promissory note of the same date for the amount of \$87,000.

The bill avers that the conveyance was made subject to another and prior trust deed dated March 15, 1926, securing payment of bonds aggregating \$420,000; that default was made in the payment of the note for \$87,000 and interest thereon and default was also made in the payment of principal and interest on the indebtedness secured by the first and prior trust deed, which named Strauss as trustee; that Strauss had declared the whole indebtedness due and payable and "has filed his bill to foreclose said trust deed, which bill is now pending in the Circuit Court of Cook County, Illinois."

The bill also avers that the premises are improved by a five-story brick building, the gross income from which amounts to approximately \$60,000 a year, and the net income to \$30,000 a year, which is not sufficient to pay taxes, interest on indebtedness,

Page 2

ALLIANCE OF
COUNTRIES

Subject

RESTATEMENT OF THE
COURT

On appeal of the
COURT

THE COURT OF THE
CITY OF CHICAGO
ON THE 10TH DAY OF
JANUARY, 1931

262 I.A. 633

MR. JAMES H. HARRIS, ATTORNEY
FOR THE PLAINTIFFS

This is an appeal by certain defendants from an order
of the court appointing a receiver after notice, March 3, 1931,
a bill was filed to foreclose a first deed executed September 1,
1927, whereby the owner transferred to the Bank of Chicago
the premises described in the bill to secure an indebtedness
amounted by a promissory note of the same date for the amount of
\$27,000.

The bill avers that the conveyance was made subject to
another and prior deed dated March 15, 1928, securing payment
of bonds aggregating \$400,000; that default was made in the payment
of the note for \$27,000 and interest thereon and default was also
made in the payment of principal and interest on the indebtedness
secured by the first and prior deed, which named Strawn as
trustee; that Strawn had accepted the whole indebtedness due and
paid and "has filed the bill to foreclose said first deed."

The bill also avers that the premises are improved by
a five-story brick building, the gross income from which amounts to
approximately \$20,000 a year, and the net income to \$10,000 a year,
which is not sufficient to pay taxes, interest on indebtedness,

operating charges, and that the value of the real estate is less than \$350,000; that the property is scant security for the indebtedness against it; that the principal defendant, Elmgate Manor Building Corporation, is insolvent and unable to pay; that it was covenanted and agreed in the trust deed that upon the filing of any bill to foreclose, the court might at once appoint a receiver for the benefit of the holders of the indebtedness with power to collect the rents, issues and profits during the pendency of the foreclosure suit and until the statutory time of redemption from any sale under a decree foreclosing the trust deed should expire.

The bill makes, among others, defendants thereto "Foreman-State Trust and Savings Bank, as Trustee, Successor to State Bank of Chicago, as trustee," Adolph Lindstrom, who is averred to be the owner of the title of the premises, and his wife, Hilda Lindstrom. The bill is duly verified.

The order appointing the receiver was made March 4, 1931, and recites that the cause came on for hearing upon the motion of solicitors for complainant and on the verified bill of complaint and that the court was apprised that the trust deed "conveys the real estate described in said bill of complaint and pledges as security all the rents, issues and profits derived from said premises;" that it appeared that it was covenanted in the trust deed that upon the filing of any bill of complaint to foreclose, the court in which said bill was filed should at once, or at any time thereafter, appoint a receiver for said premises to collect the rents, issues and profits therefrom; that it appeared that due notice had been served upon Charles Lamont and Herman Hahlbohm; that the premises were scant and meager security for the notes held by complainant; that the property under foreclosure was improved with a five-story brick building consisting

...the value of the real estate is less
than \$100,000; that the property is exempt from the
...the principal debtors, ...
...is involved and unable to pay; that it was
...and agreed in the trust deed that upon the filing of any
bill to foreclose, the court might at once appoint a receiver for
the benefit of the holders of the indebtedness with power to sell
the real estate, leases and profits during the pendency of the
foreclosure suit and until the expiration time of redemption from
any sale under a decree foreclosing the trust deed should expire.
The bill names, among others, defendants therein
...as Trustee, Successor to
State Bank of Chicago, as Successor, ...
...of the title of the premises, and his
... The bill is duly verified.
The order appointing the receiver was made March 6,
1931, and recites that the same came on for hearing upon the
motion of plaintiff for appointment and on the verified bill of
complaint and that the court was satisfied that the trust deed
conveys the real estate described in said bill of complaint and
pledges as security all the rents, issues and profits derived from
said premises; that it appeared that it was covered in the
trust deed that upon the filing of any bill of complaint to fore-
close, the court in which said bill was filed should at once, or
at any time thereafter, appoint a receiver for said premises to
collect the rents, issues and profits therefrom; that it appeared
that the notice had been served upon Charles Lement and Lenton
Kilbuck; that the premises were owned and mortgaged securely for
the better bill of complaint; that the property under fore-
closure was improved with a two-story brick building consisting

of 57 one, two and three-room apartments, some furnished and some unfurnished, and ten stores and one garage. It was therefore ordered and adjudged that the Straus National Bank & Trust Co. of Chicago should be appointed receiver of the premises; that complainant should give a \$2000 bond.

It is urged by the defendants prosecuting this appeal that the court erred in appointing a receiver because the foreclosure of the second mortgage, while the foreclosure of the first mortgage against the same premises is pending, is an abortive proceeding; that the filing of the bill in the Circuit court constituted an equitable levy and gave to that court exclusive jurisdiction of the subject matter of the suit, and that since the Circuit court first acquired jurisdiction it will retain it to the exclusion of the Superior court. It is also contended that to permit a mortgagee, who is a junior encumbrancer, to conduct an independent foreclosure, would result in confusion, increased costs, etc., while as a matter of fact such second mortgagee has a complete remedy by intervention in the proceeding to foreclose the first mortgage. It is further urged that the receiver should not have been appointed because, as it is said, the trustee named in the trust deed was not named as a defendant.

Taking up the last point mentioned, it appears that by the deed of trust the building corporation conveyed the premises to the State Bank of Chicago, an Illinois corporation, described as party of the second part and as trustee. The trust deed provided:

"In case of the death or the absence from the said County of Cook, inability or refusal to act of the said party of the second part, at any time when his action hereunder may be required by any person entitled thereto, then Chicago Title and Trust Company, a corporation of said County of Cook, shall be and it hereby is appointed and made successor in trust to the said party of the second part under this trust deed with identical powers and authority ***."

of 17 one, two and three-room apartments, some furnished and some unfurnished, and ten stores and one garage. It was therefore set out and adjusted that the Chicago National Bank & Trust Co. of Chicago should be appointed receiver of the premises; that complainant should give a \$2000 bond.

It is urged by the defendant's counsel that this appeal that the court erred in appointing a receiver because the foreclosure of the second mortgage, while the foreclosure of the first mortgage against the same premises is pending, is an absolute proceeding; that the filing of the bill in the Circuit Court constituted an equitable levy and gave to that court exclusive jurisdiction of the subject matter of the bill, and that since the Circuit Court first acquired jurisdiction it will retain it to the exclusion of the superior court. It is also contended that to pay with a mortgage, who is a junior encumbrancer, to conduct an independent foreclosure, would result in confusion, increased costs, etc., while as a matter of fact such second mortgages have a complete remedy by intervention in the proceeding to foreclose the first mortgage. It is further urged that the receiver should not have been appointed because, as it is said, the trustee named in the trust deed was not named as a defendant.

Taking up the last point mentioned, it appears that by the deed of trust the building corporation conveyed the premises to the State Bank of Chicago, an Illinois corporation, described as party of the second part and as trustee. The trust deed provided: "In case of the death or the absence from the said party of death, inability or refusal to act of the said party of the second part, at any time when his act as borrower may be required by any person entitled thereto, then Chicago Title and Trust Company, a corporation of said county of Cook, shall be and it shall be is authorized and shall contract to trust to the said party of the second part under this trust deed with identical powers and authority etc."

The bill avers no fact as to any change in the name of the trustee, but in the prayer for relief complainant names, with other defendants, (who it prays may be required to answer) the Foreman-State Trust and Savings Bank as successor in trust to the State Bank of Chicago. In the prayer for process the same is asked for against "the above named defendants and each of them."

There is no doubt as a proposition of law that the trustee named in a trust deed as the holder of the title is an indispensable party to a bill to foreclose a trust deed. It has been so held in numerous cases decided in this court and in the Supreme court. Defendants rely upon Citizens Trust & Savings Bank v. Blair, 254 Ill. App. 603. That is a case heard ex parte by the third division of this court. There the trustee named in the trust deed was not named a defendant at all. The opinion cites Walsh v. Truesdell, 1 Ill. App. 126; Lambert v. Myers, 22 Ill. App. 616; Hayes v. Owen, 69 Ill. App. 553, and Hodman v. Quick, 211 Ill. 546, and following these cases rightly held that the trustee was a necessary party and that the question could be raised in a court of review for the first time. No one of these cases relied on hold that an interlocutory order appointing a receiver will be reversed because of the omission of the trustee as a necessary party. A reversal for that reason at any rate would only require in effect the amendment of the bill in that particular respect. That is precisely what happened in that case. See Citizens Trust & Savings Bank v. Blair, 256 Ill. App. 605, where an amended order appointing a receiver was reversed for other reasons. As already stated, the case was heard ex parte. Moreover, the present case is distinguishable from all these. Here, a trustee is made defendant in the prayer for relief, and process is asked against it in the prayer for process. While the language of the bill is vague and indefinite, it does allege in effect that the Foreman-State Trust & Savings Bank

The bill states no fact as to any change in the name of the trustee, but in the prayer for relief complainant names, with other defendants, (who it prays may be required to answer) the Tennessee-Ohio Trust and Savings Bank as necessary in trust to the State Bank of Chicago. In the prayer for process the name is asked for against "the above named defendants and each of them." There is no doubt as to a proposition of law that the trustee named in a trust deed is the holder of the title in an indispensable party to a bill to foreclose a trust deed. It has been so held in numerous cases decided in this court and in the Supreme court. Defendants rely upon Illinois Trust & Savings Bank v. State Bank of Chicago, 111 Ill. 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995.

has succeeded the State Bank as trustee. Whether this is true is a matter of proof to be determined upon the hearing. If it is true (and for the purpose of this appeal we must so assume) then the proper trustee is a defendant, and the case cited is not applicable. This contention therefore cannot prevail.

This leaves for determination the controlling question of whether the pendency of a bill to foreclose the first trust deed in the Circuit court renders the present foreclosure of the second trust deed abortive. We do not entertain a doubt that suits in equity which concern the same property and subject matter and which are between the same parties should be heard in the court which first acquires jurisdiction, and this is as true of suits to foreclose trust deeds as it is of other suits and proceedings in chancery. If this suit is one of the character described, defendants are not without their remedy upon proper application to the courts, but the allegations of this bill come far short of disclosing a situation such as we have described. As complainant points out, it does not appear from the bill in the instant case that the trustee here was made a defendant in the Circuit court, or, indeed, that the complainant, who is the owner and holder of the indebtedness secured by the second trust deed, was made a party to the foreclosure in the Circuit court. It does not appear that process has been issued from that court against either defendant trustee or complainant. It does not appear that the bill in the Circuit court prays for the appointment of a receiver or that the trust deed, on which the foreclosure in the Circuit court is based, pledges the rents as security for the indebtedness or that the grantor therein agrees to the appointment of a receiver in case a bill to foreclose is filed. In fact, it does not appear that the bill to foreclose the first trust deed was pending upon the day on

has succeeded the State Bank as trustee. Whether this is true is
a matter of proof to be determined upon the hearing. It is
true (and for the purpose of this appeal we must so assume) that
the proper trustee is a defendant, and the case filed in not ap-
propriate. This contention therefore cannot prevail.
This leaves for determination the controlling ques-
tion of whether the bankruptcy of a bill is forbidden the first
trust deed in the circuit court renders the present foreclosure of
the second trust deed wrongful. It is not material a doubt that
there is equity which connects the same property and subject matter
and also the same parties should be heard in the same
which first renders foreclosure, and this is as true of equity as
foreclosure trust deeds as it is of other bills and proceedings in
chancery. If this bill is one of the numerous described, set out
with me not without their remedy upon proper application to the
court, and the allegations of said bill show the want of notice
giving a situation such as we have described. An assignment points
out, it does not appear from the bill in the least case that
the trustee here was made a defendant in the circuit court, or,
indeed, that the complainant, who is the owner and holder of the
instrument secured by the second trust deed, was made a party
to the foreclosure in the circuit court. It does not appear that
process has been issued from that court against either defendant
trustee or complainant. It does not appear that the bill in the
circuit court prays for the appointment of a receiver at that the
trust deed, on which the foreclosure in the circuit court is based,
alleges the facts on security for the indebtedness or that the
trustee therein agrees to the appointment of a receiver in case a
bill to foreclose is filed. In fact, it does not appear that the
bill to foreclose the first trust deed was pending upon the day on

which the receiver was appointed; that the Circuit court has in any manner assumed possession or control of the property, or that any such action is asked for or would be appropriate under the allegations of the bill filed in the Circuit court. Nor does it appear whether a decree of sale has been entered there. If any of these matters were true, defendants had notice of the hearing on the appointment of the receiver and could have brought such matters to the attention of the court.

It would unduly extend this opinion to discuss the many cases cited by defendants further than to say that we do not think it necessary to disagree with the rules of law announced in any one of them to sustain the order appealed from. All are quite distinguishable in the respects mentioned. We assume that the Circuit court will not hesitate to protect and assert its own jurisdiction if the facts calling for such action are presented to it; and we also assume in such case that the Superior court of Cook county will not be slow to respect the jurisdiction of the Circuit court. Harkin v. Brundage, 276 U. S. 36, clearly states the law applicable to a situation of that kind.

For the reasons indicated the order appointing a receiver will be affirmed.

AFFIRMED.

O'Conner, J., concurs.

McSurely, J., took no part in the decision of this case.

which the receiver was appointed; that the Circuit Court has in any manner assumed possession or control of the property. At that time such action is asked for or would be appropriate under the provisions of the bill filed in the Circuit Court. Now have it appear whether a decree of sale has been entered there. If any of those matters were true, respondent had notice of the hearing on the appointment of the receiver and could have brought such matters to the attention of the court.

It would hardly extend this opinion to discuss the many cases cited by respondent further than to say that we do not think it necessary to disagree with the view of law announced in any one of them to sustain the order appealed from. All the rights distinguishable in the receiver mentioned. We assume that the Circuit Court will not hesitate to protect and assert its own jurisdiction of the lands calling for such action as presented to it; and we also assume in such case that the Superior Court of Cook County will not be slow to request the jurisdiction of the Circuit Court. WILLIAM V. BROWN, JR. vs. B. F. 36, clearly states the law applicable to a situation of that kind.

For the reasons indicated the order appointing a receiver will be affirmed.

ADVISED.

W. J. CONNOR, J., concurring.
Majority, 4, took no part in the decision of this case.

35192

CHARLES BENDLER,
Appellee,

vs.

LOUIS KAPLAN,
Appellant.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

262 I.A. 633'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an interlocutory order appointing a receiver of his interest in a partnership business.

February 17, 1931, complainant filed his verified bill in the nature of a bill for discovery to uncover assets belonging to the defendant, Louis Kaplan, in an endeavor to enforce payment of three judgments which complainant had theretofore recovered against Kaplan and on which executions had been issued and returned by the public officials wholly unsatisfied. It was alleged in the bill that on January 9, 1928, complainant recovered a judgment in the Municipal court of Chicago against Kaplan for \$755 and costs; that on November 19, 1928, he recovered another judgment against defendant in the Appellate court of Illinois for costs amounting to \$32.50, and that on July 9, 1930, he obtained a decree in the Superior court of Cook county by which the defendant was decreed to pay to complainant \$75.40; that executions had been issued on these three judgments and returned wholly unsatisfied.

It is further alleged that Kaplan had an interest as a partner in a certain automobile agency and repair shop; that he had a partial interest in personal property, such as automobiles and accessories; that he was enjoying the profits derived from the partnership business; that the partnership had a substantial de-

IN THE COURT OF COOK COUNTY

STATE OF ILLINOIS
vs.
LEWIS KAPLAN

262 I.A. 633

MR. JUSTICE S. GUNTER DELIVERED THE OPINION OF THE COURT.

By this appeal, the defendant seeks to reverse an
 inferior court's decision appointing a receiver of his interest in a
 partnership business.

On February 17, 1931, complainant filed his verified
 bill in the nature of a bill for discovery to discover assets be-
 longing to the defendant, Lewis Kaplan, in an endeavor to enforce
 payment of three judgments which complainant had obtained
 recovered against Kaplan and on which execution had been issued
 and returned by the public officials wholly unsatisfied. It was
 alleged in the bill that on January 7, 1930, complainant recovered
 a judgment in the Municipal Court of Chicago against Kaplan for
 \$750 and costs; that on November 19, 1930, he recovered another
 judgment against defendant in the Appellate Court of Illinois for
 costs amounting to \$22.50, and that on July 9, 1930, he obtained
 a decree in the Superior Court of Cook County by which the defend-
 ant was decreed to pay to complainant \$75.40; that executions had
 been issued on these three judgments and returned wholly unsat-
 isfied.

It is further alleged that Kaplan had an interest and
 partner in a certain automobile agency and repair shop; that he
 had a partial interest in personal property, such as automobiles
 and accessories; that he was enjoying the profits derived from the
 partnership business; that the partnership had a substantial de-

posit of money in a certain bank, and there were further allegations as to other properties belonging to the defendant, Kaplan. Other parties interested in the partnership were made defendants. The bill prayed for discovery and the appointment of a receiver.

Upon the filing of the bill complainant served notice on the defendant that on the next day, February 18th, he would apply for the appointment of a receiver. On the 18th an order was entered on motion of the defendant continuing complainant's motion for the appointment of a receiver until February 20th, and on the latter date another order was entered, on defendant's motion, continuing the matter to February 21st, and again, on February 21st, on defendant's motion, another order was entered further continuing the matter to February 25th. On February 25th defendant procured another order to be entered continuing the matter until the next day, February 26th. On February 26th the defendant filed his verified answer in which he swore he was "amply solvent," that he had a half interest in specified real estate located in Chicago in which there was an equity of \$65,000; that "affiant's firm recently collected and disbursed the sum of \$33,000 to its various creditors and received an extension of time from numerous of its creditors so as to permit affiant's business to participate in the spring demand for automobiles; that affiant expects to have all his creditors paid in full by the late spring of this year; that there is now located in affiant's salesroom on 3152 Ogden avenue, Chicago, nine (9) new Nash automobiles, the value of any one of which is more than sufficient to permit complainant to satisfy his executions in full." These are the entire allegations of the answer.

On the same date the court entered an order finding the facts with reference to the unsatisfied judgments as alleged in the bill of complaint, also finding that the defendant Kaplan had an interest in the partnership automobile business, and the Chicago

possess of money in a certain bank, and there were further allegations as to other properties belonging to the defendant, Chicago. Other parties interested in the partnership were made defendants. The bill prayed for discovery and the appointment of a receiver. Upon the filing of the bill complainant served notice on the defendant that on the next day, February 18th, he would sign for the appointment of a receiver. On the 18th an order was entered on motion of the defendant appointing complainant's motion for the appointment of a receiver until February 20th, and on the latter date another order was entered, on defendant's motion, annulling the order of February 18th, and again, on February 18th, on defendant's motion, another order was entered further continuing the matter to February 22nd. On February 22nd defendant presented another order to be entered continuing the matter until the next day, February 23rd. On February 23rd the defendant filed his verified answer in which he swore he was "completely solvent," that he had a full interest in specified real estate located in Chicago in which there was an equity of \$65,000; that "defendant's firm recently sold" and disbursed the sum of \$22,000 to its various creditors and received an extension of time from numerous of its creditors so as to permit defendant's business to participate in the spring demand for automobiles; that defendant expects to have all his creditors paid in full by the late spring of this year; that there is now located in defendant's possession on 3125 Ogden Avenue, Chicago, nine (9) new Nash automobiles, the value of any one of which is more than sufficient to permit complainant to satisfy his execution in full. These are the entire allegations of the answer. On the same date the court entered an order granting the bill of complaint, also finding that the defendant's answer was insufficient to the material allegations as alleged in the bill of complaint, also finding that the defendant's answer was insufficient to the partnership and real estate business, and the Chicago

Title and Trust company was appointed receiver of Kaplan's interest in the partnership business upon filing its acceptance of the appointment.

The defendant contends that it was unnecessary to appoint the receiver for the reason that the defendant was "amply solvent" and that the partnership bank account might be garnisheed. We think the argument that the appointment was unnecessary because the defendant was amply solvent is rather naive. If the defendant owned the property, which his counsel now contends, and was "amply solvent," it seems the simple thing to have done was to pay the judgments which aggregated but little more than \$800.

The appointment of the receiver was authorized by Sec. 28, chap. 106a, Cahill's 1929 Statutes, which provides that on application of any judgment creditor of a partnership, the court may appoint a receiver of the partner's "share of the profits and of any other money due or to fall due to him in respect of the partnership."

A further point is made that the order appointing the receiver did not provide that the receiver should give bond. There is substantially no argument under this point and the contention is entirely without merit. The Chicago Title and Trust Company may be appointed receiver without bond under the statute in relation to trust companies.

Upon a consideration of the entire record and the argument made by counsel for the defendant, we are clearly of the opinion that there is no merit in this appeal and it is entirely frivolous.

The order of the Superior court of Cook county is affirmed.

ORDER AFFIRMED.

Matchett, P. J., concurs.

McSurely, J., took no part in the decision of this case.

Little and Trust company was appointed receiver of England's interest in the partnership business upon filing its certificate of the appointment.

The defendant contends that it was unnecessary to appoint

the receiver for the reason that the defendant was "solvent"

and that the partnership book account might be retained.

We think the argument that the appointment was unnecessary because

the defendant was "solvent" is rather naive. If the defendant

owned the property, which his counsel now contends, and was "solvent,"

it seems the simple thing to have done was to pay the

judgments which aggregated but little more than \$5000.

The appointment of the receiver was authorized by the

22, Chap. 108, 1881, which provides that on

application of any judgment creditor of a partnership, the court

may appoint a receiver of the partnership "where at the parties and if

any other money due or to be paid to him in respect of the partnership."

ship."

A further point is made that the order appointing the

receiver did not provide that the receiver should give bond. There

is substantially no argument under this point and the contention is

entirely without merit. The Chicago Little and Trust Company may be

appointed receiver without bond under the statute in relation to

trust companies.

Upon a consideration of the entire record and the

arguments made by counsel for the defendant, we are clearly of the

opinion that there is no merit in this appeal and it is entirely

dismissed.

The order of the Superior court of Cook county is

affirmed.

WILLIAM A. HARRIS,

Attorney for Plaintiff.

WILLIAM A. HARRIS, Attorney for Defendant.

34323

MARY DAUSCH,

Defendant in Error,

v.

HOTEL LA SALLE COMPANY,

Plaintiff in Error.

CIRCUIT COURT

COCK COUNTY.

262 I.A. 634¹

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is a writ of error by the Hotel La Salle Company, a judgment creditor, to review a final order of distribution entered in the Circuit Court in the case of Dausch v. Barker. The writ of error is directed against Mary Dausch, the purchaser of the property under the decree of sale by the Circuit Court. The only issue apparently involved in this proceeding is the interest of the Hotel La Salle Company under its judgment, execution and levy and also its interest, if any, by reason of its redemption from the execution and levy of Mary E. End, a judgment creditor. The original End judgment was for \$67.50. The original Hotel La Salle Company judgment was for \$351.85. These two judgments were obtained against one Fred Linick, whose interest in the property in question was afterwards conveyed to Harry B. Barker, party to the original partition proceedings. The principal orders entered in the cause and the order in which they were entered, appears as follows:

April 1, 1927, decree of partition, which also found that Mary E. End and the Hotel LaSalle Company had judgments which were liens against the interest of the defendant Barker. Appeal to the Supreme Court from the decree of partition was affirmed by the Supreme Court.

March 28, 1928, decree of sale by the Circuit Court ordering that the premises be sold free and clear of all liens

2312

Opinion filed June 15, 1931

MR. JUSTICE

of the Court

There is a writ of error by the State of Ohio

against a judgment entered, to review a final order of distribution

entered in the Circuit Court in the case of Wright v. Wright. The

bill of error is directed against said judgment, the particulars of the

grounds upon which the decree is sought to be reversed are:

1. That the judgment is void inasmuch as the same is based upon

facts which are not in evidence, and the judgment is void inasmuch as

the same is based upon facts which are not in evidence, and the judgment is void

inasmuch as the same is based upon facts which are not in evidence, and the judgment is void

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inasmuch as the same is based upon facts which are not in evidence, and the judgment is void

by the Supreme Court.

Entered at the office of the Clerk of the Court

on this 15th day of June, 1931.

except general taxes, special assessments and three certain trust deeds.

May 9, 1928, order approving master's report of sale and ordering the payment of certain claims, including the judgment of the Hotel La Salle and Mary H. End, out of the proceeds of Harry B. Barker.

August 18, 1928, order of the Circuit Court directing the master to retain \$8,376.35.

October 16, 1928, order of partial distribution by the Circuit Court overruling exceptions of Barker to the order directing distribution to certain judgment creditors. This order evidently by an oversight eliminated the judgment claims of the Hotel LaSalle Company and Mary H. End.

There appears also in the record before us the fact that on May 3, 1927, execution was taken out on the End judgment and on September 28, 1927 execution was taken out on the judgment of the Hotel La Salle Company.

It further appears from the record that on July 31, 1928, after the decree ordering the sale of the premises by the Circuit Court, redemption was made by one Leo G. Hana, as assignee of the Hotel LaSalle Company judgment.

Jan. 9, 1930, order of final distribution of all funds remaining in the hands of the master to Harry B. Barker or to Albert Sabath, his solicitor, after payment of two certain judgments.

It does not appear from the record that the Hotel LaSalle Company's judgment nor the End judgment, which was acquired by the Hotel La Salle Company, were paid out of these proceedings.

It is insisted that the court erred in ordering the balance of the funds paid to Barker without having first providing for the payment of the Hotel LaSalle judgment and its rights acquired

except general terms, special arrangements and other certain terms.

May 5, 1935, order approving master's report of sale and ordering the payment of certain claims, including the judgment of the Hotel La Salle and Mary A. Lee, out of the proceeds of Mary A. Lee's property.

August 16, 1935, order of the circuit court directing the master to retain \$5,275.25.

October 16, 1935, order of partial distribution by the circuit court overruling exceptions of master to the order directing distribution to certain judgment creditors. This order was evidently by an oversight eliminated the judgment claim of the Hotel La Salle Company and Mary A. Lee.

There appears also in the record before us the fact that on May 5, 1935, execution was taken out on the judgment and on September 22, 1935, execution was taken out on the judgment of the Hotel La Salle Company.

It further appears from the record that on July 31, 1935, after the decree ordering the sale of the premises by the circuit court, redemption was made by one Lee A. Lee, as assignee of the Hotel La Salle Company's judgment.

Jan. 5, 1936, order of final distribution of all funds remaining in the hands of the master to Mary A. Lee and to Albert Sobota, his co-defendant, after payment of two certain judgments.

It does not appear from the record that the Hotel La Salle Company's judgment nor the Lee judgment, which was satisfied by the Hotel La Salle Company, were paid out of these proceedings. It is insisted that the court erred in entering the

decree of the circuit court in favor of Albert Sobota and the rights claimed for the payment of the Hotel La Salle judgment and the rights claimed

by its acquisition of the End judgment.

Counsel for defendant in error insists that the Barker and the Hotel LaSalle Company's interests are identical, in that both parties were represented by the same counsel and that when the balance of the funds in the hands of the master were paid to Barker, he received it both for his own account and that of the Hotel LaSalle Company.

The original order of distribution in the cause of Dausch v. Barker, was before this court and reported in the case of Dausch v. Barker, 255 Ill. App. 161. It was held in that case, as shown by the original opinion, that inasmuch^{as}/no question was raised on the appeal to the order directing the payment of these two judgments, that it should be assumed that they had been paid and satisfied. A petition for rehearing was filed in the case and from that it appeared that the order of distribution did not direct the master in chancery to pay the Hotel LaSalle judgment. Upon rehearing this court found that the judgment of the Hotel LaSalle and its rights acquired under the End judgment were liens, payable out of the proceeds of sale and, in the additional opinion, this court said:

"Furthermore, the property having been sold free and clear of all judgment liens, the Hotel LaSalle, being a party to the suit, was barred from proceeding to a sale under its levy. It has been divested of its lien and of any right to proceed against the property for the purpose of enforcing the lien it once had."

The effect of this opinion was to declare the claim of the Hotel LaSalle a lien on the funds in the hands of the court belonging to Barker. It was also res adjudicata as to the right of the Hotel LaSalle to enforce its lien against the property.

Counsel for the Hotel LaSalle Company relies upon the case of Hack v. Snow, 338 Ill. 28, as authority for the proposition that, the Hotel LaSalle judgment not having been paid, it is still a lien against the property which was purchased by Mary Dausch under

by the acquisition of the said judgment.

Counsel for defendant in error insists that the
rather and the Hotel Labelle Company's interests are identical, in
that both parties were represented by the same counsel and that when
the balance of the funds in the hands of the master were paid to
himself, he received it both for his own account and that of the Hotel
Labelle Company.

The original order of distribution in the cause
of James V. Barker, was before this court and reported in the case
of James V. Barker, 228 Ill. App. 121. It was held in that case, as
shown by the original opinion, that inasmuch as question was raised
on the appeal as to the order directing the payment of these two judgments,
that it should be assumed that they had been paid and satisfied.
A petition for rehearing was filed in the case and from that it
appeared that the order of distribution did not direct the master in
necessary to pay the Hotel Labelle judgment. Upon rehearing this
court found that the judgment of the Hotel Labelle and its rights
acquired under the said judgment were liens, payable out of the
proceeds of sale and, in the additional opinion, this court said:

"Furthermore, the property having been sold free and clear
of all judgments liens, the Hotel Labelle, being a party to
the sale, was barred from proceeding as a lien holder in
law. It has been reversed of its lien and of any right
to proceed against the property for the purpose of enforcing
ing the lien it once had."

The effect of this opinion was to declare the claim of the Hotel
Labelle a lien on the funds in the hands of the court belonging
to Barker. It was also notwithstanding as to the right of the Hotel
Labelle to enforce its lien against the property.
Counsel for the Hotel Labelle Company relies upon

the case of James V. Barker, 228 Ill. App. 121, as authority for the proposition
that, the Hotel Labelle judgment not having been paid, it is still
a lien against the property which was reversed by this court's order

the decree of sale. In that case, however, the decree did not order the payment of the judgment out of the proceeds of the sale of the property. In the case at bar this court expressly recognized the right of that judgment to participate in the proceedings of sale under the order of the Circuit Court and reversed the cause as to the payment of certain other judgments against which the statute of limitations had run and which had ceased to be liens upon either the property or the fund.

As the record now stands, we find that the Hotel LaSalle judgment should have been paid out of the funds in the hands of the master before the balance was paid to Barker. On the other hand, we find that the payment to Barker was made after notice to all parties, which necessarily included notice to the Hotel LaSalle, and that no objection was made by the Hotel LaSalle nor any exception taken to the order. It also appears from the record that Hudson, O.K'd the order of August 18, 1928, which directed that the master should hold out of the proceeds of sale funds sufficient to satisfy the Hotel LaSalle Company's judgment. It would thus appear that Hudson, at that time, represented the Hotel LaSalle Company. When the appeal was perfected by Barker to the Appellate Court, Hudson appeared as counsel for Barker, an adverse interest to that of the Hotel LaSalle. Associated with him, and also representing the interest of Barker, was Sabath, counsel to whom the money was directed to be paid in the order of final distribution of Jan. 9, 1930. Hudson again appears as counsel for the Hotel LaSalle Company in the present writ of error.

It is insisted on behalf of counsel for Deusch that the interests of Barker and the Hotel LaSalle Company are identical and that, both parties having been represented by the same counsel, the money paid to Barker, or his counsel, was

the decree of sale. In that case, however, the decree did not order the payment of the judgment out of the proceeds of the sale of the property. In the case at bar this court expressly recognized the right of that judgment to participate in the proceeds of sale under the order of the Circuit Court and reversed the decree as to the payment of certain other judgments against which the statute of limitations had run and which had ceased to be liens upon either the property or the fund.

The second now remains, we find that the Hotel Lefebvre judgment should have been paid out of the funds in the hands of the master before the balance was paid to Barker. On the other hand, we find that the payment to Barker was made after notice to all parties, which necessarily included notice to the Hotel Lefebvre, and that no objection was made by the Hotel Lefebvre nor any exception taken to the order. It also appears from the record that Hudson, O.E.'s order of August 18, 1922, also directed that the master should hold out of the proceeds of sale funds sufficient to satisfy the Hotel Lefebvre Company's judgment. It would thus appear that Hudson, at that time, represented the Hotel Lefebvre Company. When the appeal was perfected by Barker to the appellate court, Hudson appeared as counsel for Barker, an adverse interest to that of the Hotel Lefebvre. Associated with him, and also representing the interest of Barker, was Nathan, counsel to whom the money was directed to be paid in the order of final distribution of Jan. 9, 1923. Hudson again appears as counsel for the Hotel Lefebvre Company in the present writ of error.

It is insisted on behalf of counsel for Barker that the interests of Barker and the Hotel Lefebvre Company are identical and that, both parties having been represented by the same counsel, the money paid to Barker, on his counsel's

necessarily paid for the benefit of Barker's claim and in satisfaction of the Hotel LaSalle Company's lien on the proceeds.

Upon the oral argument of the cause in this court, counsel for Dausch, who represented her in the original suit, stated that he had failed to read the opinion of the Appellate Court on the former appeal. The failure of counsel to see to it that the money in the hands of the master was paid in satisfaction of its claim is inexcusable. It was his duty to see that the Hotel LaSalle Company's judgment lien was satisfied of record at the time the complainant Dausch was purchasing the property. On the other hand, counsel for the Hotel LaSalle Company upon notice given, should have seen to it that his client's interest was protected at the time the Circuit Court ordered final distribution. This could easily have been done by calling the court's attention to the opinion of this court in the case of Dausch v. Barker, already referred to. There appears to be no money now in the hands of the court to satisfy the Hotel LaSalle judgment.

Our view of the situation under all the circumstances involved, is that we should leave the parties where we find them. For that reason and the reasons expressed in this opinion, the writ of error will be dismissed.

WRIT OF ERROR DISMISSED.

HEBEL AND FRIEND, JJ. CONCUR.

consequently said for the benefit of Barker's claim and in order

to effect the Hotel Leduc Company's lien on the proceeds.

Upon the oral argument of the case in this court,

counsel for Barker, who represented her in the original suit,

stated that he had failed to read the opinion of the appellate court

on the former appeal. The balance of counsel to see to it that the

money in the hands of the master was paid in satisfaction of its

claim is unnecessary. It was his duty to see that the Hotel Leduc

Company's judgment lien was satisfied at least at the time the

complaint was presented to the property. On the other hand,

counsel for the Hotel Leduc Company was not given, should

have been to it that his client's interest was protected at the time

the trial court entered final judgment. This could easily

have been done by calling the court's attention to the opinion

of this court in the case of *Bank v. Walker*, already referred

to. There appears to be no money now in the hands of the court

to satisfy the Hotel Leduc judgment.

Our view of the situation under all the circumstances

involved, is that we should leave the parties where we find them.

For that reason and the reasons expressed in this opinion, the writ

of error will be dismissed.

WILLIAM WALKER, JR.,

Attorney for the Hotel Leduc Company.

WITNESSED my hand and seal of office.

Attest.

JOHN W. WALKER, JR.,

County Clerk.

Filed for record this 10th day of May, 1906.

34617

AGNES VLAMYNCK,

Plaintiff in Error,

v.

HENRY SCHMIDT, EMIL JOHNSON
and ANNA SCHMIDT,

Defendants in Error.

437
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

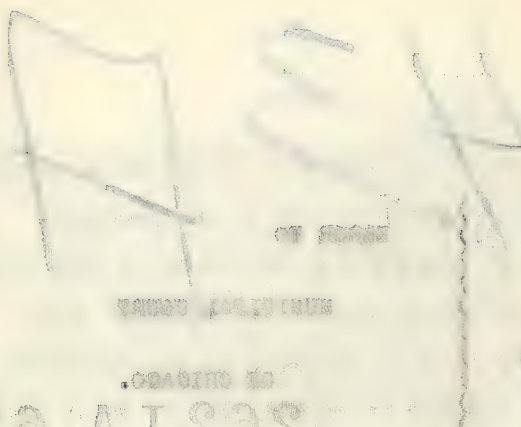
2621A 634

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This action was brought by the plaintiff, Agnes Vlamynck, against Henry Schmidt, Emil Johnson and Anna Schmidt, to recover damages for the loss of certain pelts which had been delivered to the defendants, as bailees, for the purpose of having the pelts made into a fur coat. At the close of plaintiff's case the court instructed the jury to return a verdict in favor of the defendants, Anna Schmidt and Henry Schmidt. At the end of all the evidence the jury returned a verdict finding the defendant, Emil Johnson, not guilty. Judgment was entered upon this verdict and from this judgment plaintiff was granted an appeal conditioned upon the filing of an appeal bond in the sum of \$250 and a bill of exceptions to be filed within 60 days. A motion was made in this court to strike from the record the bill of exceptions. This motion was reserved to the hearing. The cause was tried before the Honorable Max Luster, one of the Judges of the Municipal Court of Chicago.

The appeal was prayed and allowed June 21, 1929, and on August 19, 1929, the bill of exceptions was presented to and signed by A. B. Erickson, Judge. No reason is given in the certificate signed by Erickson, explaining why the bill of exceptions was



CHICAGO, ILL.

CHICAGO, ILL.

262 I.A. 634

AGENTS, VANDERBILT, ...
PLAINTIFF IN ERROR
V.
HENRY ROBERTS, EMIL JOHNSON
AND ANNA SCHMIDT,
Defendants in Error.

Opinion filed June 15, 1931

MR. JUSTICE ROBERTS delivered the opinion

of the court.

This action was brought by the plaintiff, against

defendant, against Henry Roberts, Emil Johnson and Anna Schmidt, to

recover damages for the loss of certain papers which had been delivered

to the defendants, as well as, for the purpose of having the papers

made into a fair copy. At the close of plaintiff's case the court

instructed the jury to return a verdict in favor of the defendants,

Anna Schmidt and Henry Roberts. At the end of all the evidence the

jury returned a verdict finding the defendant, Emil Johnson, not

guilty. Judgment was entered upon this verdict and from this judgment

plaintiff has brought an appeal conditioned upon the filing of an

affidavit in the sum of \$250 and a bill of exceptions to be filed

within 30 days. A notice was also filed with the court to show cause

against the bill of exceptions. This notice was received to the hearing.

The cause was tried before the Honorable MAX LAMER, one of the

Judges of the Municipal Court of Chicago.

The appeal was argued and allowed June 21, 1931, and

on August 19, 1931, the bill of exceptions was presented to and

signed by A. E. Kingston, Judge. No reason is given in the certificate

case signed by Kingston, explaining why the bill of exceptions was

presented to him, rather than to the judge who tried the cause.

On June 23, 1930, nearly a year after the bill of exceptions was presented to Erickson and marked, "Presented", the bill of exceptions was signed by Max Luster, but not as judge. We assume that it was the same Max Luster, judge, who tried the cause. The bill of exceptions was signed nunc pro tunc as of August 19, 1929. There is nothing, however, in the certificate signed by Max Luster explaining in any way the delay nor setting forth any disability on his part which prevented his signing the bill of exceptions within the time, and there is nothing stated in the certificate upon which he bases his authority to sign nunc pro tunc as of August 19, 1929. A nunc pro tunc order must be based upon some memorandum, in order to give the court the right to enter such an order.

The Supreme Court of this state in the case of The People v. Rosenwald, 265 Ill. 548, in its opinion says:

"The office of an order nunc pro tunc is only to supply some omission in the record of an order which was really made but omitted from the record. If an order is actually made by the court but there is a failure to enter it, the court may correct the mistake in failing to enter the order and make the record show the order which the court actually made as of the time it was made. No court has a right to create an order by that method or to supply an order which was never, in fact, made. A nunc pro tunc order cannot be made to supply an omission to make an order, but only an omission in the record of the order." (Lindauer v. Pease, 192 Ill. 456, and cases cited.) To the same effect see Stein v. Meyers, 263 Ill. 199. And where there is no minute or memorial paper in the records to show that the order was, in fact, made, it cannot, under these decisions, be so entered. This rule in this State is in accord with the weight of the authority in other jurisdictions. Cleveland Leader Printing Co. v. Green, 52 Ohio St. 487; Jillett v. Union Nat Bank, 56 Mo. 304; Cox v. Gress, 51 Ark. 224; 15 Anoy of Fl. and Pr. 344; 17 id. 934.

When the bill of exceptions was presented to Judge Hopkins on October 10, 1914, he undoubtedly could have entered an order in his court extending the time within which the bill of exceptions might be signed by the trial judge, Olson, as neither the Municipal Court statute nor the Practice act forbids an extension beyond that date. (Western Dredging and Improvement Co. v. Heldmaier, 53 C. C. A. 625; Railway Conductors' Benefit Ass'n. v. Leonard, *supra*; Hill v. City of Chicago, 218 Ill. 178; Fieser v. Minkota Milling Co., 222 id. 139.) This order would appear of record, and if within the time thus extended the bill had been presented to Judge Olson and signed, it could then have been filed without a nunc pro tunc

presented to him, whether there be any judge who tried the same.

Do this and you'll have a vision of the world as it is.

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The bill of exceptions was signed with the date 10 August 1952.

There is no doubt that the above information is correct.

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STATE OF NEW YORK

"The office of an agent is not to be used as a safe deposit box."

of the village of Yabrova in 1911. The house was built in 1911.

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and advised it could not have been filed without a power of attorney. It was suggested the bill had been presented to House Clerk

order. Had Judge Olson, when it was presented to him on October 21, 1914, recited in his nunc pro tunc order the entry by Judge Hopkins on the bill of exceptions, it would be sufficient to furnish a basis for the entry of such a nunc pro tunc order, provided it was recited that such entry had been made by Judge Hopkins on said record while he was presiding in the municipal court, (see United States Life Ins. Co. v. Shattuck, 159 Ill. 610,) and that due diligence had been shown by appellant in seeking to have the bill presented to the trial judge before it was presented to Judge Hopkins."

Counsel for plaintiff insists that the bill of exceptions in this case is saved because of the signing of a stipulation by counsel for defendants and cite the case of Northwest Park District v. Hedenberg, 267 Ill. 588. An examination of that case, however, discloses the fact that from the abstract in that case it did not appear that another judge had heard some of the evidence, consequently there was nothing to show that such evidence should have been certified by another judge.

It is further insisted on behalf of the plaintiff that under this authority counsel is precluded from making this motion to dismiss because counsel for the defendants O.K'd the bill of exceptions and entered into a stipulation to the effect that the original might be used instead of a copy. An examination of the record discloses the fact that the bill of exceptions was O.K'd by counsel for the defendant, Anna Schmidt, and on her behalf only, and that this stipulation only included an approval of the bill of exceptions up to the end of the plaintiff's case, at which time Anna Schmidt was dismissed out of the proceeding. This was not a sufficient stipulation to preserve the bill of exceptions. The fact that counsel stipulated that the original bill of exceptions could be used instead of a copy signifies nothing in our opinion, as this stipulation is not for the purpose of showing an agreement as to the correctness of the bill of exceptions, but is only done for the purpose of saving the costs of preparing a copy. The motion to strike the bill of exceptions is therefore granted and

10-1-1944 To the end of the year 1944 the number of...

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姓名: 王德胜 性别: 男 年龄: 45 民族: 汉族 籍贯: 山东省潍坊市 职业: 教师 学历: 本科 学位: 硕士 职称: 副教授 工作单位: 潍坊市第一中学 联系电话: 0536-2345678 电子邮箱: wangdesong@wzy.edu.cn 身份证号: 370702197805123456 住址: 潍坊市潍城区东风街123号 邮编: 261000 备注: 无不良嗜好, 身体健康, 为人正直, 责任心强。

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THE UNIVERSITY OF CHICAGO

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that price was below the average of the prices of the same goods in the same market at the same time in the same year.

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1. The first step is to identify the problem or question that needs to be answered.

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population has traditionally been engaged in agriculture, and the way of life has been based on the needs of the farm. In urban areas, the population has traditionally been engaged in industry and commerce, and the way of life has been based on the needs of the city. This has led to a number of differences between the two ways of life, including differences in the types of housing, the types of food, and the types of entertainment. Another important consequence of urbanization is that it has led to a change in the social structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two social structures, including differences in the types of social organizations, the types of social activities, and the types of social problems. Finally, urbanization has led to a change in the political structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two political structures, including differences in the types of political organizations, the types of political activities, and the types of political problems.

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How Salaries are Paid to Employees To Find out more about salaries

the bill of exceptions stricken. An examination of the bill of exceptions, moreover, shows that there was no motion for a new trial, consequently, we are precluded from a consideration of the evidence. C. E. & Q. R. R. Co. v. Hazelwood, 194 Ill. 69.

It is true that a motion for a new trial appears in the common law record, but this does not preserve the motion for our consideration. No error is assigned upon the common law record and there is, consequently, nothing before us for consideration.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

REBEL AND FRIEND, JJ. CONCUR.

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of the National Court is affirmed.

For the reasons stated in this opinion the judgment

there is, consequently, nothing before us for consideration.

consideration. It is not assigned upon the common law record and

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It is not that a motion for a new trial is made in

• **2002年1月1日** 实施《中华人民共和国道路交通安全法》。

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34743

FLORENCE KUSS,

Appellee,

v.

BIRD-SYKES COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2521A. C34

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff, Florence Kuss, brought her action against the Bird-Sykes Company to recover damages because of misrepresentations made by the defendant in connection with the sale of an automobile to the plaintiff. Plaintiff purchased the automobile which was a Graham-Paige car, on or about April 3, 1929, for \$2,300. The car was known as a Model 6-29, town sedan. Payment was made as follows: \$58.75 on signing order; \$100 on delivery and the transfer by the plaintiff to the defendant of a used Graham-Paige car, which was to be applied as part payment. At the same time defendant paid a finance company \$388.96 due on the used car; \$145.50 for insurance and \$99.50 for financing charges on the new car. As a result of these transactions, plaintiff owed the defendant a balance of \$1,475 and the title to the new car was retained by the defendant as security. At the time of the trial the balance had been reduced to \$915. Testimony on behalf of the plaintiff was introduced for the purpose of showing that it had been represented to her that the car purchased was a 1929 model, whereas, in fact, it was a 1928 model and worth considerably less on the market.

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CHICAGO, ILL.

2621 A. 634

Opinion filed June 15, 1931

MR. PRESIDENT JUSTICE CLIFFORD delivered the opinion

of the court.

The plaintiff, Florence Knox, brought her action

against the Fifth-Street Company to recover damages because of mis-

representation made by the defendant in connection with the sale

of an automobile to the plaintiff. Plaintiff purchased the automobile

which was a Graham-Paige car, on or about April 8, 1929, for \$2,300.

The car was known as a Model 8-40, four seater. Payment was made in

installments: \$250.00 on signing contract; \$100 on delivery and the balance

by the plaintiff to the defendant of a used Graham-Paige car, which

was to be applied as part payment. At the same time defendant paid

a finance company \$200.00 and on the same day; \$145.00 for insurance

and \$25.00 for financing charges on the new car. As a result of these

transactions, plaintiff owed the defendant a balance of \$1,475 and

the title to the new car was retained by the defendant as security.

At the time of the trial the balance had been reduced to \$815.

Testimony on behalf of the plaintiff was introduced for the purpose

of showing that it had been represented to her that the car purchased

was a 1929 model, whereas, in fact, it was a 1928 model and worth

considerably less on the market.

In view of the fact that the cause will have to be retried, no good purpose would be served in discussing the evidence nor arriving at a conclusion as to its probative effect. The cause was tried by the court without a jury. We have examined the record and find there is no evidence as to the value of a car of the kind and description which plaintiff received by reason of her purchase. There is no evidence in the record as to the damages sustained upon which the trial court could have made a finding. Damages in cases of this character are not presumed. 27 Corpus Juris, Fraud Sec. 180; page 49; Schwitters v. Springer, 236 Ill. 271. The measure of damages in cases of this kind is the loss which the plaintiff sustained by reason of the fraud and deceit. Hazelton v. Carolus, 133 Ill. App. 512.

There is no evidence in the record upon which the finding of \$750 and costs could be predicated.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND FRIENDS, JJ. CONCUR.

In view of the fact that the issues will have to

be retried, no good purpose would be served in dismissing the evidence
not arriving at a conclusion as to its probative effect. The issues
was tried by the court without a jury. We have examined the record
and find there is no evidence as to the value of a car of the kind
and description which plaintiff received by reason of her purchase.
There is no evidence in the record as to the damages sustained when
which the trial court would have made a finding. Damages in cases
of this character are not presumed. 37 Corpus Juris, Third Sec. 120;
page 43; Smith v. Smith, 220 Ill. 571. The measure of

damages in cases of this kind is the loss which the plaintiff suf-
fered by reason of the fraud and deceit. Smith v. Smith, 220
Ill. 571, 572.

There is no evidence in the record upon which the

trial of 1920 and costs could be predicated.

For the reasons stated in this opinion the judgment
of the appellate court is reversed and the cause remanded for a new
trial.

REVEREND JUSTICE AND OTHER MEMBERS.

CHIEF JUSTICE, J. H. ...

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34817

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel., DIANA VUKASOVICH,

(Plaintiff) Appellee,

v.

PAUL DRAGEL,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 634⁴

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This is a prosecution under the statute upon a
complaint for bastardy. The jury was waived, the cause submitted
to the court and a finding of guilty entered and judgment on the
finding.

The plaintiff, Diana Vukasovich, filed her complaint
charging the defendant Paul Dragel with being the father of her child,
born March 26, 1930, as a result of intercourse with him on June
16th and July 4, 1929, at her father's home.

It is urged as ground for reversal that there was
no evidence that the complainant was unmarried at the time of the
alleged intercourse. The cases cited in support of this contention
were decided before the present amendment to the act entitled, "An
Act Concerning Bastardy", Cahill's Ill. Rev. Statutes, Chapter 17.
The amendment to this act dropped the word "unmarried" before the
word "woman". The complaint on which the action was based and which
was sworn to by the complainant charges "that at the time she was
delivered of said child she was and still is an unmarried woman."
Plaintiff testified that she had never had intercourse with any other
man. Counsel's argument that there was no evidence that the complain-
ant was unmarried at the time of the alleged intercourse is answered
in the case of People v. Gless, 239 Ill. App. 356, wherein it is
stated;

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel.,
(Plaintiff) Appellee,
vs.
JAMES WILSON,
(Defendant) Appellant.

RETURN FROM
SHERIFF'S OFFICE
OF CHICAGO

SEC. I.A. 634

Opinion filed June 15, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

This is a prosecution under the statute upon a complaint for bastardy. The jury was waived, the cause submitted to the court and a finding of guilty entered and judgment on the finding.

The plaintiff, James Wilson, filed her complaint charging the defendant Paul Hesel with being the father of her child, born March 26, 1929, as a result of intercourse with him on June 18th and July 4, 1928, at her father's home.

It is urged as ground for reversal that there was no evidence that the complaint was annexed at the time of the alleged intercourse. The cases cited in support of this contention were decided before the present amendment to the act entitled, "An act concerning bastardy", Chas. II, sec. 11, passed, Chapter 17. The amendment to this act dropped the word "annexed" before the word "woman". The complaint on which the action was based and which was sworn to by the complainant charges "that at the time she was delivered of said child she was and still is an unmarried woman". Plaintiff testified that she had never had intercourse with any other man. Counsel's argument that there was no evidence that the complaint was annexed at the time of the alleged intercourse is answered in the case of People v. Wilson, 320 Ill. App. 426, wherein it is stated:

"It is contended for the defendant that the record fails to show that the relatrix either pleaded or proved that at the time of the alleged conception she was unmarried. The words of the statute (Gahill's Stat. Chap. 17, sec. 1) are, 'When a woman who shall be pregnant, or delivered of a child, which, by law, would be deemed a bastard.'

In the complaint it was stated that she was 'delivered of a child which by law would be deemed a bastard, and that at the time she was so delivered of said child she was still an unmarried woman.' That fulfills the requirements of the statute. She testified at the trial that she was single. No question was raised at the trial as to her status at the time of conception; and, so, applying the principle laid down in Erskine v. Davis, 26 Ill. 258, that: 'The presumption of coverture is prospective from the time when coverture is shown to exist, and not retrospective,' it follows that not only are we not entitled to presume that at conception she was married, but on the other hand to presume that she was not married. Further, she testified that she did not have sexual intercourse with any one else. Assuming that to be true, it follows that she was, in the words of the statute, 'delivered of a child which by law would be deemed a bastard,' and at that time was still unmarried. The words of the present statute are not quite the same as those of the statute in force when the case of People v. Griffin, 142 Ill. App. 588, was decided. Then section 1 began with the words, 'That when an unmarried woman who shall be pregnant.' The present statute begins with the words, 'When a woman who shall be pregnant or delivered of a child, which by law would be deemed a bastard'; the word 'unmarried' being elided. In the Griffin case the court held that the relatrix, being a married woman when she conceived the child which was alleged to be a bastard, was not entitled to prosecute under the Bastardy Act. It was stipulated in that case, however, that she was married at the time of conception, while, here, the presumption is that she was not. With the statute as it is, with the word 'unmarried' elided, and the evidence showing that the relatrix was delivered of a child which by law would be deemed a bastard, we think both the complainant and the evidence as to the status of the relatrix fulfilled the statutory requirements."

Plaintiff testified that the defendant was the father of her child and that the act was committed at her home on June 16th and July 4th of the year 1929.

Defendant admits that he was at the house on two different occasions and that on one occasion he was drunk and did not remember much about what took place; that at one time when he was at her house there was nobody there but himself and the girl. He testified further that he went to sleep in a bed, but that plaintiff was not in the room.

"It is contended by the defendant that the record fails to show that the witness either believed or proved that at the time of the alleged conversation she was unmarried. The words of the statute (Ors. 17, sec. 1) are, 'When a woman who shall be pregnant or delivered of a child, which, by law, would be deemed a bastard,'

In the complaint it was stated that she was 'delivered of a child which by law would be deemed a bastard, and that at the time she was so delivered of said child she was still an unmarried woman.' That fulfills the requirements of the statute. She testified at the trial that she was single. No question was raised at the trial as to her status at the time of conception; and, as requiring the opposite, it is shown to exist, and not retrospective, it follows that she was not entitled to presume that at conception she was married, but on the other hand to presume that she was not married. Further, she testified that she did not have sexual intercourse with any one else. Assuming that to be true, it follows that she was, in the words of the statute, 'delivered of a child which by law would be deemed a bastard,' and of that she was still unmarried. The words of the present statute are not within the scope of the statute in issue when the record is examined. It is stated that when an unmarried woman who shall be pregnant or delivered of a child, which, by law, would be deemed a bastard, the word 'unmarried' shall apply. In this case the record fails to show that the witness was unmarried when she conceived the child which she alleged to be a bastard, and she testified to intercourse with the defendant. It was alleged in the complaint that the defendant committed the crime of conception, while, in the present case, it is alleged that the defendant committed the crime of delivery, and the evidence shows that the defendant was delivered of a child which by law would be deemed a bastard, and which both the complaint and the evidence as to the status of the witness fulfilled the statutory requirements.

The defendant testified that the defendant was the

father of her child and that she was delivered of her child on June 10th and July 1st of the year 1905.

The defendant states that he was at the house on two different occasions and that on one occasion he was drunk and did not remember much about what took place; that at one time when he was at her house there was nobody there but himself and the girl. He testified further that he went to sleep in a bed, but that

plaintiff was not in the room.

When plaintiff's father charged him with being the father of plaintiff's child and told him that he would have him arrested unless he married the girl, he left town and remained in Cleveland, Ohio for about three weeks before returning. Flight is an element to be considered as bearing upon the question of the guilt of the defendant. The People v. Wheeler, 297 Ill. 289.

A number of witnesses were produced for the purpose of showing that defendant was at the home of a relative on July 4, 1929. These witnesses were all relatives of the accused.

Actions brought under this statute are in their nature civil actions and only a preponderance of the evidence is necessary. The court heard and saw the witnesses and every intendment should be indulged in favor of the finding and judgment of the trial court. We see no reason for disturbing the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HIEBEL AND FRIEND, JJ. CONCUR.

When defendant's father charged him with being the
father of plaintiff's child and told him that he would have him
arrested unless he married the girl, he left town and remained in
Cleveland, Ohio for about three weeks before returning. Right in
an attempt to be considered as having won the question of the
guilt of the defendant. THE PEOPLE v. ROBERT J. ROSS, 1937 Ill. 289.
A number of witnesses were examined for the purpose
of showing that defendant was at the time of a relative on July 4,
1937. These witnesses were all relatives of the defendant.
Defendant brought under this statute and in their
nature civil actions and only a punishment of the defendant is
necessary. The court held that the defendant was guilty of the
crime charged and judgment in favor of the plaintiff and judgment of the
trial court. We see no reason for disturbing the judgment.
The defendant failed in this action, and
judgment of the municipal court is affirmed.
JAMES H. HARRIS, JR.

WILLIAM H. HARRIS, JR., CLERK.

34824

ALBERT STAUFENBIEL,

Appellee,

v.

EDWIN PALM,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

26214634

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff brought his suit to recover for real estate commissions claimed to be due by reason of procuring a written contract for exchange of properties by and between the defendant Edwin Palm and one James Lauletta. Involved in the exchange was a six flat building belonging to Palm, upon which he, Palm, placed a value of \$40,000. A contract was drawn up and signed by the parties with the provision for the commissions included. Later Palm objected to this valuation, and a new contract was drawn and signed by the parties, placing the value of the six flat building at \$41,500. Included in the properties which Lauletta was to turn over were certain vacant lots, and on the opposite side of the street from these was a sand pit. The original of the written undertaking provided that the defendant Palm was to have received from Lauletta cash in the amount of \$2,500 and the second written signed agreement provided that this should be taken care of by an incumbrance on the property.

It is the contention of the defendant that the second written agreement was procured by fraud on the part of the plaintiff, in that plaintiff represented that the sand pit opposite the lots involved in the transaction was to be filled and the street paved.

It is further contended on the part of the defendant

1931

ALBERT STEINBERG

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Opinion filed July 12, 1931

MR. JUSTICE BRIDGES delivered the opinion

of the court.

The plaintiff brought this suit to recover for real

estate commissions claimed to be due by reason of procuring a

written contract for exchange of property by and between the

defendant Louis Palm and one James Hamilton. Involved in the

exchange was a six flat building belonging to Palm, upon which he

Palm, placed a value of \$40,000. A contract was drawn up and

signed by the parties with the provision for the commissions included.

Later Palm objected to this valuation, and a new contract was drawn

and signed by the parties, placing the value of the six flat

building at \$41,000. Included in the properties which Hamilton

was to turn over were certain vacant lots, and on the opposite side

of the street from these was a sand pit. The original of the

written undertaking provided that the defendant Palm was to have

received from Hamilton cash in the amount of \$2,500 and the second

written agreed agreement provided that this should be taken care

of by an instrument on the property.

It is the contention of the defendant that the

second written agreement was procured by fraud on the part of the

plaintiff. In that plaintiff represented that the sand pit opposite

the lots involved in the transaction was to be filled and the street

graded.

It is further contended on the part of the defendant

that he did not read the second agreement, but relied upon the statement of the plaintiff Staufenbiel that it was the same as the original written agreement except for the fact that the consideration of \$40,000 was changed to \$41,500.

Defendant further contends that he did not see nor know of the fact that the \$2,500 cash consideration had been changed so as to provide for an incumbrance instead of cash.

The evidence is conflicting on the questions, - the only parties testifying being the plaintiff and the defendant. The burden of proof was upon the defendant to establish the matters set out in his affidavit of merits charging fraud on the part of the plaintiff in the procurement of the second written agreement.

The jury was properly instructed in regard to the matter and returned a verdict in favor of the plaintiff. Judgment was entered upon this verdict, which was for the sum of \$1,245 and we see no reason for disturbing this judgment.

Objection is made on behalf of the defendant to instructions 1 and 2 given on the part of the plaintiff, on the ground that they ignore the defenses introduced by the defendant. These were not the only instructions offered and given, but there were other instructions which definitely informed the jury as to the duty of the plaintiff and the rights of the defendant. In our opinion there was nothing contained in the instructions that was error and the giving of the instructions in question was proper.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

that he did not read the second agreement, but relied upon the statement of the plaintiff's attorney that it was the same as the original written agreement except for the fact that the consideration of \$40,000 was changed to \$41,000.

Defendant further contends that he did not see nor know of the fact that the \$4,000 cash consideration had been changed so as to provide for an increase instead of cash.

The evidence is conflicting on the question, - the only parties testifying being the plaintiff and the defendant. The burden of proof was upon the defendant to establish the matters set out in his affidavit of merits showing fraud on the part of the plaintiff in the procurement of the second written agreement.

The jury was properly instructed in regard to the matter and returned a verdict in favor of the plaintiff. Judgment was entered upon this verdict, which was for the sum of \$1,240 and we see no reason for disturbing this judgment.

Objection is made on behalf of the defendant to instructions 1 and 2 given on the part of the plaintiff, on the ground that they ignore the evidence introduced by the defendant. These were not the only instructions offered and given, but there were other instructions which collectively informed the jury as to the duty of the plaintiff and the rights of the defendant. In our opinion there was nothing contained in the instructions that was error and the giving of the instructions in question was proper. For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HERB AND FRIEND, JJ. CONCUR.

34878

PEOPLE OF THE STATE OF
ILLINOIS,

(Plaintiff) Defendant in Error,

v.

GRANT FORTNEY,

(Respondent) Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2621A.635

Opinion filed June 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Grant Fortney, plaintiff in error, was found
guilty of contempt by the Municipal Court of Chicago and ordered
committed to the common jail of Cook County for a period of 30 days.
From this judgment and sentence he has sued out a writ of error.

The petition filed in the cause in the Municipal
Court by one Abraham B. Margolis, charged that on June 30, 1930,
there was pending in the Municipal Court before John A. Sbarbaro,
one of the judges of that court, the case of the People v. Pine, in
which the said Pine was charged by affidavit with crime against
the State of Illinois.

The petition further charges that two important
witnesses were not present at that trial and that petitioner notified
the court and was instructed to have the witnesses in court on
July 3, 1930, to testify on behalf of the State.

The petition further charges that on or about June
28, 1930, the said Fortney, respondent, with others, entered into
a conspiracy to intimidate, injure and destroy witnesses should they
appear to give testimony in the cause pending before the court;
charges further that the said Grant Fortney, respondent, in pursuance
of said conspiracy, told one Doyle and one Orlick, witnesses, that
if they testified in said cause he, Fortney, would break their necks;

RECORD OF THE STATE OF

MUNICIPAL COURT

(Plaintiff) vs. (Defendant)

GRANT FORNEY

(Respondent) Plaintiff in error.

1931 A. 335

Opinion filed June 15, 1931

THE HONORABLE JUDGE WILLIAM DELIVERED THE OPINION

IN THE COURT.

Grant Forney, Plaintiff in error, was found

guilty of contempt by the Municipal Court of Chicago and ordered

committed to the common jail of Cook County for a period of 30 days.

From this judgment and sentence he has sued out a writ of error.

The petition filed in the cause in the Municipal

Court by one Abraham H. Matzkin, alleges that on June 20, 1930,

there was pending in the Municipal Court before John A. Spaworth,

one of the judges of that court, the case of the People v. Grant Forney, in

which the said case was charged by affidavit with crime against

the State of Illinois.

The petition further charges that two important

witnesses were not present at that trial and that petitioner notified

the court and was instructed to have the witnesses in court on

July 8, 1930, so testify on behalf of the State.

The petition further charges that on or about June

22, 1930, the said Forney, respondent, with others, engaged into

a conspiracy to intimidate, injure and destroy witnesses should they

attempt to give testimony in the cause pending before the court;

charges further that the said Grant Forney, respondent, in pursuance

of said conspiracy, told one Doyle and one Oliver, witnesses, that

if they testified in said cause he, Forney, would bring their names

that neither of them would live to enter said court room; that said witnesses on the 30th day of June arrived at said courthouse and that said respondent Fortney was standing in the hallway for the purpose of carrying out his threats and that thereupon the said witnesses left the courthouse and did not testify in said cause; that said acts on the part of said Fortney took place so near to the presence of the court as to constitute a direct criminal contempt committed in the presence of said court.

This complaint was supported by the affidavit of the petitioner and the witnesses Doyle and Orlick. In answer to this petition the said Fortney filed his answer denying each and every allegation of the petition. This answer was subscribed and sworn to by Fortney, the respondent.

The court, over objection of the respondent, proceeded to hear evidence, entered a finding of guilty and sentenced the respondent to the county jail.

From the evidence it appears that certain threats were made against the witnesses by the respondent Fortney at the home of Weisenberg and that when the witness Orlick reached the felony branch of the Municipal Court on the 30th of June, for the purpose of testifying as a witness, and was coming up the outside stairs at the front entrance of the building, he saw the respondent; that the respondent Fortney was in the doorway; that the witness Orlick then walked away and entered a cab and was driven home.

There is no testimony to the effect that anything transpired in the courtroom in the presence of the court, or in such proximity as to bring the actions of the respondent under the direct notice and attention of the trial court. A court has the inherent right to punish for contempt, any act constituting a contempt committed in its presence. The court also has the right to punish for direct contempt, for disobedience or abuses of its process.

that neither of them would live to enter said court room; that said witnesses on the 25th day of June arrived at said courthouse and that said respondent Terney was standing in the hallway for the purpose of entering and his throat and that throughout the said witness left the courthouse and did not testify in said court; that said note on the part of said Terney took place so near to the presence of the court as to constitute a direct criminal contempt committed in the presence of said court.

This complaint was supported by the affidavits of the petitioner and the witnesses Doyle and Olick. In answer to this petition the said Terney filed his answer denying each and every allegation of the petition. This answer was subscribed and sworn to by Terney, the respondent. The court, over objection of the respondent, proceeded to hear evidence, entered a finding of guilty and sentenced the respondent to the county jail.

From the evidence it appears that certain threats were made against the witness by the respondent Terney at the home of Haisenberg and that when the witness Olick reached the telephone booth of the Municipal Court on the 25th of June, for the purpose of testifying as a witness, and was coming up the outside stairs at the front entrance of the building, he saw the respondent; that the respondent Terney was in the doorway; that the witness Olick then walked away and entered a cab and was driven home. There is no testimony to the effect that anything

transpired in the courtroom in the presence of the court, or in such proximity as to bring the actions of the respondent under the direct notice and attention of the trial court. A court has the inherent right to punish for contempt, and not necessitating a contempt committed in its presence. The court also has the right to punish for direct contempt, for disobedience or contempt of its process.

A contempt committed outside of the Criminal Court is a constructive contempt and is triable upon petition and answer and in no other way.

The Supreme Court of this state in the case of The People v. McDonald, 314 Ill. 548, held that an assault by McDonald upon Goldstein, one of the parties to the suit pending in said court, committed outside of the courtroom but within 50 feet thereof, was not a direct contempt in the presence of the court.

The testimony in the case at bar shows that the conspiracy and threats were made some distance from the courtroom at the home of Weisenberg. The testimony also shows that the nearest that Fortney came to the courtroom where the case of The People v. Fine was being tried was the front door of the court building in which the court was in session. Under the circumstances the defendant Fortney should have been tried on the petition and his answer thereto. His answer being under oath should have been taken as true and the defendant Fortney discharged.

In the case of The People v. McLaughlin, 334 Ill. 354, it appears that a petition was filed charging one Robert E. McLaughlin with a contempt of court because of his efforts to influence the testimony of a witness in a case then proceeding before a judge of the Criminal Court of Cook County. The court held that the defendant should have been discharged upon his answer and that it was error for the court to hear evidence. In its opinion the court said:

"The right to punish an offender for contempt of court is a right inherent in the criminal court of Cook county, and when the act constituting such contempt is committed in the presence of the court, the court has the right to deal summarily with the offender and punish him without the hearing of any evidence. In such case the court acts upon its own knowledge. But where the contempt is not committed in the presence of the court, the court can act only upon a hearing and upon evidence. The distinction between criminal and civil contempts has been recognized in this jurisdiction since the decision in Crook v. People, 16 Ill. 534, and has been declared in numerous decisions since. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive

or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people as represented by their judicial tribunals. In such cases the defendant is tried upon his answer alone. No other evidence may be heard. If the party charged shows by his answer under oath that he is not guilty of the contempt charged his answer is conclusive. If the answer is false the remedy is by indictment for perjury. The answer must be taken as true, and if sufficient to purge the party of the contempt he is entitled to be discharged. (O'Brien v. People, 216 Ill. 354; Wake v. People, 230 id. 174; Mothschild & Co v. Steger Piano Co., 356 id. 196; People v. Seymour, 272 id. 295; People v. McDonald, 314 id. 548.) The plaintiff having by his answer denied all the acts charged against him and all wrongful intent in his conversation with Neumann was entitled to be discharged."

The Supreme Court in the case of The People v. McDonald, 314 Ill. 548, in its opinion said:

"In a case where the proceeding for contempt is for acts committed not in the presence of the court and not in furtherance of the remedy sought in a suit or in enforcement of the orders or decrees of the court but to maintain the authority of the court and uphold the administration of justice, if the party should answer denying the alleged wrongful acts his answer is conclusive and he is entitled to his discharge."

This contempt, if such it was, was not committed in the presence of the court and the contempt was not one growing out of the disobedience of the orders, decrees or process of the court. Under the rule as established in this state, it became the duty of the Judge of the Municipal Court hearing the contempt proceedings to discharge the defendant on his answer. If the answer was false, the respondent subjected himself to a prosecution for perjury.

In this case the plaintiff by his answer having denied all the acts charged against him, he was entitled to be discharged.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HEBEL AND FRIEND, JJ. CONCUR.

Three months off at sea. All in, 1895.

This content, it would be well not committed in the presence of the court and the content was not the subject of the proceedings of the court, because of the court. Under the rule as established in this state, it became the duty of the judge of the municipal court hearing the content proceedings to also give the defendant on his answer. If the answer was false, the respondent subjected himself to a prosecution for perjury. In this case the plaintiff by his answer having

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34337

JOSEPH LEVINSON and HARRY LEVINSON,
co-partners, doing business as
LEVINSON'S LOAN BANK,

Plaintiffs in Error,

v.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, a Corporation,

Defendant in Error.

WRIT OF ERROR

TO MUNICIPAL COURT

OF CHICAGO.

20214.635²

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiffs brought suit in the Municipal Court of Chicago, to recover upon a policy of burglary insurance issued by defendant. The case was tried before the court and a jury, resulting in a verdict and judgment in favor of defendant. Plaintiffs seek by this writ of error to reverse that judgment.

The policy in question provided coverage against loss such as claimed by plaintiffs only (1) if the property was feloniously taken from the safe after entry therein by the forceable opening of the safe when locked, by the use of tools, electricity, chisels or explosives; (2) it also required that books and accounts should be regularly kept from which loss could be accurately determined by the defendant; and (3) that immediate notice of the loss should be given and affirmative proof of loss filed with the defendant within 60 days from the date of the discovery of the loss.

The evidence discloses that plaintiffs, father and son, were co-partners in the pawn brokerage business under the name and style of "Levinson's Loan Bank", at 739 North Clark Street, Chicago, Illinois. Plaintiffs had two safes containing valuable merchandise and pledged articles, which stood side by side near the rear of the store behind a wicket and counter running across the store, where the cash register and other fixtures stood. Immediately behind the safes were a number of shelves on which suit cases and

[illegible]

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THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

Opinion filed June 15, 1937

in a verbal and judgment in favor of defendant. Plaintiff seeks
reversal. The case was tried before the court and a jury. Verdict
for plaintiff. To recover upon a policy of burglary insurance issued by
plaintiff's company suit in the Municipal Court at
St. Louis. Plaintiff delivered the opinion of the court.

[illegible]

There were no persons in the pawn brokerage business under the name and style of "Levinson's Loan Bank", at 715 North Clark Street, Chicago, Illinois. Plaintiff had two notes containing valuable merchandise and pledged articles, which stood side by side near the front of the store behind a window and number running across the store, where the cash register and other fixtures stood. Immediately

like articles were kept. On the vacant second floor directly above the safes and shelves was a room with three windows opening out upon a one story roof over the rear of plaintiffs' store.

On the evening of Saturday, June 13, 1925, both plaintiffs and Spiegel, their clerk, were in the store at closing time about 11 o'clock P.M. Joseph Levinson closed safe number one, the one burglarized, and Harry Levinson closed safe number two, pursuant to which they locked the store, which was protected by a burglar alarm system, and left the store.

On Sunday, June 14th, N. R. Bly and Peter Truhler were engaged in cutting a doorway on the third floor. Carl Bozor, who had worked for Bly, called about noon to see if his tools were ready for Monday. Bly wanted to tack on some metal lath and sent Bozor through the building looking for nails. While walking around on the second floor Bozor stepped on a piece of linoleum lying on the floor and his foot went down through a hole in the floor covered by the linoleum. He then went back to the third floor and told Bly about it, whereupon Bly and Truhler came down and all three of them looked through the hole into plaintiffs' store. Thereafter Bly went to the Chicago Avenue Police Station and notified the police, who immediately came to the premises, but could not gain entrance because the store was still locked. Plaintiff, Harry Levinson, was notified by telephone at his home and immediately came to the store, unlocked the front door and admitted the waiting police officer. He also telephoned his father and told him what had happened, whereupon Joseph Levinson came to the store, arriving there about fifteen minutes later. When plaintiffs and the police entered the store they found that the larger safe had been broken open and everything taken out. Practically all of its contents, with the exception of a few articles scattered about the floor, were missing. Chisels, bits,

the evidence was kept. On the second floor directly above the sales and shelves was a room with three windows opening out upon a one story roof over the rear of Alitalia's store.

On the evening of Saturday, June 13, 1936, both Alitalia and Kibbey, their clerk, were in the store at closing time about 11 o'clock P.M. Joseph Levenson closed safe number one, the one burglarized, and Harry Levenson closed safe number two, pursuant to which they locked the store, which was protected by a burglar alarm system, and left the store.

On Sunday, June 14th, A. R. Rix and Peter Turbaker were engaged in selling a doorway on the third floor. Carl Koser, who had worked for Rix, called about noon to see if his store was ready for Monday. Rix wanted to look on some metal safe and went down through the building looking for calls. While walking around on the second floor Koser stopped on a piece of linoleum lying on the floor and his foot went down through a hole in the floor covered by the linoleum. He then went back to the third floor and told Rix about it. Whereupon Rix and Turbaker came down and all three of them looked through the hole into Alitalia's store. Thereafter Rix went to the Chicago Avenue Police Station and notified the police. The investigation was in the store, but could not be continued because the store was still locked. Alitalia, Harry Levenson, was notified by telephone at his home and immediately came to the store. He unlocked the front door and admitted the waiting police officer. He also telephoned his father and told him what had happened, whereupon Joseph Levenson came to the store, arriving there about fifteen minutes later. When Alitalia and the police entered the store they found that the larger safe had been broken open and everything taken out. Practically all of its contents, with the exception of a few articles scattered about the floor, were missing. Chicago, also,

jimmies and other tools, together with a new knotted rope, a wet silk shirt, a wet coat, a hand bag, and a bar of soap were found on the floor of the store behind the safe. Several trunks, the strong box and cash register, had also been pryed open. The burglar alarm was broken and the batteries which operated it thrown upon the floor. The trap door into the basement was open and the window into the alley stair well from the coal cellar, which had previously been boarded up, was likewise broken open. After remaining at the store about an hour and a half, plaintiffs went to the Chicago Avenue Police Station, returned to the store, called up the Pinkerton Detective Agency for a man to watch the place over night, locked the premises and left. On Monday, June 15th, plaintiffs arrived at the store about 8:30 o'clock A. M., followed shortly thereafter by Stott and Arthur, representatives of the defendant company, who during the remainder of that day, with Harry Levinson, checked the books to ascertain the articles lost, the work continuing over the next day.

Defendant claimed in its affidavit of merits that it was not liable under the policy because of the failure of plaintiffs to comply with the terms thereof in the following respects: (1) that the safe was not burglarized by a person or persons unknown to plaintiffs; (2) that the books and accounts were not regularly kept by plaintiffs so that the loss could be accurately determined therefrom by defendant; (3) that at the time of the loss the safe door was not properly closed and locked; (4) that a proper and affirmative proof of loss under oath was not filed within 60 days from the date of the discovery of the loss at the office of defendant, containing a complete inventory of all property on account of which claim was made, showing the original cost thereof and the actual cost value of each article. Aside from the contention that plaintiffs failed to comply with the provisions of the policy in the foregoing respects, the

linens and other books, together with a new knitted robe, a
vat silk shirt, a wet coat, a hand bag, and a hat of soap were
found on the floor of the store behind the safe. Several trunks, also
the strong box and cash register, had also been picked open. The
burglar alarm was broken and the battery which operated it thrown
upon the floor. The trap door into the basement was open and the
sinker into the alley stair well from the coal cellar, which had
previously been boarded up, was likewise broken open. After
remaining at the store about an hour and a half, Plaintiff's went to
the Chicago Avenue Police Station, returned to the store, called
up the Pinkerton Detective Agency for a man to watch the place over
night, locked the premises and left. On Monday, June 18th, Plain-
tiff arrived at the store about 8:30 o'clock A. M., followed shortly
thereafter by Giot and Arthur, representatives of the defendant
company, who during the remainder of that day, with Harry Levinson,
checked the books to ascertain the articles lost, the work continuing
over the next day.

Defendant claimed in its affidavit of denial that
it was not liable under the policy because of the failure of plain-
tiff to comply with the terms thereof in the following respects: (1)
that the note was not authenticated by a person or persons named in
plaintiff's (2) that the books and accounts were not regularly kept
by plaintiff so that the loss could be accurately determined therefrom
by defendant; (3) that at the time of the loss the note book was not
properly closed and locked; (4) that a proper and effective check
of loss under note was not filed within 60 days from the date of the
discovery of the loss at the office of defendant, containing a
complete inventory of all property on account of which claim was made,
showing the original cost thereof and the actual cash value of each
article. Aside from the contention that plaintiff failed to comply
with the provisions of the policy in the foregoing respects, the

defense was based upon the theory that the burglary was not genuine but only simulated, and that the same could not have transpired in the manner testified to by plaintiffs' witnesses.

Plaintiffs insist that the undisputed evidence establishes that a burglary occurred; that all the requirements of the policy were fully complied with and that the verdict was against the clear weight of the evidence. It is further urged that attorneys for defendant made improper statements and arguments to and in the presence of the jury, and that the court erred in admitting prejudicial evidence and in permitting such statements and arguments to be made, which of themselves, are sufficient grounds for reversal.

In support of the latter contention the following incidents occurring during the trial are pointed out; In the cross examination of the plaintiff, Joseph Levinson, by defendant's counsel the witness testified that he went to the police station on the Monday following the robbery, whereupon the following occurred:

"Q. They told you on that occasion that that was an inside job, didn't they?

Mr. Potter: I object to that, what they said.

A. No, sir, they didn't say any such thing.

Mr. Potter: I object to that, your Honor.

The Court: Objection sustained.

* * * * *

Q. Didn't they tell you they were not interested, that it was not a robbery or a burglary?

Mr. Potter: I object to that.

A. They didn't tell me no such thing.

The Court: Objection sustained.

Mr. Everett: Did the police accept your inventory?

A. They did."

It appears that in March, 1928, plaintiffs' store

defendants was based upon the theory that the burglary was not genuine but only simulated, and that the same could not have transpired in the manner testified to by plaintiffs' witnesses.

Plaintiffs insist that the undisputed evidence

establishes that a burglary occurred; that all the requirements of the policy were fully complied with and that the vessel was against the plain weight of the evidence, it is further urged that attorneys for defendant made improper statements and arguments to and in the presence of the jury, and that the court erred in admitting prejudicial evidence and in permitting such statements and arguments to be made, which of themselves, and sufficient grounds for reversal.

In support of the latter contention the following

incidents occurring during the trial are pointed out: In the cross examination of the plaintiff, Joseph Levinson, by defendant's counsel the witness testified that he went to the police station on the morning following the robbery, whereupon the following occurred:

"Q. They told you on that morning that there was an inside job, didn't they?

Mr. Foster: I object to that, what they said.

A. No, sir, they didn't say any such thing.

Mr. Foster: I object to that, Your Honor.

The Court: Objection sustained.

* * *

Q. Didn't they tell you they were not interested, that it was not a robbery or a burglary?

Mr. Foster: I object to that.

A. They didn't tell me no such thing.

The Court: Objection sustained.

Mr. Foster: Will the police accept your testimony?

A. They did."

It appears that in March, 1932, plaintiffs' store

was held up and a large loss sustained. Defendant had the holdup coverage and refused to pay. Upon cross examination of Joseph Levinson the following took place:

"Mr. Everett: You had a holdup in March there, didn't you?

Mr. Potter: I object to that as immaterial.

Mr. Everett: That is material. It is against the same company and the same place. It is to show the relationship of the parties and the attitude of the witness, possibly in this case and in another case.

The Court: I will sustain the objection.

Mr. Everett: You have sued the Fidelity & Casualty Company in four lawsuits, haven't you?

A. I don't know what lawsuits, which ones?

Mr. Potter: I object to that. It may be necessary to sue them in four more before we get the money out of them.

The Court: I will let him answer.

A. I don't know what lawsuits we have started against this defendant. I don't know how many times we have sued them. This is the first time I have been on a trial with this defendant. We never had a trial with the Casualty Company before.

Q. You have sued them on your holdup case, haven't you?

A. There was never a case.

Q. The suit is pending, isn't it, in this court?

A. I don't believe that you are talking about that case at all. You are talking about this case.

Q. Do you refuse to answer that question?

The Court: Answer the question.

A. Yes, to my knowledge we are suing them for another loss.

Q. A loss that occurred in March?

Mr. Potter: I object to that

The Court: Objection sustained."

Subsequently in cross examining one Polikoff, an attorney who prepared and forwarded the proof of loss, defendant's counsel proceeded as follows:

was held up and a large loss sustained. Defendant had the balance
covered and refused to pay. Upon cross examination of Joseph

Defendant the following took place:

"Mr. Everett: You had a balance in March there, didn't you?"

Mr. Everett: I object to that as immaterial.

Mr. Everett: That is material. It is against the issue
competent and the same issue. It is to show the relationship
of the parties and the attitude of the witness, possibly
in this case and in another case.

The Court: I will sustain the objection.

Mr. Everett: You have asked the fidelity & honesty question
in four instances, haven't you?

Q. A. I don't know what immaterial, which case?

Mr. Everett: I object to that. It may be necessary to ask
them in four more before we get the money out of them.

The Court: I will let him answer.

A. I don't know what immaterial we have started against this
defendant. I don't know how many times we have asked them.
This is the first time I have been on a trial with this
defendant. We never had a trial with the defendant Joseph
before.

Q. You have asked them on your father's case, haven't you?

A. There was never a case.

Q. The only in question, isn't it, in this court?

A. I don't believe that you are talking about that case
at all. You are talking about this case.

Q. Do you refuse to answer that question?

The Court: Answer the question.

A. Yes, to my knowledge we are asking them for another loss.

Q. A fact that occurred in March?

Mr. Everett: I object to that.

The Court: Objection sustained.

Subsequently in cross examination and finally, an

attorney who appeared and forwarded the proof of loss, defendant's
counsel proceeded as follows: "Mr. Everett: I am going to ask you a few questions."

"Q. Now, just prior to this time, you handled that loss, the alleged loss to the Levinsons involving a holdup, did you not?

Mr. Potter: I object to that.

Mr. Everett: If the court please, that is relevant.

The Court: That is only for the purpose of establishing the question, I take it, of knowledge as to the proof of loss. Is that the purpose?

Mr. Everett: That is the purpose.

The Court: And only for that purpose I allow the witness to answer.

Mr. Potter: Exception.

A. You might call it handling it. I was not actually retained in that matter yet.

Q. That happened on March 17, 1935, did it?

A. The -

Q. The alleged holdup? A. Well -

Mr. Potter: I object to that as immaterial and irrelevant.

The Court: Only for that purpose, as I have stated, the witness may answer.

A. The holdup happened on March 17, 1935.

Mr. Everett: And you acted for the Levinsons in that claim, did you not?

Mr. Potter: Same objection.

The Court: He may answer for that purpose.

Mr. Potter: Exdeption.

A. No, sir."

At the beginning of the trial a motion was made to exclude witnesses. The plaintiff, Joseph Levinson, was the second witness. When called to the stand, the following colloquy occurred between counsel:

"Mr. Potter: What is your name? A. Joseph Levinson.

Mr. Everett: Would you ask Mr. Harry Levinson to step outside while this witness is testifying?

Mr. Potter: No, both of these men are plaintiffs in this case.

A. Now, just prior to this time, you handled that issue, the alleged issue to the witnesses involving a holding, did you not?

Mr. Potter: I object to that.

Mr. Everett: If the court please, that is relevant.

The Court: That is only for the purpose of establishing the question, I take it, of knowledge as to the proof of law, is that the purpose?

Mr. Everett: That is the purpose.

The Court: And only for that purpose, I think the witness is relevant.

Mr. Potter: Exception.

A. You might call it handling it. I was not actually retained in that matter yet.

A. That happened on March 17, 1933, did it?

A. Yes.

A. The alleged holding? A. Well -

Mr. Potter: I object to that as immaterial and irrelevant.

The Court: Only for that purpose, as I have stated, the witness was relevant.

A. The holding happened on March 17, 1933.

Mr. Everett: And you acted for the witnesses in that claim, did you not?

Mr. Potter: Same objection.

The Court: No answer for that purpose.

Mr. Potter: Exception.

A. Rebuttal.

At the beginning of the trial a motion was made to

exclude witnesses. The plaintiff, Joseph Levinson, was the second witness. When called to the stand, the following colloquy occurred

between counsel:

Mr. Potter: What is your name? A. Joseph Levinson.

Mr. Everett: Would you ask Mr. Joseph Levinson to step outside while this witness is testifying?

Mr. Potter: No, both of these men are plaintiffs in this case.

Mr. Everett: But I want the court and the jury to know that I have made this request.

Mr. Potter: They are not entitled to make such a request. I object to the request.

The Court: The objection is sustained."

At the conclusion of the case and during defendant's argument to the jury, the following took place:

"Mr. Everett: When this case was started I made a motion to exclude the witnesses so that one witness would not hear the other witnesses' testimony. That order was entered. I then asked that one of the Levinsons go out of the court room when the other was testifying and that they refused to do. And they had the right to refuse to do it.

Mr. Potter: I object to any comment about it.

Mr. Everett: I think that it is a circumstance the jury may consider. Under the law they had a right to stay in here.

The Court: Objection sustained.

Mr. Everett: You gentlemen saw that both Levinsons stayed here during the testimony and each heard the other.

Mr. Potter: I object to argument on it and ask for a ruling of the Court.

The Court: Let that stand. Go ahead, gentlemen.

Mr. Potter: Exception.

Mr. Everett: There was an order that the witnesses outside of the plaintiffs and one representative of the defendant should not hear the testimony of the others.

Mr. Potter: I object to that.

The Court: Objection will be sustained.

Mr. Everett: And an order was entered -

The Court: Both sides had a right to have representatives here. That is the right of the plaintiffs, either one or both -

Mr. Everett: Yes.

The Court: - Had the right to be here.

Mr. Everett: Yes, I say that. I do not dispute that. I say all witnesses were excluded and had no right to hear the testimony of any other witness and if anyone came into the court room and sat here he could not have testified.

Mr. Potter: I object to the argument and ask for a ruling on it.

Mr. Forester: But I want the court and the jury to know that I have made this request.

Mr. Forester: They are not entitled to make such a request. I object to the request.

The Court: The objection is sustained.

At the conclusion of the case and during defendant's

argument to the jury, the following took place:

Mr. Forester: When this case was started I made a motion to exclude the witnesses as that was witness would not hear the great witness' testimony. That motion was sustained. I then asked that one of the witnesses go out of the court room when the other was testifying and that they returned to do. And they had the right to refuse to do it.

Mr. Forester: I object to any comment about it.

Mr. Forester: I think that it is a circumstance the jury may consider. Under the law they had a right to stay in here.

The Court: Objection sustained.

Mr. Forester: For gentlemen can that both witnesses stayed here during the testimony and each heard the other.

Mr. Forester: I object to argument on it and ask for a ruling of the court.

The Court: Let that stand. No objection, gentlemen.

Mr. Forester: Excuse me.

Mr. Forester: There was an order that the witnesses outside of the courtroom and not representative of the defendant should not hear the testimony of the others.

Mr. Forester: I object to that.

The Court: Objection will be sustained.

Mr. Forester: And an order was entered -

The Court: Both sides had a right to have representatives here. That is the right of the plaintiff, either one or both -

Mr. Forester: Yes.

The Court: - And the right to be here.

Mr. Forester: Yes, I say that. I do not dispute that. I say all witnesses were excluded and had no right to hear the testimony of any other witness and it anyone came into the court room and that he would not have testified.

Mr. Forester: I object to the argument and ask for a ruling on it.

The Court: He is talking now as to the witnesses.

Mr. Everett: Yes, I am not talking about the plaintiffs.

The Court: Objection overruled.

Mr. Potter: Exception.

Mr. Everett: Naturally you object to this because it is a serious matter.

Mr. Potter: There is nothing serious about it. I object to it the same as you objected, because I have a right to do it.

The Court: Either side have a right to object when they feel that either is invading the province of the Court as to law.

Mr. Everett: I understand that the rule entered here, outside of the plaintiffs, required the witnesses to be outside of this room when other witnesses were testifying. Now, then it is admitted in this case by Mr. Smith, their expert * * * that is the young gentleman who is studying fire departments - that they took him up to a lawyer's office and Mr. Polikoff gave him a transcript of the testimony of Mr. Fink, Sr., and admitted that that had the same effect as though he had sat in this court room and heard Mr. Fink testify. They violated the ruling of this Court. It wasn't the proper thing to do and they know it.

Mr. Potter: I object to the argument and ask for a ruling.

The Court: Yes, the objection will be sustained.

Mr. Everett: That it wasn't proper?

The Court: That they know it.

Mr. Everett: I assume that a lawyer known when an order is entered they must comply with it.

Mr. Potter: I object to that statement - that it is improper and for counsel to discuss the testimony with an expert.

Mr. Everett: I say you gave them the transcript of the testimony and you admitted it.

The Court: The jury have heard the testimony.

Mr. Potter: I ask for a ruling on the objection.

The Court: Overruled.

Mr. Potter: Exception."

It thus appears that defendants injected into the case, not once, but repeatedly, matters which were clearly improper and prejudicial to plaintiffs, - first, by referring to remarks of the police officers that the alleged burglary was an "inside job";

The Court: We are waiting now as to the witnesses.

Mr. Webster: Yes, I am not waiting about the witnesses.

The Court: Objection overruled.

Mr. Webster: Exception.

Mr. Webster: Naturally you object to this because it is a
verbal matter.

Mr. Webster: There is nothing wrong about it. I object to
it the same as you objected, because I have a right to do so.

The Court: Either side have a right to object when they feel
that either is invading the province of the Court as to law.

Mr. Webster: I understand that the rule entered here, and
that of the plaintiff, required the witnesses to be sworn
of this case when they came into the courtroom. Now, I
think it is admitted in this case by Mr. Webster, that
that is the young defendant who is charged with
the crime - that they had him as a lawyer's office and
Mr. Webster gave him a transcript of the testimony of Mr.
Tins, Mr. and admitted that that was the same witness as
though he was not in this court when he heard Mr. Tins
testify. They received the ruling of this Court. If women's
the proper thing to do and they know it.

Mr. Webster: I object to the argument and not for a ruling.

The Court: Yes, the objection will be sustained.

Mr. Webster: That is woman's property?

The Court: That they know it.

Mr. Webster: I assume that a lawyer knows when an order is
entered they must comply with it.

Mr. Webster: I object to that statement - that it is improper
and you cannot to discuss the testimony with an expert.

Mr. Webster: I say you gave them the transcript of the
testimony and you admitted it.

The Court: The jury have heard the testimony.

Mr. Webster: I am for a ruling on the objection.

The Court: Overruled.

Mr. Webster: Exception.

It then appears that evidence objected into the
case, not once, but repeatedly, without which case clearly in favor
and prejudicial to plaintiff. - First, by refusing to remove it

then bringing into the case the subject matter of the holdup that occurred subsequent to the alleged burglary, as to which it was also contended that it was not genuine but simulated, and then reiterating and emphasizing the fact that the Levinsons, who were plaintiffs in the proceeding, stayed in court during the testimony and heard each other testify, in spite of the court's ruling that they were entitled to remain in the court room.

In addition to the foregoing incidents defendant's counsel made in part the following argument:

"Mr. Everett: A pawnshop, gentlemen, is a menace to a community; it isn't a benefit. The law recognizes it as such. The law compels them to report everything they take in, lend money on. Why? Because it is a place for thieves to go and dispose of property that they steal from you and me. I say they are a menace to a community. What is a burglar going to do with a pocket full of watches if he can't dispose of them? He wants the money. One watch is good enough for an individual if it keeps time. The law requires that business to report everything they take in. Is there any other business that we have to have a whole department of our police to watch? The City of Chicago pays \$15,000,000 a year for its police department. Part of that money is spent to watch pawnshops. Why? Because it is the character of the business. Now do you tell me that the Levinsons did not become acquainted with burglars, holdup men and thieves? Hadn't they heard how safes are blown and robbed? Certainly they had. So they planned this one out and thought they would fool somebody; but they can't do that; there is always a slip some place.

Why didn't they put Mullen on the stand here? He was in the police department and has nothing else to do but chase around pawnshops, and he said he went every day to Levinson's to find stolen property in the pawnshops. Now, isn't that a situation to be taken into consideration in determining whether or not Levinsons planned this burglary? Let me go a little further. Counsel made a lot of the fact that we had this list for two years; that the police had reports of stuff pawned. Do you suppose Levinson pawned this stuff in Chicago? You heard me examine him and perhaps you had thought the questions were foolish and had no bearing, but you know what I had in mind.

Levinson sells his stuff, his jewelry, in New York, Philadelphia and all over the country and he buys from New York from 'importers', he called them. Now that is the method of the pawnbrokers in United States to evade the laws of a city that requires a report on stuff loaned over the counter. A bushel of watches taken by Levinson to New York and sold to an importer or another pawnshop in New York would never be traced or sold any other place in the United States. Do you suppose these pawnbrokers carry on this business and evade a law like we have in Chicago? If they took four watches around to four different pawnshops they would have to be

entitled to remain in the court room. each other testify. In spite of the court's ruling that they were in the courtroom, stayed in court during the testimony and heard and decided the fact that the defendants, who were maintainable contained that it was not genuine but simulated, and then testifying occurred subsequent to the alleged burglary, so to which it was also then bringing into the case the subject matter of the holding that

in addition to the foregoing information contained in the following documents:

[illegible]

reported and would be found by the numbers. No. There are established fences - that is what they are called - in the United States; there must be, and they play in hand with the burglars and robbers and holdup men, because they couldn't dispose of their property that was stolen unless they had an outlet, and the pawnshop is the outlet. It is a disgraceful business. They lend \$2.00 on a wedding ring, the poor fellow is down to the last penny, he takes the ring he gave his wife on their wedding day and he puts it in the pawnshop; gets \$2.00. What does he pay? 36% a year. The fellow that saved up and bought his Masonic pin or any other pin takes it over to the pawnshop; he is hard up; he pays 36% a year, and if it is a good thing and he has only borrowed a small amount on it, if he falls down on his interest the ring or whatever it is is taken for the loan is sold. It is a disgraceful and disreputable business.

Mr. Potter: Now if the Court please, I object to that. I object to that. I submit that it is unfair, improper and prejudicial.

Mr. Everett: It is not unfair. It is shown by the evidence in this case and it is a matter of argument.

Mr. Potter: I object to it and ask for a ruling of the Court.

Mr. Everett: I insist that I have a right to state the nature of the business these people are engaged in.

The Court: The law provides that counsel may draw the inference from the evidence and may state the opinion that he draws from the evidence. I will overrule the objection.

Mr. Potter: Exception.

Mr. Everett: You will have these books with you, gentlemen. Look at the articles that are pawned and look at the amounts loaned and look at the descriptions of these articles and then decide the character of the business that Harry Levinson and his father Joseph - (addressing Joseph Levinson:) I wouldn't think you would smile at this accusation brought against you.

Mr. Joseph Levinson: It don't mean a thing.

Mr. Everett: Hard boiled! Why shouldn't he be just as hard boiled as any human being I ever saw in my life; no regard for the truth; no regard for honesty, and now with these accusations being made against him and the Court ruling that they are proper he sits there and smiles.

Mr. Harry Levinson: Because they are untrue.

The Court: Don't argue with counsel, gentlemen. Proceed.

Mr. Everett: I am willing to have him make a spectacle of himself more than he has before this jury, and I haven't got him yet. I will get him in a few minutes.

represented and would be found by the jury. Mr. Jones
are established facts - that is what they are called -
in the United States; there must be, and they play in hand
with the burglar and robber and hold-up man, because they
concern the safety of their property and their lives.
They had an outlet, and the partnership is the outlet. It is a
business. They have \$5.00 on a wedding ring, the
poor fellow is down to the last penny, he takes the ring he
gave his wife on their wedding day and he takes it in the
pocketbook; how much? \$5.00. What does he pay? \$5.00 a year. The
fellow that saved up and bought his business for any other
kind of money it over to the partnership; he is hard up; he pays
\$5.00 a year, and it is a good thing and he has only
received a small amount on it. It is all down on his interest
the first of January it is in the loss he sold. It
is a financial and financial business.

Mr. Jones: Now if the court please, I object to that.
I submit that it is unclear, improper and
irrelevant.

Mr. Jones: It is not unclear. It is shown by the evidence in
this case and it is a matter of argument.

Mr. Jones: I object to it and ask for a ruling of the court.

Mr. Jones: I submit that I have a right to state the nature
of the business these people are engaged in.

The court: The law provides that counsel may draw the infer-
ence from the evidence and may state the opinion that he draws
from the evidence. I will overrule the objection.

Mr. Jones: Exception.

Mr. Jones: You will have these people with you, gentlemen.
Look at the picture that was passed and look at the man's
face and look at the description of these people and
then decide the character of the business that Betty Jones
and her father Joseph - (addressing Joseph Jones) I
would like to know you would call it this business or not
against you.

Mr. Jones: Exception: It isn't even a crime.

Mr. Jones: Well, believe it or not, I should like to be just as sure
called as any human being I ever saw in my life; no more
for the court; no regard for humanity, no more will these
corporations being asked to give him and the court telling
that they are asked to give them and believe.

Mr. Betty Jones: Because they are asked.

The court: Don't argue with counsel, gentlemen, please.

Mr. Jones: I am willing to leave him make a statement as
factual as he can make this case, and I haven't
got him yet. I will get him in a few minutes.

Now, take that into consideration, gentlemen, in weighing the evidence - the character of the business that this man and his father are engaged in; whether it is honorable and upright; whether they conduct it honorably and uprightly; and you will take many other things into consideration, but the point I was making at that time was this - that in determining whether it is probable that Levinson would plan a thing of this kind you can take into consideration their associations; the people they deal with; the character of their business and see whether or not they would be the people who would employ burglars to share with them any profits they make in this manner. And as I say, it has been done in Chicago time and time again, with very positive proof of one case within the last week or ten days, where the person confessed.

Mr. Potter: I object to that, if the Court please, and ask for a ruling of the Court.

The Court: I think gentlemen, you should stay within the evidence.

Mr. Potter: I asked for a ruling of the Court.

The Court: The jury will be instructed to disregard the last statement with reference to anything that appeared in the press about anything else."

Proper objections were made to all of these proceedings.

The record discloses that there was no evidence to sustain the charge that plaintiffs ever consorted with criminals, that they evaded any law, or that they ever knowingly purchased or loaned money upon stolen property. Neither is there any evidence to warrant counsel's charge that these plaintiffs were "fences" for stolen property or a "menace to the community", simply because they operated a pawnshop. The business of loaning small sums of money on personal property is authorized and regulated by statute. There is no evidence that plaintiffs did not conduct their business legitimately and in accordance with the law. Moreover, it was affirmatively shown that the Levinsons never forfeited a pledge until interest thereon had been delinquent for more than thirteen months. Three per cent. a month is the interest rate authorized by the statutes of this state on loans of this character and argument such as that last referred to is nothing more than a direct and frank appeal to the passion and prejudices of the jurors.

The language of the court in Ill. Cent. R. & Co. v. Seitz, 111 Ill. App. 242, which was quoted with approval in Silvers v. Peoria Ry. Co., 200 Ill. App. 487, is pertinent to the instant case. The court there said:

"There is enough natural and inherent prejudice in the minds of jurors against railroads and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion or prejudice of jurors. A lawyer who tries his case in a proper manner observing the ethics of the profession is at a great temporary disadvantage when trying a cause against counsel who resort to improper language to obtain a verdict. Verdicts thus obtained, generally are and always should be short-lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discourage such misconduct on the part of lawyers, by reversing judgments obtained by them, when it is manifest they are the result of unprofessional conduct."

If it be true that there is a natural and inherent prejudice in the minds of jurors against railroads and other corporations, it is equally, if not to a greater extent, true as to pawnbrokers and those engaged in a similar business, and to augment this prejudice by direct and improper appeals, calculated to arouse the sympathy and prejudice of jurors, is bound to result in a miscarriage of justice.

From a careful examination of the record in this case we are satisfied that the verdict herein resulted from passion and prejudice occasioned by improper examination of witnesses and prejudicial remarks made to the jury in the course of defendant's argument, and that as a result thereof plaintiffs did not have a fair trial.

In view of our conclusions upon this phase of the trial and because the case will have to be retried, we deem it inadvisable to pass upon the other contentions made by the respective parties.

For the reasons stated the judgment of the trial court will be reversed, and the cause remanded.

REVERSED AND REMANDED.

REBEL, J. CONCURS.
WILSON, P.J. DISSENTS.

34636

THE BRADY CONVEYOR CORPORATION,
a Corporation,

Plaintiff- Appellee,

v.

E. H. EDWARDS COMPANY, a Corporation,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 635³

Opinion filed June 15, 1931

MR. JUSTICE FRIEND ON PETITION FOR REHEARING.

This cause is now before us on rehearing granted.

Plaintiff for the first time raises the question that two items for \$114. and \$8.50, respectively, were separate and distinct from the original contract of the parties and not included in the judgment of the Municipal Court. It is urged that the item for \$114. represents installation of the pipe line for which defendant agreed to pay, and that the sum of \$8.50 represents a part of the expense incurred in installing a new shaft.

Courts of review have consistently adhered to the rule that on a petition for rehearing points which were not presented in the argument of the case will not be considered. (Arkley v. Miblack, 272 Ill. 356; Davis v. Gibson, 70 Ill. App. 273.)

Moreover we find from an examination of the record that the item of \$114. was subject to the same guaranty as the original order and was requested by plaintiff as necessary in its efforts to make the installation operate successfully. Plaintiff contends that the liability of defendant to pay this item is based on a letter written by the E. H. Edwards Company to plaintiff under the date of February 1, 1929, from which we quote:

1931

THE UNITED STATES OF AMERICA
a corporation

vs.

J. H. EDWARDS, a corporation

Defendant

WESTERN COURT

OF CHICAGO

262 I.A. 635

Opinion filed July 12, 1931

THE COURT, after reading the petition for rehearing,

is of the opinion that the petition for rehearing is

granted. This court is not before us on rehearing granted.

Plaintiff for the first time raises the question that two items for

\$114. and \$8.50, respectively, were separate and distinct from the

original contract of the parties and not included in the judgment

of the Municipal Court. It is urged that the item for \$114.

represents installation of the pipe line for water supply at

to pay, and that the sum of \$8.50 represents a part of the expense

incurred in installing a new shaft.

Courts of review have consistently adhered to the

rule that on a petition for rehearing points which were not presented

in the argument of the case will not be considered. (*Atkins v.*

Atkins, 273 Ill. 282; *Atkins v. Atkins*, 70 Ill. App. 277.)

Moreover we find from an examination of the record

that the item of \$114. was subject to the same guaranty as the

original order and was requested by plaintiff as necessary in its

efforts to make the installation operate successfully. Plaintiff

contends that the liability of defendant to pay this item is based

on a letter written by the E. H. Edwards Company to plaintiff under

the date of February 1, 1929, from which we quote:

" Please let's not waste any more time and if it's \$114.00 you want us to guarantee, may we try to make it as clear as possible to you that we have authorized you to proceed with the work.

All we ask is that you get our conveyor to work satisfactorily and we have no hesitancy in paying the bills as presented."

It appears from this letter that defendant's promise to pay the item for installation of the pipe line was conditioned upon the satisfactory operation of the whole installation and subject to the same guaranty. In view of our finding that the sugar feeder was not made to operate successfully and satisfactorily, we believe these items should be disallowed for the same reasons applicable to the equipment.

The judgment of the Municipal Court will be reversed with findings of fact and judgment here.

REVERSED WITH FINDING OF FACT
AND JUDGMENT HERE.

WILSON, P.J. AND REBEL, J. CONCUR.

FINDING OF FACT:

We make the following findings of fact: Defendant's order for the purchase and installation of the equipment, was made conditional upon its successful operation and satisfaction to defendant. The items for \$114.00 and \$8.50 respectively were subject to the same condition. The machinery and equipment were never made to work successfully or to defendant's satisfaction, and therefore defendant was not obligated to pay therefor.

It appears from this latter investigation's promise to pay the item for installation of the page line was contemplated upon the radio factory operation of the whole installation and subject to the same guarantee. In view of our finding that the radio factory was not made to operate successfully and satisfactorily, we believe these items should be disallowed for the same reasons applicable to the equipment. The judgment of the Municipal Court will be reversed.

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to make the following findings of fact: Defendant's
order for the purchase and installation of the equipment, was made
coincidental with the receipt of the equipment and installation of
Defendant. The items for \$114.00 and \$2.50 respectively were shipped
to the same address. The company and Defendant were never made
to work successfully so to Defendant's satisfaction, and therefore
Defendant was not obligated to pay invoice.

34636

THE BRADY CONVEYORS CORPORATION,
a Corporation,

Plaintiff, Appellee,

v.

E. H. EDWARDS COMPANY, a Corporation,
Defendant, Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 635

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The Brady Conveyors Corporation, as plaintiff, brought an action in contract against E. H. Edwards Company, as defendant, in the Municipal Court of Chicago, for the purchase price and installation of a sugar feeder, to be used in connection with a conveyor, designed to take granulated sugar from a bin in defendant's candy factory by means of gravity influence and feed it into a so-called blower for conveyance to the top floor of defendant's plant. The cause was tried by the court without a jury, resulting in a finding and judgment in favor of plaintiff in the sum of \$444.00.

The contract upon which plaintiff's claim is founded is contained in various letters that passed between the parties, resulting in an order for the equipment and the installation thereof, dated November 3, 1928, which contained the following provision:

"It is understood that the Brady Conveyors Corp. is to install this equipment subject to our acceptance and approval, and if the equipment does not successfully convey the sugar to the receiving bin on our top floor, they are to remove the equipment without any cost or expense to us."

Plaintiff's statement of claim alleges that defendant ordered the sugar feeder on November 3, 1928, for a stipulated price; sets forth the foregoing paragraph in the order wherein the equipment and installation is made subject to the acceptance and approval of defendant; alleges that the feeder was installed and operated perfectly but that defendant arbitrarily and unreasonably refused to accept or

THE BRADY CONVEYOR COMPANY, INC.
a corporation

Plaintiff, Respondent,

E. H. NEWBERRY COMPANY, a corporation,

Defendant, Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

362 I.A. 635

Opinion filed May 18, 1931

MR. JUSTICE FRANK delivered the opinion of the court.

The Brady Conveyor Corporation, as plaintiff, brought

an action in contract against E. H. Newberry Company, as defendant, in

the Municipal Court of Chicago, for the purchase price and installation

of a sugar feeder, to be used in connection with a conveyor, designed

to take granulated sugar from a bin in defendant's candy factory by

means of gravity influence and feed it into a so-called mixer for

conveyance to the top floor of defendant's plant. The cause was tried

by the court without a jury, resulting in a finding and judgment in

favor of plaintiff in the sum of \$400.00.

The contract upon which plaintiff's claim is founded is

contained in various letters that passed between the parties, resulting

in an order for the equipment and the installation thereof, dated

November 3, 1928, which contained the following provision:

"It is understood that the Brady conveyors are
to be installed this equipment subject to our inspection and
approval, and if the equipment does not successfully convey
the sugar to the receiving bin on our top floor, they are
to remove the equipment without any cost or expense to us."

Plaintiff's statement of claim alleges that defendant

ordered the sugar feeder on November 3, 1928, for a stipulated price;

sets forth the foregoing paragraph in the order wherein the equipment

and installation is made subject to the acceptance and approval of

defendant; alleges that the feeder was installed and operated partially

but that defendant refused to accept or

approve the same. There is no allegation in the statement of claim, however, that the equipment was accepted and approved by defendant in accordance with the provisions of the contract, nor is there any evidence to show that defendant accepted and approved the installation. On the contrary, it appears quite clearly from the evidence that defendant through a long period of time expressed his dissatisfaction with the operation of the machinery, and gave plaintiff every opportunity to place the same in working order. On February 1, 1929, defendant wrote plaintiff that "all we ask is that you get our conveyor to work satisfactorily and we have no hesitancy in paying the bills as presented." On March 1, Edwards wrote plaintiff again as follows:

"Week after week, we call your attention to the fact that the sugar conveyor is not working, and you have assured us time after time that if we would do certain things you would guarantee the conveyor to work.

We do not know whose fault it is or what is wrong, but isn't it possible for you to do something and stay on the job long enough to complete it? We are going into our second year and still the conveyor is not working."

In another letter dated March 13, 1929, Edwards again wrote plaintiff saying:

"It seems that one mistake after another has been made and no one has assumed the responsibility, and I am wondering what a guarantee means if one is not going to fulfill it. Your guarantee to us was that you would furnish us a feeder which would operate satisfactorily and eliminate the trouble we were having and get our conveyor working one hundred per cent.

Because of several mistakes of your engineer you ask us for extras, and all I can say is the sugar is not being conveyed to the third floor, and unless the equipment is working, it is no good to us, and we are compelled to insist that this equipment is either made to work or taken off our premises."

A statement contained in Edwards' letter to plaintiff of March 13, 1929, to the effect that:

"Your engineers, as well as mine, make mistakes and I am disappointed that our original engineer did not give you the job for a lump sum of \$2100.00 for a complete installation as you say."

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is chiefly relied upon by plaintiff in support of its contention that Edwards approved the equipment and installation. We cannot agree with this conclusion, however. The same letter contains various criticisms of the sugar feeder, expresses dissatisfaction with the operation thereof, and complains of plaintiff's failure to make good its guarantee.

In addition to the foregoing complaints made in writing, defendant offered other evidence that the feeder would not operate satisfactorily. E. H. Edwards, president of the defendant corporation, testified that after the feeder was installed, it failed to work properly; that the mechanism pulverized the sugar and the pressure in back of it forced the pulverized sugar into the various moving parts and locked the motor; that he made complaints to plaintiff during several months, without avail, never accepted the feeder nor indicated his satisfaction therewith, and finally had it removed and shipped back to plaintiff, who refused to accept the same.

Thomas Heatley, defendant's factory superintendent, testified that he saw the feeder in operation at the Brooklyn plant; that defendant's mechanics took it apart and he observed that the granulated sugar dropping into the feeder pulverized therein, blocking the gears and plates so that operation was impossible.

Frank Rubinno, an employee of defendant in the candy department, testified that the sugar pulverized in the feeder, clogged the gears and stopped the operation of the equipment.

Harry H. Weiss, manager and president of the plaintiff corporation, testified that he inspected defendant's plant several months prior to the installation of the sugar feeder, for the purpose of advising defendant with reference to plaintiff's equipment and making a proposal for sale and installation thereof, but made no inspection after the equipment was installed, and never saw the

is chiefly relied upon by plaintiff in support of its contention that
defendant approved the equipment and installation. We cannot agree
with this conclusion, however. The same letter contains various
expressions of the sugar feeder, expressing dissatisfaction with the
operation thereof, and complaint of plaintiff's failure to make
good the equipment.

In addition to the foregoing complaints made in writing,
defendant offered other evidence that the feeder would not operate
satisfactorily. E. M. Edwards, president of the defendant corporation,
testified that after the feeder was installed, it failed to work
properly; that the mechanism pulverized the sugar and the pressure
in back of it forced the pulverized sugar into the various working
parts and locked the motor; that he made complaints to plaintiff;
during several months, without result, never accepted the feeder nor
indicated his satisfaction therewith, and finally had it removed and
shipped back to plaintiff, who refused to accept the same.

Thomas Hestley, defendant's factory superintendent,
testified that he saw the feeder in operation at the Brooklyn plant;
that defendant's mechanics took it apart and he observed that the
granulated sugar dropping into the feeder pulverized therein, block-
ing the parts and making so that operation was impossible.

These findings, and evidence of defendant in the early
department, testified that the sugar pulverized in the feeder,
clogged the parts and stopped the operation of the equipment.

Harry E. White, manager and president of the plaintiff
corporation, testified that he requested defendant's plant manager
months prior to the installation of the sugar feeder, for the purpose
of obtaining defendant's release to plaintiff's equipment and
making a proposal for sale and installation thereof, but made no
inspection after the equipment was installed, and never saw the

feeder in operation in connection with the conveyor in defendant's plant. It appears, however, that after examining the premises and before the order was placed, Weiss wrote defendant on November 2, 1928, quoting figures for plaintiff's device and saying:

"We guarantee to successfully transfer the sugar from the overhead bin to the conveyor line at a rate corresponding to the present capacity of the system. In the event the equipment does not meet the above guarantee, we will assume the expense of removing same."

This guarantee, made for the purpose of inducing defendant to place its order with plaintiff, was evidently based upon Weiss' examination of the conveyor then in operation and his knowledge of what he believed plaintiff's sugar feeder to be capable of doing under conditions as he found them in defendant's plant. Defendant's order of November 3, 1928, accepted the guarantee, and in express terms reserved to itself the right to accept and approve the machinery and installation.

Under the contract between the parties plaintiff undertook to fulfill two requirements: (1) that the equipment would meet the acceptance and approval of the purchaser; and (2) that it would successfully convey the sugar to the receiving bin on the top floor of defendant's plant. As to the latter, the evidence clearly indicates that the device did not operate successfully and that defendant exercised extreme patience in giving plaintiff every opportunity to make it work in accordance with the plaintiff's guarantee. Moreover, under the established rule in this state, the purchaser of machinery may by contract constitute himself as judge of whether or not it meets with his approval. It was so stated in Goodrich v. Van Nortwick, 143 Ill. 445, wherein plaintiff sought to recover the purchase price of a fanning mill to clean wheat, which defendant had rejected. The court said:

leader in operation in connection with the conveyor in defendant's plant. It appears, however, that after examining the process and before the order was placed, Weiss wrote defendant on November 5, 1935, advising defendant of plaintiff's device and saying:

"We suggested in our letter of November 5, 1935, that the conveyor line at your plant be modified to the extent necessary of the system. In the event the equipment does not meet the above requirements, we will assume the expense of testing same."

This suggestion, which was the subject of a meeting held on November 11, 1935, was evidently based upon Weiss' examination of the conveyor then in operation and his knowledge of what he believed plaintiff's patent leader to be capable of doing under conditions as he found them in defendant's plant. Defendant's order of November 5, 1935, accepted the suggestion, and in express terms reserved to itself the right to accept and approve the machinery and installation.

Under the contract between the parties plaintiff understood to install the requirements: (1) that the equipment would meet the suggestions and approval of the defendant; and (2) that it would successfully convey the sugar to the receiving bin on the top floor of defendant's plant. As to the latter, the evidence clearly indicates that the device did not operate successfully and that defendant refused to accept it as being plaintiff's responsibility to make it work in accordance with the plaintiff's suggestion. However, under the stipulated facts in this case, the presence of a certain way of contract constitutes plaintiff's right to reject it and it seems clear that plaintiff's right to reject it was stated in plaintiff's letter of November 5, 1935. Plaintiff's right to reject the process, even if a finding will be given that, which defendant had rejected. The same will.

"The terms of the agreement were, that if it suited and answered the purpose. It is manifest, that it was required to answer both requirements. If it did not suit appellee, then he had the right to return the property, and he was by the terms of the contract to be the sole judge of whether it suited him. That did not depend upon the opinion or judgment of other persons. It was a right he reserved by his contract, and having reserved the right, he could not be prevented from exercising it within the limited period.

Again, if it did not answer the purpose for which it was purchased he had the right to return it within the time. But, failing to suit, he was not bound to show that it did not answer the purpose of its purchase. All evidence therefore introduced to prove that it did not work well was unnecessary, and immaterial to the issue. It did not suit appellee, and he returned the property within the stipulated period, and according to the agreement appellee was bound to prove nothing more."

Plaintiff had the burden of proving acceptance and approval of the equipment. This it failed to do and it also failed to sustain its allegation that defendant was unreasonable and arbitrary in refusing to accept. We are, therefore, of the opinion that the court should have found the issues in favor of defendant.

Accordingly the judgment of the trial court will be reversed and judgment here.

REVERSED AND JUDGMENT HERE.

WILSON, P.J. AND NEBEL, J. CONCUR.

"The terms of the agreement were, that it is
granted and reserved the right. It is granted, that
it was granted to answer both requirements. It is that
not only appears, then he has the right to return the
property, and he was by the terms of the contract to be
the same, but of which it is said that it was not
known upon the opinion or judgment of other persons. It
was a right to be returned by his contract, and having re-
turned the right, he would not be returned then. It is
it within the right of the
right. It is that it did not answer the purpose for which
it was intended he had the right to return it within the
time, but, failing to do so, he was not bound to show that
this is did not answer the purpose of the agreement. All vi-
dence therefore introduced to prove that it did not work
well was unnecessary, and immaterial to the issue. It did
not work well, and he returned the property within the
or stipulated period, and according to the agreement appears
was bound to prove nothing more."

It was also the finding that the burden of proving compliance and
approval of the agreement. This is failed to do and it also failed
to sustain the allegation that defendant was unexcusable and
actively in refusing to accept. He was, therefore, at the opinion
that the court should have found the issues in favor of defendant.
Accordingly the judgment of the trial court will be
reversed and judgment here.

REVEREND AND HONORABLE JUDGE.

WILSON, J. L. AND WILSON, J. J. JUDGES.

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34630

JOSEPH LEVINSON and HARRY
LEVINSON, Co-Partners, doing
business as Levinson's Loan
Bank,

Appellees,

v.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, a Corporation,

Appellant.

507
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 635⁴

Opinion filed on June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Suit was brought in the Municipal Court of Chicago to recover upon a policy of insurance, designated as an "Interior Office Robbery Policy", issued by defendant to Joseph Levinson and Harry Levinson, copartners doing business as Levinson's Loan Bank. The case was tried before the court and a jury, resulting in a judgment for plaintiffs in the sum of \$18,791.60, from which this appeal is prosecuted.

Plaintiffs' claim is based upon losses sustained by reason of an alleged robbery or holdup of plaintiffs' store, conducted as a loan bank or pawn shop, at 739 North Clark Street, Chicago, on the morning of March 17, 1926, committed by an unknown man who has never been identified or apprehended. The persons alleged to have been held up are Joseph Levinson, one of the partners, and Peter Spiegel, their clerk, who were alone in the pawn shop at the time.

It appears from plaintiffs' evidence that the pawn shop was located on the east side of Clark Street, a few doors south of Chicago Avenue. It consisted of a single long and narrow room, across which, about 60 feet back of the entrance, ran a partition or "grille", behind which stood two safes, the cash register and

1. In the instant case, the court is asked to grant summary judgment in favor of the defendant, Henry Layman, on the basis of the facts and circumstances set forth in the complaint.

2. The court finds that the facts and circumstances set forth in the complaint are sufficient to establish that the defendant, Henry Layman, is entitled to summary judgment.

THE COURT FINDS THAT THE DEFENDANT, HENRY LAYMAN, IS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF THE FACTS AND CIRCUMSTANCES SET FORTH IN THE COMPLAINT.

Opinion filed on June 15, 1931

MR. JUSTICE DELANEY delivered the opinion of the court. This case was brought in the Municipal Court of Chicago to recover upon a policy of insurance, designated as an "Inter-Oceanic Marine Policy", issued by defendant to Joseph Layman and Henry Layman, respondents being business of defendant's firm name. The case was tried before the court and a jury, resulting in a judgment for plaintiffs in the sum of \$12,781.00, from which this appeal is prosecuted.

Plaintiffs' claim is based upon losses sustained by reason of an alleged robbery or holding up of plaintiffs' store, conducted as a loan bank on June 17, 1925, at 735 North Clark Street, Chicago, on the morning of June 17, 1925, committed by an unknown man who has never been identified or apprehended. The persons alleged to have been held up are Joseph Layman, one of the partners, and Peter Spigal, their clerk, who were alone in the bank shop at the time.

It appears from plaintiffs' evidence that the bank shop was located on the east side of Clark Street, a few blocks south of Chicago Avenue. It consisted of a single long and narrow room, across which, about 20 feet east of the entrance, was a partition or "wall", behind which stood two safes, the cash register and

other office fixtures. At night the jewelry pledges were kept in one safe, the jewelry stock in the other. In the day time the jewelry stock was displayed in trays, about 40 in number, in the show cases and the store window. Toward the front of the store along the north side a small toilet room was partitioned off, the door to which opened eastward into the store. Between this toilet room and the grille were two parallel rows of coat hangers upon which hung suits of clothes for sale. The store usually opened for business about 9 o'clock A. M. Before that time the jewelry stock had to be removed from the safe and placed in the show cases and window, the store swept and prepared for the opening of business.

About ten minutes of nine on the morning in question Spiegel, the clerk, was admitted to the store by Joseph Levinson, who again locked the door. Spiegel commenced to sweep out and Levinson continued to get the jewelry stock ready for display. Shortly thereafter the holdup man came to the door, was admitted by Spiegel, at Levinson's direction, and the door relocked. Spiegel and the holdup man then went over to the coat racks to look at suits of clothes. Spiegel, who had been there only six weeks and was unfamiliar with the stock, could not find a plaid suit of the size to fit the holdup man and called Levinson over. Levinson left the trays of jewelry he was arranging to find the suit. The holdup man thereupon produced a revolver and ordered Spiegel and Levinson behind the coat racks to the toilet. They were then forced to lie down upon the floor, their hands and feet tied with ropes, and were commanded to lie quietly.

In the meantime Lewis, a witness for defendant arrived and found the front door locked. One Cornea was also waiting at the front entrance. Lewis looked in through the front door and saw no one. About this time a police officer, named Dalacker,

other office fixtures. At night the jewelry display cases were kept in one state, the jewelry store in the other. In the day time the jewelry store was displayed in trays, about 10 in number, in the show cases and the store window. Toward the front of the store along the north side a small toilet room was partitioned off, the door to which opened outward into the store. Between this toilet room and the grille were two partitioned rows of coat hangers upon which hung suits of clothes for sale. The store usually opened for business about 9 o'clock, A. M. Before long time the jewelry store had to be removed from the sale and placed in the show cases and window. The store swept and prepared for the opening of business. About ten minutes at nine on the morning in question Spiegel, the clerk, was admitted to the store by Joseph Levinson. He again looked the door. Spiegel commenced to sweep out and Levinson continued to get the jewelry store ready for display. Shortly thereafter the holding man came to the door, was admitted by Spiegel, at Levinson's direction, and the door unlocked. Spiegel and the holding man then went over to the next room to look at suits of clothes. Spiegel, who had seen there only six weeks and was unfamiliar with the store, could not find a field suit of the size to fit the holding man and called Levinson over. Levinson left the trays of jewelry he was arranging to find the suit. The holding man thereupon produced a revolver and ordered Spiegel and Levinson behind the next racks to the toilet. They were then forced to lie down upon the floor, their hands and feet tied with ropes, and were commanded to lie quietly.

In the meantime Levin, a witness for defendant arrived and found the front door locked. One Horner was also waiting at the front entrance. Levin looked in through the front door and saw no one. About this time a police officer, named Mahoney,

passed by and observing the two men waiting in front of the store also looked in through the door and saw no one. He told Lewis and Cornes that Levinson probably was eating in the restaurant next door to the store. The police officer stepped over to the restaurant and failing to find Levinson there went back past the pawn shop along Clark Street to make his regular box pull, leaving Lewis and Cornes still waiting.

At the corner of Clark and Erie Streets Dalacker met Officer Kirwan, his partner; they both pulled the box at 9:10 A. M. and proceeded north again on Clark Street. In the meantime the alleged holdup man had walked out of the store past Lewis and Cornes. He is described by Lewis as a large man, weighing about 200 pounds, wearing a loose fitting raglan overcoat buttoned up the front. Lewis and Cornes then finding the door unlocked entered and walked back to the grille. Lewis testified that they saw no one and that Cornes called "Levinson". There being no response they became frightened and left the store, met Dalacker and Kirwan, and with them reentered the store. Dalacker called "Levinson" from the entrance and Kirwan telephoned the Chicago Avenue police station for reinforcements. Dalacker then proceeded into the store. Again he called to Levinson and this time received a response from the toilet room. In the meantime a squad of policemen arrived from the station headed by Lieutenant McGuire, the ropes were out and Levinson and Spiegel released. Cornes could not be found and was therefore not produced at the trial on the hearing of the case. Lewis, whose testimony was taken by deposition prior to the hearing, died before the trial.

It is urged chiefly by defendant (1) that the holdup was simulated and not genuine; (2) that plaintiffs did not comply

passed by and observing the two men waiting in front of the store also looked in through the door and saw no one. He told Lewis and Barnes that Levinson previously was waiting in the restaurant next door to the store. The police officer stepped over to the restaurant and calling to find Levinson there went back past the news shop along Clark Street to make his regular beat call, leaving Lewis and Barnes still waiting.

At the corner of Clark and Erie Streets Chicago was Officer Kinnear, his partner, they both waited the box at 3:10 A. M. and proceeded north again on Clark Street. In the meantime the alleged holding man had walked out of the store past Lewis and Barnes. He is described by Lewis as a large man, weighing about 200 pounds, wearing a loose fitting vest and buttoned up the front. Lewis and Barnes then finding the door unlocked entered and walked back to the office. Lewis testified that they saw no one and that Barnes called "Levinson". There being no response they became frightened and left the store, met Delaney and Kinnear, and with them returned the store. Delaney called "Levinson" from the entrance and Kinnear telephoned the Chicago Avenue police station for reinforcements. Delaney then proceeded into the store. Again he called to Levinson and this time received a response from the office door. In the meantime a squad of policemen arrived from the station headed by Lieutenant Mueller, the ropes were cut and Levinson and Delaney released. Barnes could not be found and was therefore not produced as the trial on the hearing of the case. Lewis, whose testimony was taken by deposition prior to the hearing, died before the trial.

It is urged chiefly by defendant (1) that the holding was unlawful and not genuine; (2) that plaintiff's life was not

with the provisions of the policy which required the filing of a sworn proof of loss with the company at its home office in New York within 60 days of the date of the alleged loss; (3) that defendant did not receive a fair trial because of the prejudicial conduct of attorneys for plaintiff in propounding improper questions to one of the witnesses, and in making improper remarks during the trial and upon the argument of the case; (4) that the improper admission of evidence alone should cause a reversal where the evidence is conflicting and the question of liability is close; (5) that the court erred in giving and refusing improper instructions to the jury.

The policy in question required the proof of loss (1) to contain a complete inventory of the stolen property, stating the original cost and cash value of each article at the time of loss; (2) to define the interest of the assured in the property; (3) to include reasonable evidence of the commission of the robbery and the time it occurred; and (4) to describe the other insurance, if any, and the purposes for which the premises were occupied.

The evidence discloses that on the day of the robbery notice of the holdup was given to the authorized agents of the defendant in the City of Chicago, who sent one Stott to plaintiffs' place of business to check the loss. Stott arrived there about one o'clock on the day of the holdup and with the assistance of Harry Levinson proceeded to compile the required information; he remained there all that day until eight o'clock in the evening, all of the following day and about two hours of the third day to complete the work. In order to ascertain the loss they proceeded to check off upon the stock book with a heavy blue pencil all articles which could be found in the store. When this had been completed and all articles still on the premises were checked off against the stock book, Stott listed the missing articles, i.e., those not checked, sold or disposed of, and not checked off as being still in the store. This list, comprising

with the provisions of the policy which required the filing of a sworn proof of loss with the company at its home office in New York within 60 days of the date of the alleged loss; (3) that defendant did not receive a fair trial because of the prejudicial conduct of the attorney for plaintiff in propounding improper questions to one of the witnesses, and in making improper remarks during the trial and upon the argument of the case; (4) that the improper admission of evidence alone should amount to a reversal where the evidence is conflicting and the question of liability is close; (5) that the court erred in giving and refusing improper instructions to the jury.

The policy in question provided the proof of loss (1) to contain a complete inventory of the stolen property, stating the original cost and cash value of each article at the time of loss; (2) to define the interest at the time of the robbery and to include reasonable evidence of the character of the robbery and the time it occurred; and (3) to describe the other insurance, if any, and the purposes for which the business was conducted.

The evidence also shows that on the day of the robbery notice of the robbery was given to the authorized agents of the defendant and in the City of Chicago, who sent one Stott to plaintiff's place of business to advise the loss. Stott arrived there about one o'clock on the day of the robbery and with the assistance of Harry Levinson proceeded to compile the required information; he remained there all that day until eight o'clock in the evening, all of the following day and about two hours of the third day to complete the work. In order to ascertain the loss they proceeded to check off upon the stock book with a heavy blue pencil all articles which could be found in the store. When this had been completed and all articles still in the premises were checked off against the stock book, Stott listed the missing articles, i.e., those not checked, sold or disposed of, and

not checked off as being still in the store. This list, containing

twenty-one pages, was prepared entirely in Stott's handwriting and introduced in evidence. In making this list Levinson produced all of the books and records requested for Stott's inspection and Stott testified that the books were kept in an orderly way, and that Levinson showed him proof of the purchases or the entry in his book for every article lost, about which he made any inquiry. It is not disputed that the value of the jewelry listed by Stott, as shown by the books, exceeded \$25,000, and that all of the items so listed were actually missing when Stott prepared his list. The articles taken or missing and so listed consisted of diamond rings, scarf pins, diamond emblems and some unset diamonds. Some of these articles were attached to small display cards which were also missing. The complete check up by Stott and Levinson disclosed that a total of 173 cards were gone and a total of about 375 diamonds and articles of jewelry were missing.

On March 30, 1935, Stott returned to the plaintiffs' store to get Joseph Levinson's signature to a statement. On that occasion he told Harry Levinson he would like to see some of the vouchers for the purchase of stolen articles, and Harry Levinson produced and showed Stott invoices or cancelled checks concerning the purchase of every article about which he inquired.

Between March 17th and 30th, defendant secured a number of written statements from the plaintiffs and Spiegel. On the afternoon of the holdup Stott interrogated Spiegel regarding what had happened and wrote out a statement which was presented to Spiegel and signed by him. On the same afternoon Stott also followed the same procedure with reference to Harry Levinson, whom he interrogated and procured his signature to a statement prepared by Stott. Within a day or two after the holdup McNamara, a claim attorney for the agent of defendant in Chicago, called Harry Levinson and Spiegel down to his office and examined them separately. There

lastly and hence, was prepared entirely in Stott's handwriting and introduced in evidence. In making this list Levinson produced all of the books and records requested for Stott's inspection and Stott testified that the books were kept in an orderly way, and that Levinson showed him proof of the purchases or the entry in his book for every article lost, about which he made any inquiry. It is not disputed that the value of the jewelry listed by Stott, as shown by the books, extended \$25,000, and that all of the items so listed were actually missing when Stott prepared his list. The articles taken or missing and so listed consisted of diamond rings, wrist pins, diamond earrings and some small diamonds. Some of these articles were attached to small display cards which were also missing. The complete check up by Stott and Levinson disclosed that a total of 175 cards were gone and a total of about 375 diamonds and articles of jewelry were missing.

On March 20, 1932, Stott returned to the plaintiff's store to get Joseph Levinson's signature to a statement. On that occasion he told Harry Levinson he would like to see some of the vouchers for the purchase of stolen articles, and Harry Levinson produced and showed Stott invoices or cancelled checks concerning the purchase of every article about which he inquired.

Between March 17th and 20th, defendant secured a number of written statements from the plaintiff and Spiegel. On the afternoon of the day Stott interrogated Spiegel regarding what had happened and wrote out a statement which was presented to Spiegel and signed by him. On the same afternoon Stott also followed the same procedure with reference to Harry Levinson, when he interrogated and procured his signature to a statement prepared by Stott. Within a day or two after the holding hearings, a claim attorney for the agent of defendant in Chicago, called Harry Levinson and called him to his office and examined him separately. There

were present at each examination Mr. McNamara, his assistant, one Shipley who was the chief claim agent of the defendant, and Miss Jack, McNamara's secretary. With the assistance of Shipley, McNamara questioned Spiegel and Harry Levinson in minute detail concerning the holdup. During the course of the interrogation McNamara dictated a statement to the stenographer and with reference to part of the examination Miss Jack took down the complete questions and answers. Shortly thereafter when the statements had been written up Stott took them out to the pawn shop and procured the signatures of both Harry Levinson and Spiegel.

Joseph Levinson was taken ill on the afternoon of the holdup and did not return to work for a week. Shortly after his return he was called down to McNamara's office and the same process was repeated as to him. On March 30, Joseph Levinson signed a statement prepared by Stott, based on his examination. All of the various statements, herein referred to, were sworn to and notarized by Stott as a notary public, and turned over by Stott to McNamara who in turn forwarded them, together with the list of stolen articles compiled by Stott, to the defendant's home office in New York.

Harry Levinson testified that after Stott had finished examining the receipts and vouchers submitted to him he said -

"I am very well satisfied with how you keep your records, that you can trace the different items and show invoices and where the merchandise comes from";

that when he went down to McNamara's office

"Mr. McNamara introduced himself to me and told me that he wanted me to come down here just to make a statement, that the New York office wanted to know details, and that Mrs. Stott had taken the statement of loss, and he wanted this statement to accompany the statement of loss to go to New York; just as to my knowledge of what happened and what took place on March 17th."

Levinson further testified that when his interrogation by McNamara was completed the latter said to him

"Now, Mr. Levinson, this statement we are going

were present at such examination Mr. Mahoney, his assistant, one
clerk who was the chief agent of the telephone, and Miss
Jack, Mahoney's secretary. With the assistance of Philip, Mahoney
questioned Philip and Harry Levinson in minute detail concerning
the holding. During the course of the investigation Mahoney dis-
tated a statement to the stenographer and with reference to part of
the examination Miss Jack took down the complete questions and
answers. Shortly thereafter when the statements had been written up
Miss Jack took them out to the head clerk and presented the signatures of
both Harry Levinson and Philip.

Joseph Levinson was taken ill on the afternoon of
the holding and did not return to work for a week. Shortly after his
return he was called down to Mahoney's office and the same process
was repeated as to him. On March 10, Joseph Levinson signed a
statement prepared by Stott, based on his examination. All of the
various statements, herein referred to, were sworn to and notarized
by Stott as a notary public, and turned over by Stott to Mahoney
who in turn furnished them, together with the list of stolen articles
compiled by Stott, to the defendant's home office in New York.
Harry Levinson testified that after Stott had

finished examining the receipts and vouchers submitted to him he said -
"I am very well satisfied with how you have kept your
records. That you can trace the different items and when
invoices and where the merchandise comes from."

That when he went down to Mahoney's office
"Mr. Mahoney introduced himself to me and told me
that he wanted me to come down here just to make a statement
that the New York office wanted to know details, and that
Mr. Stott had taken the statement of Louis, and he wanted this
statement to accompany the statement of Louis to go to New
York; just so as my knowledge of what happened and what
took place on March 17th."

Levinson further testified that when the inspec-
tion of his work was completed the latter said to him

to send that all to New York, you will hear from us probably a little later on."

And that when Stott brought the completed statement out for Harry Levinson's signature, Stott said to him,

"Well, there will be nothing further, I believe, if there is, we will get in touch with you. At the present, nothing further, I guess, to be done about the stock and so forth."

It further appears from Harry Levinson's testimony that about six weeks after the holdup he called McNamara over the telephone and had the following conversation with him:

"I said, 'McNamara, has that check of ours come in yet?' He said, 'No, but' he says, 'don't worry about it.' He says, 'It may be in any day now'. He says, 'I will let you know,' he says, 'when it comes in'."

Joseph Levinson, the other plaintiff, testified that when he had completed his statement to McNamara and Shipley in McNamara's office, the latter said to him,

"Mr. Levinson, I thank you very much for coming down here, sorry to take up your time. I am only the Chicago representative; the bosses, the company is in New York."

and that when Stott presented the completed statement for signature and the same was signed by Joseph Levinson after some corrections were made thereon by him. Stott said:

"Well, that is all I believe you will ever be bothered about; you are through, and this has got to go to New York."

McNamara denied having made the foregoing statements to Harry Levinson, except he admitted saying that the statements he had taken would be sent to New York, and upon cross examination as to the various conversations had with the Levinsons he testified in part as follows:

"Q. Did you at any time suggest to them that there should be something furnished to you?

A. Yes, sir.

Q. And what did you suggest?

to send him all to New York, you will hear from me
probably a little later on."

and that when that brought the completed statement out for Harry

Levinson's signature, that said to him,

"Well, there will be nothing further, I believe,
if there is, we will get in touch with you. At the
present, nothing further, I guess, to be done about the
stock and so forth."

It further appears from Harry Levinson's testimony that about six
weeks after the holding he called Rosenbaum over the telephone and had

the following conversation with him:

"I said, 'Rosenbaum, has that check of ours come
in yet?' He said, 'No, but we are very sorry about
it.' He said, 'It may be in my bag now.' He says, 'I
will let you know,' he says, 'when it comes in.'"

Joseph Levinson, the other plaintiff, testified that

when he had completed his statement to Rosenbaum and Shipley in

Rosenbaum's office, the latter said to him,

"Mr. Levinson, I thank you very much for coming
down here, sorry to take up your time. I am only the
Chicago representative; the person, the company is in
New York."

and that when that presented the completed statement for signature

and the same was signed by Joseph Levinson after some conversation

were made between him, that said:

"Well, that is all I believe you will ever be
bothered about; you are through, and this has got to go
to New York."

Witnesses denied having made the foregoing statements

to Harry Levinson, except he admitted saying that the statements

he had taken would be sent to New York, and upon cross examination

as to the various conversations had with the Levinsons he testified

in part as follows:
"Q. Did you at any time suggest to them that there
should be something furnished to you?"
A. Yes, sir.

and that was the end of it?

A. I suggested that if they had further proof they should furnish it, or the loss, to come under our policies.

Q. You told them to furnish claims on proofs of loss, did you?

A. No, I did not say proof of loss. If you mean proof of loss as a document -

Q. Yes.

A. - I did not want to say that in the answer. What I meant to say was that they should furnish further proof that they had a loss that would be covered under our policy; in other words, evidence - let me use the word - they should furnish other evidence if they had it.

I never said anything to them about reporting it on forms, proof of loss, furnished by the company. I did not furnish them with any forms of proof of loss."

Stott denied all of the statements attributed to him by Levinson.

The first count of plaintiffs' statement of claim alleges that they furnished proof of loss as required by the policy. The second count is predicated on the theory that there was a waiver of the proof of loss. At the close of plaintiffs' case the court allowed defendant's motion to strike the evidence so far as it related to the first count and in effect directed a verdict against plaintiffs as to this count, leaving in the case only the second count which was based upon the theory of waiver.

Plaintiffs still assert that the information thus given to defendant's agents, consisting of a complete and accurate list of the missing articles, together with sworn statements in writing taken from both of the plaintiffs and their clerk, setting forth the circumstances of the holdup in minute detail, and the production of vouchers and checks for defendant's inspection, showing proof of the purchase or entry of every missing article, constituted a full compliance with the requirements of the policy, as to proof of loss. They urge further, however, that if such proof of loss was not in fact furnished, as held by the trial court,

A. I suggested that if they had further proof they should furnish it, or the case, to some other person.

Q. You told them to furnish claim on proofs of loss, did you?

A. No, I did not say proof of loss. If you need proof of loss as a document -

Q. Yes.
A. - I did not want to say that in the answer. What I meant to say was that they should furnish further proof that they had a loss that would be covered under our policy; in other words, evidence - let me use the word - they should furnish other evidence if they had it.

I never said anything to them about reporting it on forms, proof of loss, furnished by the company. I did not furnish them with any form of proof of loss.

What I said was all of the statements referred to

him by Levinson.

The first count of plaintiffs' statement of claim alleges that they furnished proof of loss as required by the policy. The second count is predicated on the theory that there was a waiver of the proof of loss. At the close of plaintiffs' case the court allowed defendant's motion to strike the evidence so far as it related to the first count and in effect allowed a verdict against plaintiffs as to this count, leaving in the case only the second count which was based upon the theory of waiver.

Plaintiffs still assert that the information thus given to defendant's experts, consisting of a complete and accurate list of the missing articles, together with sworn statements in writing taken from both of the plaintiffs and their clerk, setting forth the circumstances of the holding in minute detail, and the production of vouchers and checks for defendant's inspection, showing proof of the purchase or entry of every missing article, constituted a full compliance with the requirements of the policy, as to proof of loss. They urge further, however, that if such proof of loss was not in fact furnished, as held by the trial court,

the waiver thereof under the facts in this case cannot be denied. With reference to the latter contention defendant insists that there was no waiver of the provisions of the policy requiring that a proof of loss be furnished; that the proceedings hereinbefore described constituted nothing more than an investigation of the loss by defendant and did not excuse the insured from filing a proof of loss; that neither the defendant's investigator Stott, nor its claim agent McNamara, had authority to waive the filing of a proof of loss, and consequently there could be no waiver of this requirement by the company because of any actual representations of these agents.

With reference to these contentions, however, we regard the following decisions in this state as controlling. In Drilling House Ins. Co. v. Dowdall, 159 Ill. 179, the fire insurance Company's adjuster called on the insured shortly after the fire inspected the losses, made a memorandum of the hay, corn and oats burned, inquired as to the price or value of it, offered a certain sum in settlement, which was refused, and departed. Plaintiff, when asked on cross examination whether he had given a signed statement to the company, said:

"He asked us to give him proof of loss, and he copied it down."

When the time required in the policy for furnishing proof of loss had expired the company refused payment because no proof had been filed. A verdict and judgment was had for plaintiff. On appeal the court refused to reverse the judgment and said:

"While the question of waiver is usually one of fact and for the jury, still, if there is no conflict in the evidence on that subject it becomes a matter of law, to be determined by the court. The testimony of the plaintiff as to what took place between herself and the company's agent, Smith, is wholly uncontradicted. She says he called upon her for proofs of loss, and took down, in writing, what she and her son told him. True, she did not furnish him proofs within the requirement of the policy; but if the agent called for 'proofs of loss', and without objection accepted what was given him in response to that request, the insured surely had a right to assume no other proofs would be required."

the writer thereof under the facts in this case cannot be denied.
With reference to the latter contention defendant insists that there
was no waiver of the provisions of the policy requiring that a proof
of loss be furnished; that the proceedings heretofore described
constituted nothing more than an investigation of the loss by defendant
and did not amount to the making of a proof of loss; that
without the defendant's investigation being made, and its results
known, defendant was entitled to give the filing of a proof of loss, and
consequently there could be no waiver of this requirement by the
company because of any actual investigation of these matters.

With reference to these contentions, however, we
regard the following decisions in this state as controlling. In
Pauline Knapp Ins. Co. v. Janney, 120 Ill. 170, the line insurance
company's adjuster called on the insured shortly after the fire
inspected the damage, made a memorandum of the day, hour and date
of the fire, inquired as to the price or value of it, offered a certain
sum in settlement, which was refused, and departed. Plaintiff
then asked of these examinations whether he had given a signed

statement to the company, said:
"He asked me to give him proof of loss, and he
said 'copy it down'."

When the time required in the policy for furnishing proof of loss had
expired the company refused payment because no proof had been filed.
A verdict and judgment was had for plaintiff. On appeal the court

refused to reverse the judgment and said:

"While the question of when a loss is actually and
fact and for the policy, still, if there is no conflict in
the evidence on this subject it becomes a matter of law,
to be determined by the court. The testimony of the
plaintiff as to what took place between himself and the
company's agent, which is really uncontradicted, and
which he called upon her for proof of loss, and took down,
in writing, that she had said him. That, she did
not furnish him proof within the requirement of the policy;
but if the agent called for 'proof of loss', and if that
evidence established what was given him in response to that
request, the insured surely had a right to receive no other

This decision was approved in the recent case of Fray v. The National Fire Ins. Co., 341 Ill. 431, where the defendant insurance company appealed from a verdict and judgment on a fire insurance policy under which no proof of loss had been filed, and asserted that the evidence did not show it to have been waived. The court, however, said:

"The rule is settled that an insurance company may, through its agent, waive proof of loss without the use of express words. This may be done by his acts and conduct inconsistent with an intention to enforce the strict compliance with the conditions of the policy, which conduct is calculated to lead the insured to believe that the company did not intend to require such compliance. (Citizens' Ins. Co. v. Stoddard, 197 Ill. 330; Milwaukee Mechanics' Ins. Co. v. Schallman, 188 id. 213; Dwelling House Ins. Co. v. Dowdall, 159 id. 179.) The question was one for the jury, and there was ample evidence to justify the trial court in overruling appellant's motion, at the close of the evidence, for an instructed verdict."

The doctrine thus enunciated in the foregoing cases and decisions cited therein seems to us to represent the correct rule in this state. The only object of the provision contained in the policy requiring proof was to afford the company evidence of the facts and circumstances necessary to establish a valid claim. All of the information that could have been included in a formal proof of loss was obtained by defendant from plaintiffs through an inspection of the latter's books, vouchers and records, and a minute examination of the plaintiffs and their clerk with reference to the manner in which the holdup occurred. The procedure followed by defendant's agents, their acts and conduct was manifestly inconsistent with any intention to enforce strict compliance with the conditions of the policy, and was evidently calculated to lead the insured to believe that the company did not intend to require such compliance. Under the decisions we do not regard the question of authority as controlling. The conduct and acts of the company's representatives, without the use of express words, was sufficient to constitute what the court in the Dwelling House case designated as an estoppel

This decision was reversed in the recent case of First Nat. Bk. v. The National
Life Ins. Co., 241 Ill. 521, where the defendant insurance company
appealed from a verdict and judgment on a fire insurance policy
under which no proof of loss had been filed, and asserted that the
evidence did not show it to have been waived. The court, however, said:

"The rule is settled that an insurance company
may, through its agent, waive proof of loss without the
use of express words. This may be done by his acts and
conduct inconsistent with an intention to enforce the
strict compliance with the conditions of the policy, which
conduct is calculated to lead the insured to believe that
the company did not intend to insist upon such compliance."
(Citation: First Nat. Bk. v. The National Life Ins. Co., 241 Ill. 521, 522; First Nat. Bk. v. The National Life Ins. Co., 241 Ill. 521, 522; First Nat. Bk. v. The National Life Ins. Co., 241 Ill. 521, 522.) The decision was
affirmed, and the case was sent back to the trial court
for a new trial, the court being of the opinion that the
evidence of the agent, for an intended verdict.

The doctrine thus enunciated in the foregoing cases
and decisions cited therein seems to us to represent the correct
rule in this state. The only object of the provision contained in
the policy requiring proof was to afford the company evidence of the
facts and circumstances necessary to establish a valid claim. All
of the information that could have been included in a formal proof
of loss was obtained by defendant from plaintiffs through an
inspection of the latter's books, vouchers and records, and a minute
examination of the plaintiffs and their clerk with reference to the
manner in which the holding occurred. The procedure followed by
defendant's agents, their acts and conduct was manifestly inconsistent
with any intention to enforce strict compliance with the conditions
of the policy, and was evidently calculated to lead the insured to
believe that the company did not intend to require such compliance.
Under the decision we do not regard the position of defendant as
controlling. The conduct and acts of the company's representatives,
without the use of express words, was sufficient to constitute what
the court in the leading case cited above has held to be an intended

en pais, and precluded it, after the expiration of 60 days, from insisting upon strict compliance with the provisions of the contract.

It is next urged that the court erred in receiving in evidence the statement of Earl G. Lewis. With reference to this contention it appears that Lewis, a colored man, who was waiting at the door of the pawn shop when the holdup man came out, had died prior to the trial of the case. However, defendant had taken his deposition before he died, which was read at the trial. On the taking of the deposition counsel for plaintiffs cross-examined Lewis in their behalf, in the course of which he showed Lewis a written statement signed and identified by him, which gave an account of what he had witnessed. That differed in two respects from his evidence taken by deposition, as follows: (1) In his deposition Lewis stated that the holdup man wore a derby hat. In his statement, "I think he wore a cap, although the other man said he wore a derby"; and (2) In the deposition Lewis testified that the holdup man had one hand in his coat pocket and the other out, whereas the statement says that, "he had his hand in his pocket, and I thought at the time that he had a gun in his pocket." After counsel had completed his cross-examination of Lewis, defendant's attorney demanded that he be shown the statement which was identified by Lewis and marked by the court reporter. The request was refused by plaintiffs' attorney, whereupon counsel for defendant stated that he would object to the introduction of the statement during the trial or to the use thereof in any way whatever, unless it was then produced before the notary so that he might use it in redirect examination. Upon the hearing of the case before the court, the deposition was introduced by defendant as part of its case. The statement referred to was shown to Gordon, the court reporter, who took the evidence upon the hearing of the deposition as well as upon the trial, and he identified it as the document upon which he had placed his identification mark, without being first sworn as a witness,

in this, and produced it, after the expiration of 30 days, from in-
cluding upon their compliance with the provisions of the contract.
It is now urged that the court erred in receiving
in evidence the statement of Earl G. Lewis. With reference to this
contention it appears that Lewis, a colored man, who was sitting at
the door of the room when the holding man came out, had died
prior to the trial of the case. However, defendant had taken his
deposition before he died, which was read at the trial. On the
taking of the deposition counsel for plaintiff's cross-examined Lewis
in their behalf, in the manner which he showed Lewis a written
statement signed and identified by him, which gave an account of
what he had witnessed. That differed in two respects from his evidence
taken by deposition, as follows: (1) In his deposition Lewis stated
that the holding man wore a derby hat. In his statement, "I think
he wore a cap, although the other man said he wore a derby"; and (2)
in the deposition Lewis testified that the holding man had one hand
in his coat pocket and the other out, whereas the statement says that
"he had his hand in his pocket, and I thought at the time that he had
a gun in his pocket." After counsel had completed his cross-examination
of Lewis, defendant's attorney demanded that he be shown the statement
which was identified by Lewis and marked by the court reporter. The
request was refused by plaintiff's attorney, whereupon counsel for
defendant stated that he would object to the introduction of the
statement during the trial or to the use thereof in any way whatever,
unless it was then produced before the jury so that he might see it
in direct examination. Upon the hearing of the case before the
court, the deposition was introduced by defendant as part of its case.
The statement referred to was shown to Gordon, the court reporter,
who took the evidence upon the hearing of the deposition as well as
upon the trial, and he identified it as the document upon which he had
placed his identification mark, without being first sworn as a witness.

and the statement was thereafter introduced in evidence. It is urged that this constituted error on the part of the court and Section 30, Chapter 51, Ill. R. S. is relied upon as ground for the contention. This section of the statute provides "that all exhibits produced to the said commissioner * * or which shall be proved or referred to by any witness * * shall be enclosed, sealed up, and directed to the clerk of the court in which the action shall be pending." Edleman v. Gilmore, 75 Ill. 367, is cited by defendant to sustain its contention. This was a suit on a note and neither the note, the interrogatories, the commission nor the other papers were returned to the clerk of the court, but were sent to the attorneys for the plaintiffs, and the court simply said that there was such material departure from the requirements of the statute in respect to notes and depositions that the court should have sustained the defendant's motion before trial to suppress them. There were in the Edleman case two elements which readily distinguish that decision from the instant case. The defendant there moved to suppress the depositions before trial, and there was such a material departure from the requirements of the statute as to make the depositions inconsistent. It was laid down as a general rule in Gasteel v. Millison, 41 Ill. App. 61, that if the cross-examining counsel after putting a paper in the hands of a witness merely asks as to its identity, his adversary will have no right to see the document; but if the paper is used for the purpose of refreshing the memory of the witness, or if any question be put regarding its contents a sight of the document may then be demanded by the opposite counsel. In the case at bar the statement in question was not used on cross examination to refresh Lewis' memory, but was merely presented to him for identity of his signature preliminary to offering it in evidence upon the hearing of the case, and we believe the rule laid down in the Gasteel case to be applicable to the situation before us.

and this statement was thereafter introduced in evidence. It is

argued that this constituted error on the part of the court and

section 30, Chapter 11, L. R. is relied upon as ground for the

contention. This section of the statute provides "that all exhibits

produced to the said commissioner " or which shall be proved or

related to by any witness " shall be unclassified, sealed up, and

directed to the clerk of the court in which the action shall be

pending." Illinois v. Williams, 375 Ill. 387, is cited by defendant to

support its contention. This was a civil case and neither the

note, the testimony, the deposition nor the other papers were

returned to the clerk of the court, but were sent to the attorneys

for the plaintiffs, and the court simply said that there was such

material deposited from the requirements of the statute in respect

to notes and depositions that the court should have maintained the

defendant's motion before trial to suppress them. There were in

the Williams case two elements which readily distinguish that decision

from the instant case. The defendant there moved to suppress the

depositions before trial, and there was such a material deposition from

the requirements of the statute as to make the deposition inadmis-

sible. It was held even as a general rule in Illinois v. Williams,

375 Ill. 387, that in the cross-examining counsel after getting

a paper in the hands of a witness merely takes on its identity,

his adversary will have no right to see the document; but if the paper

is used for the purpose of refreshing the memory of the witness, or

if any question be put regarding its contents a right of the document

may then be demanded by the opposite counsel. In the case at bar

the statement in question was not used on cross examination to

refresh defendant's memory, but was merely presented to him for identity

of his signature preliminary to offering it in evidence upon the ques-

tion of the case, and we believe the rule laid down in the instant

case to be applicable to the situation before us.

Moreover Lewis' statement did not differ from his testimony in any substantial particular, and there was nothing in it which would tend to impeach his testimony. Inasmuch as the alleged holdup man was never apprehended nor identified, the question whether he wore a cap or a derby hat could not be material as tending to establish his identification, and the discrepancy between Lewis' testimony in the deposition and that contained in his statement, wherein he gives it as his opinion that the holdup man had a gun in his pocket, merely corroborates that which is undisputed in the case, namely, that Harry Levinson and Spiegel were held up at the point of a gun. If the person whom Lewis saw leaving the premises after the holdup was the one that committed the robbery, he probably still had the gun which he used in the commission of the crime, and this would be true whether the holdup was genuine or only simulated.

The conduct of plaintiffs' attorney in asking improper questions of witnesses and in making vague, inflammatory and prejudicial statements during his argument are urged as further ground for reversal. Aside from the several instances in the record where counsel on both sides somewhat overstepped the bounds of propriety, two circumstances are urged as being especially prejudicial. One occurred in connection with the cross examination of the witness Leventhal, who entered the employ of plaintiffs in September 1935, more than six months after this alleged holdup. His testimony was generally to the effect that on a number of occasions while working for Levinson, the latter had purchased stolen property which he knew to be stolen. He mentioned a number of specific purchases of personal property from a man named White, whom he characterized as a shop lifter. Leventhal identified a photograph of White taken from the "rogues' gallery" of the police department, which was admitted in evidence over plaintiff's objection. Leventhal also

Moreover Lewis' statement did not differ from his testimony in any substantial particular, and there was nothing in it which would tend to impeach his testimony. Inasmuch as the alleged holding was never expounded nor identified, the question whether he wore a cap or a derby hat could not be material as tending to establish his identification, and the discrepancy between Lewis' testimony in the deposition and that contained in his statement, wherein he gives it as his opinion that the holding man had a gun in his pocket, merely corroborates that which is undisputed in the case, namely, that Harry Levinson and Wright were held up at the point of a gun. All the person whom Lewis saw leaving the premises after the holding was the one that committed the robbery, he probably still had the gun which he used in the commission of the crime, and this would be true whether the holding was genuine or only simulated.

The conduct of Plaintiff's attorney in asking improper questions of witnesses and in making vague, inflammatory and prejudicial statements during his argument are urged as further grounds for reversal. Aside from the several instances in the record where counsel on both sides somewhat overstepped the bounds of propriety, two circumstances are urged as being especially prejudicial. One occurred in connection with the cross examination of the witness Levinthal, who entered the employ of Plaintiff in September 1935, more than six months after this alleged holding. His testimony was generally to the effect that on a number of occasions while working for Levinson, the latter had purchased stolen property which he knew to be stolen. He mentioned a number of specific purchases of personal property from a man named White, whom he characterized as a cheap thief. Levinthal identified a photograph of White taken from the "rogues' gallery" of the police department, which was admitted in evidence over Plaintiff's objection. Levinthal also

testified to a conversation which he was alleged to have overheard between plaintiffs involving the revocation of Harry Levinson's license as a pawn broker in 1932, and the payment of money to an alderman of the ward for reissuance thereof. All of this testimony was given on direct examination of Leventhal by defendant's counsel over plaintiff's objection. On cross examination Leventhal was asked if he had been accused of stealing from his last employer, Mr. Solar of Des Moines, and whether he had ever been arrested. Objections to these questions were sustained by the court. It is urged, however, that the mere asking of the questions was so prejudicial as to require reversal.

We are of the opinion that much of the examination of Leventhal on direct examination was improper and highly prejudicial to plaintiffs, having no direct bearing on the issue as to whether or not the robbery was committed. In conducting this line of examination defendant voluntarily brought into the case not convictions, but mere verbal accusations of crime in connection with totally unrelated matters to impeach plaintiffs. Defendant introduced other evidence of a similar character at various stages of the trial, all calculated to impeach plaintiffs' reputation. For instance, the defendant's witness, Daniel Murphy, an acting police captain, testified on behalf of defendant that he said to Joseph Levinson after the alleged robbery:

"Mr. Levinson we are too busy with real holdups here, no time to spend on phoney holdups. I will be very frank with you. In my opinion, you were not held up at all, and, so far as the police department is concerned, you are not going to be assisted to do any collecting. So far as we are concerned, I am going to forget about this holdup."

Another instance was the introduction of a bill of complaint filed by Joseph Levinson against Harry Levinson for dissolution of the copartnership existing between them subsequent to the alleged holdup. Defendant asked one of the Levinsons about this proceeding on

testified to a conversation which he was alleged to have overheard between plaintiffs involving the revocation of Henry Levinson's license as a pawn broker in 1933, and the payment of money to an attorney of the law for retainer fees thereon. All of this testimony was given on direct examination of Levinson by defendant's counsel over plaintiff's objection. On cross examination Levinson was asked if he had been accused of stealing from his last employer, Mr. Peter of New Orleans, and whether he had ever been arrested. Objections to these questions were sustained by the court. It is urged, however, that notwithstanding all the questions was no prejudicial as to require reversal.

We are of the opinion that much of the examination of Levinson on direct examination was improper and highly prejudicial to plaintiffs, having no direct bearing on the issue as to whether or not the robbery was committed. In conducting this line of examination defendant valiantly brought into the case not only evidence but also other evidence in order to impeach plaintiffs' testimony. Levinson's testimony is impeached by other evidence of a similar character at various stages of the trial, all objected to by plaintiffs' reputation. For instance, the defendant's witness, Daniel Murphy, an acting police captain, testified on behalf of Levinson that he said he taught Levinson after the Miami robbery:

"Mr. Levinson we are two guys with real bad luck, making no money at all. I will be very lucky with you. In my opinion, you may not hold up at all, but you are a real tough guy. I am convinced, for you are going to be wanted to do any collecting, so let me be associated, I am going to testify about this holding."

Another instance was the introduction of a bill of complaint filed by Joseph Levinson against Henry Levinson for dissolution of the copartnership existing between them subsequent to the Miami robbery. Defendant called one of the witnesses about this proceeding on

cross examination. Counsel for plaintiffs objected to the question as being immaterial and incompetent. Defendant, however, persisted in referring to the chancery proceeding until plaintiffs' attorney, apparently fearful that the jury might suspect something material and injurious to plaintiff was being withheld from them, consented to the introduction of the bill of complaint, and defendant's counsel thereupon read the entire bill to the jury. Manifestly it had nothing to do with the issues in this case and tended only to inject some extraneous matter into the record, which was calculated to prejudice the jury against plaintiffs.

While the particular questions propounded to Leventhal on cross examination were technically improper, objections thereto were promptly sustained by the court, and we believe that in view of the circumstances, they were not so prejudicial as to require a reversal. The bulk of Leventhal's testimony had to do with accusations of various crimes alleged to have been committed by plaintiffs at different times, and much of his testimony is subject to the same criticism as defendant makes of Leventhal's cross examination, and to a greater degree. Consequently the defendant is in no position to ask a reversal from this court on the ground that plaintiffs attempted to impeach Leventhal by means of similar incompetent evidence.

The other complaint has to do with remarks of counsel upon argument before the jury. One of the instances complained of is the following:

"And that is what he did in examining every witness. He simply tried his best by a lot of rapid fire question, by a lot of tricky questions, by a lot of questions that no man in the world could answer yes or no -

Mr. Everett: Just a minute. I object to that statement of trickery.

Mr. Hawkins: (Continuing) - by a lot of - I withdraw it your Honor - by a lot of impossible questions

other examination. Counsel for plaintiff objected to the question as being immaterial and incompetent. Defendant, however, persisted in relating to the answers previously given by plaintiff, attorney, apparently feeling that the jury might suspect something material and irrelevant to plaintiff was being withheld from them, connected to the introduction of the bill of complaint, and defendant's counsel thereupon moved the entire bill to the jury. Manifestly it had no-thing to do with the issues in this case and tended only to inject some extraneous matter into the record, which was excluded by the judge. The jury against plaintiff.

While the particular questions propounded to defendant on cross examination were technically improper objections thereto were properly sustained by the court, and we believe that in view of the circumstances, they were not so prejudicial as to require a reversal. The bulk of defendant's testimony had to do with conversations of various crimes alleged to have been committed by plaintiff at different times, and much of his testimony is subject to the same criticism as defendant's. Consequently the defendant's testimony, and to a greater degree, consequently the defendant is in no position to ask a reversal from this court on the ground that plaintiff attempted to impeach defendant by means of similar inconsistent evidence.

The other complaint was to do with remarks of counsel upon argument before the jury. One of the instances complained of is the following:

"And that is what he did in this case. He simply tried to lead the jury to believe that he was in the world would never get to no-thing. I object to that."

At. (plaintiff): That is a mistake. I object to that statement of counsel.

that nobody could answer yes or no, and when the witness says, 'let me answer the question,' 'No, no, I don't want to hear that.'

Why, the questions were like this: 'When did you stop beating your wife,' "

Another appears as follows:

" * * * and take the money from their assured, and then come in here and in the next breath say, 'you are harlots and prostitutes and crooks and criminals. We will take your money, but if you have a loss, we won't pay it.' I say that is contemptible, and I put them below any pawnbroker that I ever heard of."

It should be pointed out, however, that these remarks were made in reply to the argument of defendant's counsel from part of which we quote a length

"Now, who are the associates of pawnbrokers? The associates are burglars, holdup men, shoplifters, pickpockets; and you don't have to go on the record of this case to determine that. You gentlemen in determining this case have a right to bring into your jury room your practical experience, and we know as practical men that the pawnshop today is a menace. We know that the people of Chicago today are required to pay from ten to fifteen million dollars every year to maintain a police force.

* * * * *

Can you imagine a pawnshop man buying all these articles from one man and not suspecting they were stolen? One day a musical instrument, another day some other instrument, another day something else, a camera that he bought from him, that was stolen from the Eastman people. The very diversity of articles that this man brought in would lead any man to suspect that he was a shoplifter or burglar, wouldn't it? The very list he gave you this morning. Yet he continues to buy, buy, buy, fishing reels, cameras, musical instruments, military brushes. Where does he get them? Any other place but stealing? And he brings them in there and sells them for a pittance, a \$50 article for \$5 or \$10.

It is that very thing, gentlemen, that we have got to stop in this community before you are going to have a safe place to live in Chicago. The very name of this town is ridiculed throughout the world. Mention Cicero and they want to know, 'Did you ever go through Cicero without a mail jacket?' Go to California, as I have done, 'Oh, and you are alive, eh?'

* * * * *

But I am telling you the way to cut it out is to cut out the pawnshops, if it can be done, It is not a

legitimate business when conducted as these people conduct it, not a bit of it. It makes it unsafe for you to go along with your pockets open; you lose your watch or you get into a crowded street car and you lose your pocket book, you lose your stickpin, and where does it go? To a pawnshop. If a burglar or pickpocket or holdup man kept that property on his hands, in his possession, the police would pick him up and they would have him cold-handed.

* * * * *

It is an established crooked business. We know it from our general knowledge. We know it as men of common sense, and that is the business these men are conducting.

Now, would men in that line of business, would men of that caliber frame a holdup so as to collect insurance when they had not lost a thing? Ask yourself that question. Would they do it? Is it possible they would do it? With their acquaintance with the crooks would they get a crook to go in there and put up this performance of a stickup man?

* * * * *

Gentlemen, there will be submitted to you in your jury room a copy of that police investigation upon which Harry Levinson's license was revoked. I have read you the statute here this morning, requiring persons who apply for license for pawnshops to make application for the license. And it is not shown here that after Harry Levinson had his license revoked he made any application until 1928, and then Leventhal says that this ex-alderman, this alderman who is now in Leavenworth penitentiary, went to the front and got him reinstated. That is in 1928. From 1921 to 1925, when this burglary happened, or robbery, Harry Levinson had no license, and the law required him to have one.

I read you the law, read you the city ordinance, that anyone who engages in the pawn brokerage business must take out a pawn shop license, and he did not have any, so they operated there unlawfully from 1921 to 1925, when this robbery occurred.

The investigation shows that his license was revoked because he bought stolen property. There is one piece of business. He knows this fellow White, Frisco, holdup men, burglars, thieves, robbers. And there are the pictures. That is White; known under three or four other aliases, Godfrey J. Smith, and another one, some other Smith. That is the man that Harry Levinson was buying all this stuff from that he showed you this morning, running from musical instruments to hair brushes.

Do you suppose he knew he was buying stolen property from that man? If it was on only one occasion, maybe not. But continuous purchases of articles running from Flutes, saxophones, hair brushes, cameras - he is some boy. Some line of business he is engaged in, if he is not engaged in the burglary business."

From an examination of the argument of counsel for both sides we are led to the conclusion that there was nothing in plaintiffs' closing argument to the jury which was not justified by way of reply to the accusations made against plaintiffs by counsel for the defendant. Some of defendant's statements were justified as proper inferences to be drawn from the evidence upon the defense made that the robbery was simulated and not genuine, but much of what was said was highly improper and was undoubtedly calculated to prejudice the jury against plaintiffs. Notwithstanding the character of defendant's argument the jury saw fit to return a verdict in favor of plaintiffs, which, in view of the natural prejudice that exists against those engaged in the business of pawn brokers, tended only to create a still greater prejudice and distract the minds of the jury from the real issues involved. It has frequently been held that a party will not be heard to complain of improper language and conduct on the part of opposing counsel where his own counsel had been guilty of like improprieties. (Chicago City Ry. Co. v. Foster, 228 Ill. 388; Chicago City Ry. Co. v. Shreve, 228 Ill. 530; Brant v. O. & A. R. R. Co., 294 Ill. 606.) It was said in People v. Storer, 329 Ill. 536:

"The object of the review of judgments of trial courts by courts of appellate jurisdiction is not to determine whether the record is free from error but to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, in a trial in which no error has occurred which might be prejudicial to defendant's rights."

It is surprising, in view of the defense here interposed and the evidence and arguments adduced in support thereof, that the jury should have returned a verdict in favor of plaintiffs, and in our opinion, while the record is not entirely free from error, we believe that there was no such prejudicial error, so far as the plaintiffs' case is concerned, as would justify a reversal of the judgment.

From an examination of the statement of counsel for both sides we are led to the conclusion that there was nothing in plaintiff's closing statement to the jury which was not justified by way of reply to the accusations made against plaintiff by counsel for the defendant. Some of defendant's statements were justified as proper inferences to be drawn from the evidence upon the defense made that the robbery was simulated and not genuine, but much of what was said was highly improper and was undoubtedly calculated to prejudice the jury against plaintiff. Notwithstanding the character of defendant's argument the jury saw fit to return a verdict in favor of plaintiff, which, in view of the natural prejudice that exists against those engaged in the business of pawn brokers, tended only to create a still greater prejudice and distort the minds of the jury from the real issues involved. It has frequently been held that a jury will not be held to consider an improper language and conduct on the part of opposing counsel where his own counsel had been guilty of like improprieties. (See Wheeler v. Wheeler, 102 Ill. 202; Wheeler v. Wheeler, 102 Ill. 202; Wheeler v. Wheeler, 102 Ill. 202.) It is said in Wheeler v. Wheeler, 102 Ill. 202:

"The object of the rules of evidence is not to correct by courts of appeals mistakes made by juries in the trial of cases, but to prevent such mistakes from occurring in the first place. It is a trial court's duty to see that the evidence is not admitted in a trial which is calculated to prejudice the jury against the defendant's rights."

It is surprising, in view of the defense here introduced and the evidence and arguments adduced in support thereof, that the jury should have returned a verdict in favor of plaintiff, and in our opinion, while the result is not entirely free from error, we believe that there was no such prejudicial error, so far as the plaintiff's case is concerned, as would justify a reversal of the judgment.

The complaint with reference to the giving and refusal of instructions relates to questions connected with the furnishing of proof of loss and the waiver thereof, the legal aspect of which has already been discussed in this opinion. We have examined these instructions and find no errors with reference thereto.

For the reasons stated the judgment of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

The complaint also referred to the fact that the defendant
of information relating to the defendant's conduct with the defendant
of fact of law and the other parties, the legal aspect of which
has already been discussed in this opinion. We have examined these
instructions and find no errors with reference thereto.
For the reasons stated the judgment of the trial court

will be affirmed.

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WITNESSETH, J. J. and J. J. J. J.

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34683

ALICE BOARES,

Appellee,

v.

GUS FREDRICKSON,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

262 I.A. 636

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit against defendant in the Circuit Court of Cook County to recover for injuries sustained by her as a result of a collision between an automobile in which she was a passenger and defendant's car, driven by defendant's daughter, in the Village of River Forest, Illinois, on July 7, 1927. The case was tried before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of \$9,000, from which defendant prosecutes this appeal.

The facts essential to a determination of the principal question in the case disclose that defendant's daughter, Ruth, was driving her father's automobile which collided with the car in which plaintiff was a passenger on the evening of July 7, 1927; that Ruth Fredrickson was nearly nineteen years of age at the time, had graduated from high school in 1926, attended business college for some time thereafter, and on June 1, 1927 started to work for Fredrickson's Express, of which her father was a part owner, at a salary of \$15 per week; that while so engaged she continued to reside at her father's home, paying board to her mother, and had been self-supporting since June 1, 1927; that the automobile in question was owned by defendant and used in connection with his business during the day and for family purposes at other times. The oil and gas for the car were purchased by the company. On the

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Opinion filed June 15, 1951

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1. The first group of people who are affected by the disease are those who are in the early stages of the disease. This group is the most vulnerable and is at the highest risk of death. They are the people who are in the early stages of the disease and are the most vulnerable.

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evening in question Ruth Fredrickson borrowed the car with her father's consent, drove alone to the home of a girl friend, and the two girls then proceeded to Maywood, a nearby village, to attend a church social given by the church to which Ruth belonged. The accident happened while she was driving west on Lake Street enroute to the church.

Plaintiff's action is founded on the so-called family purpose doctrine, as applicable to automobiles, by which it is sought to recover from defendant who provided an automobile for the use of his family, which caused the injury to the plaintiff while being driven by defendant's daughter for her own pleasure with his consent.

Whatever doubt may have existed as to the adoption of this doctrine in Illinois is definitely settled by the recent decision of White v. Seitz, 342 Ill. 266, wherein the Supreme Court after considering the cases of Arkin v. Page, 287 Ill. 420; Graham v. Page, 300 Ill. 40; Gates v. Mader, 316 Ill. 313, and other decisions in this state and elsewhere based upon circumstances somewhat similar to the instant case, announced the following conclusions as to the settled law in this state:

"That a parent is not liable for the tort of his minor child merely from the relation; that the owner of an automobile who merely permits another to use it for his own purposes is not liable for the negligence of the person so using it; that the owner of an automobile is not liable for an injury occasioned by the negligent use of the machine by his servant if the servant was at the time at liberty from the service of his master and not engaged in doing his master's business but was pursuing his own interest exclusively; and that the relation of master and servant is not established between the owner of an automobile and his minor son by the mere fact that the father purchased the machine for the pleasure of the family and that he permitted his son to use it for his own pleasure."

In a more recent decision of the Supreme Court, Anderson v. Byrnes, yet unreported, being Docket No. 19,378, filed in the April Term 1931, the court again affirmed its conclusions in the Arkin and Seitz cases, supra, and announced that:

evening in question with defendant's car with her father's consent, drove alone to the home of a girl friend, and the two girls then proceeded to a nearby village, to attend a church social given by the church to which both belonged. The accident happened while she was driving west on Lake Street enroute to the church.

Plaintiff's action is founded on the so-called family purpose doctrine, an application to automobiles, by which it is sought to recover from defendant who provided an automobile for the use of his family, which caused the injury to the plaintiff while being driven by defendant's daughter for her own pleasure with his consent.

Whatever doubt may have existed as to the adoption of this doctrine in Illinois is definitely settled by the recent decision of White v. Kiefer, 328 Ill. 300, wherein the Supreme Court after consulting the cases of Allen v. Turner, 307 Ill. 480; Wright v. Turner, 300 Ill. 501; Wright v. Turner, 328 Ill. 318, and other decisions in this state and elsewhere based upon circumstances somewhat similar to the instant case, announced the following conclusions as to the settled law in this state:

"That a father is not liable for the tort of his minor child arising from the operation of an automobile who merely provides a vehicle for the use of his family; that the father is not liable for the negligence of the driver of the vehicle; that the owner of an automobile is not liable for an injury occasioned by the negligent use of the vehicle by the driver if the driver was of the age of majority at the time of his death and was engaged in doing his father's business and was permitted to use the automobile; and that the liability of a father for an injury occasioned by the negligent use of an automobile by his minor son or daughter is based on the fact that the father provided the vehicle for the use of his family and that he permitted his son to use it for his own pleasure."

In a more recent decision of the Supreme Court, Wright v. Kiefer, 328 Ill. 300, the court again affirmed the conclusions in the Allen and Wright cases, supra, and announced that:

"The doctrine known as the 'family purpose' doctrine in the courts which follow it, is not the law in Illinois."

The facts in the instant case clearly show that Ruth Fredrickson was using her father's automobile for her own pleasure, though with his consent. There is nothing in the record to indicate that she was engaged in any mission for her father or any other member of the family. In Arkin v. Page, and both of the recent decisions hereinbefore referred to, the court expressly say that the liability of the father for injuries caused by the son's negligent operation of the father's automobile can rest only on the agency of the son. Since no such relationship is shown by the facts in the instant case, there can be no liability on the part of the defendant.

For the reasons stated, the judgment of the trial court will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT.

WILSON, P.J. AND HEBEL, J. CONCUR.

FINDINGS OF FACT.

We make the following findings of fact, that the defendant, Gus Fredrickson, was the owner of the automobile which collided with the car in which plaintiff was a passenger on the evening of July 7, 1927; that defendant's automobile was used by him in connection with his business and for family purposes; that on the evening in question Ruth Fredrickson, his daughter, was using her father's car with his consent to attend a church social in Maywood, was not engaged upon any mission for her father or any other member of the family, and that the record in the case discloses no facts upon which the relationship of principle and agent or master and servant could be founded while the car was thus used by Ruth Fredrickson on the evening in question.

The doctrine known as the "family homestead" contains in the words which follow it, is not the law in Illinois.

The facts in the instant case clearly show that such a relationship was maintained by the father for his own pleasure, though with his consent. There is nothing in the record to indicate that she was engaged in any mission for her father or any other member of the family. In Allen v. Allen, and both of the recent decisions heretofore referred to, the court expressly say that the liability of the father for injuries caused by the son's negligent operation of the father's automobile can rest only on the agency of the son. Since no such relationship is shown in the instant case, there can be no liability on the part of the defendant.

For the reasons stated, the judgment of the trial

court will be reversed with findings of fact here.

REVEREND JOHN W. BURNETT, C. J.

ALLEN, J. L. and BURNETT, J. J. CONCUR.

ILLINOIS REPORTS.

In this case we take the following findings of fact, that the defendant, the Fredrickson, was the owner of the automobile which collided with the car in which plaintiff was a passenger on the evening of July 7, 1927; that defendant's automobile was used by him in connection with his business and for family purposes; that on the evening in question said Fredrickson, his daughter, was driving her father's car with his consent to attend a church social in Troy, and not engaged upon any mission for her father or any other member of the family; and that the record in the case discloses no facts upon which the relationship of agency can be said to exist and no such relationship is shown in the instant case.

34710

IDA ETCHINGHAM,

Appellee-Plaintiff,

v.

THERESA BECKER,

Appellant-Defendant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 636²

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

An action of replevin was brought in the Municipal Court of Chicago by Ida Etchingham against Theresa Becker and John Doe for possession of an Auburn Sedan automobile. The cause was heard by the court, without a jury, resulting in a finding and judgment in favor of plaintiff, from which the defendant, Theresa Becker, prosecutes this appeal.

The essential facts disclose that Theresa Becker maintained a home for herself and daughter, and rented a room therein to one William Etchingham, husband of the plaintiff, who had lived separate and apart from his wife for about five years; that on June 24, 1929, Etchingham accompanied by Mrs. Becker and one Arthur Burns, proceeded to the West Town Auburn Company's salesroom and consummated a purchase of the Auburn car in question, taking title thereto in the name of Theresa Becker; that a Studebaker car then owned by Etchingham was turned in on account of the purchase and a credit of \$475. received therefor; that under the terms of the purchase \$140 cash was required to be paid besides the credit received on account of the Studebaker car, \$75. of which was advanced by Burns to Etchingham, who turned it over to Walker, the salesman for the West Town Auburn Company, with directions that the conditional sales contract providing for the payment of the balance by installments, be made out in the name of Mrs. Becker; that at the same time applications for state and

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Opinion filed June 15, 1931

262 I.A. 636

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name of Mrs. Becker; that at the same time applications for state and
 for the payment of the balance by installments, be made out in the
 Germany, with directions that the conditional sales contract providing
 who turned it over to Weiner, the salesman for the West Town Laundry
 the first of January, 1929, of which was advanced by Weiner to Washington,
 cash was required to be paid besides the credit received on account of
 1929. received therefor; that under the terms of the purchase 1929
 Washington was turned in on account of the purchase and a credit of
 the name of Theresa Becker; that a checkbook was then issued by
 a purchase of the amount out in question, being this there is
 proceeded to the West Town Laundry Company's collection and commencing
 24, 1930, Washington accompanied by Mrs. Becker and one Arthur Burns,
 separate and apart from his wife for about five years; that on June
 to one William Washington, husband of the plaintiff, she had lived
 maintained a home for herself and daughter, and rented a room therein
 The essential facts disclose that Theresa Becker

proceeded this appeal.
 ment in favor of plaintiff, from which the defendant, Theresa Becker,
 heard by the court, without a jury, resulting in a finding and judg-
 has for possession of an Auburn sedan automobile. The cause was
 heard of Chicago by the defendant against Theresa Becker and John
 an action of replevin was brought in the Municipal
 Mr. JUSTICE WILSON delivered the opinion of the court.

city licenses were made in Mrs. Becker's name and paid for, and insurance on the car also issued in her name; that monthly payments of \$68.13, required by the contract, were regularly made by Mrs. Becker up to May 24, 1930, at which time, according to her testimony, she withdrew \$277.22 from the bank account of her daughter and added a sufficient sum of her own money to make up the remaining six payments in order to take advantage of a 6% interest rebate; that on June 28, 1930, about a month subsequent to the final payment on account of the purchase of said automobile by Theresa Becker, William Etchingham died at the Cook County Hospital in Chicago, and immediately prior to his death, in the presence of his wife and other witnesses, stated that he wanted his wife, Ida Etchingham, to have the car; that seven days subsequent to Etchingham's death, Theresa Becker put the car up for sale with the West Town Auburn Company, from whom it was replevied and delivered to plaintiff, in whose favor the court entered judgment for possession thereof.

Two principal questions of fact are presented to the court for determination: (1) whether the Auburn car belonged to William Etchingham at the time of his death; and (2) whether he made a gift causa mortis to his wife immediately prior to his death.

With reference to the first question seven or eight witnesses testified on behalf of the plaintiff that they had seen William Etchingham driving the automobile; that his initials "W.E." were upon the doors thereof, and that he had on many occasions stated to them that the automobile belonged to him. Besides this evidence there is the testimony of Edward Jackson that on two or three occasions he called for Etchingham's mail in which there were salary checks from the City of Chicago, by whom Etchingham was employed; that he gave these checks to Mrs. Becker, who wrote Etchingham's name thereon, and said she was going to use them as payments on the Auburn car. Arthur Burns, who accompanied Mrs. Becker and Etchingham to

city licenses were made in Mrs. Becker's name and paid for, and
insurance on the car also issued in her name; that monthly payments
of \$33.12, required by the contract, were regularly made by Mrs.
Becker up to May 24, 1930, at which time, according to her testimony,
she withdrew \$27.25 from the bank account of her daughter and added
a sufficient sum of her own money to make up the remaining six
payments in order to take advantage of a 25 percent rebate; that
on June 25, 1930, about a month subsequent to the final payment on
account of the purchase of said automobile by Thomas Becker,
William Washington died at the Cook County Hospital in Chicago,
and immediately prior to his death, in the presence of his wife and
other witnesses, stated that he wanted his wife, Ida Washington, to
have the car; that seven days subsequent to Washington's death,
Thomas Becker put the car up for sale with the west town dealer,
Loomis, from whom it was repurchased and delivered to plaintiff, in
whose favor the court entered judgment for possession thereof.
Two principal questions of fact are presented to the
court for determination: (1) whether the woman was believed to
William Washington at the time of his death; and (2) whether he made
a gift inter vivos to his wife immediately prior to his death.
With reference to the first question seven or eight
witnesses testified on behalf of the plaintiff that they had seen
William Washington driving the automobile; that his initials "W.W."
were upon the license thereon, and that he had on many occasions stated
to them that the automobile belonged to him. Besides this evidence
there is the testimony of Edward Jackson that on two or three
occasions he called for Washington's will in which there were entries
taken from the City of Chicago, by whom the license was registered;
that he gave these entries to Mr. Becker, the west town dealer's man,
Loomis, and said she was going to use them as payments on the automobile.
Edward Jackson, the deceased Mrs. Becker and Washington to

the West Town Auburn Company, when the exchange of automobiles was made, testified that Etchingham instructed Walker, the salesman, to put the car in Theresa Becker's name so that his wife could not take it from him.

As against this evidence defendant introduced the sales contract and other documentary evidence purporting to show that the car was purchased by Mrs. Becker, and the evidence of Mrs. Becker herself, who testified to the circumstances under which the Auburn car was purchased; that she was by occupation a waitress in a restaurant, receiving \$20. per week salary and tips averaging \$3.50 per day. Mrs. Becker denied having ever applied any of Etchingham's pay checks as part payment for the car in question.

The trial court, who heard the evidence and had an opportunity to observe the witnesses, found that the car belonged to William Etchingham, and after a careful examination of the record we are not disposed to disturb that finding as being against the manifest weight of evidence.

It is urged as a matter of law, aside from the facts of the case, that replevin will not lie in favor of plaintiff because no demand was made on the West Town Auburn Company for possession of the car preliminary to the seizure. We cannot agree with this contention, however. That both parties claimed the right of possession and title to this chattel is undisputed, and under such circumstances demand is not necessary to enable either to maintain replevin against the other. It was so held in Barnes Scale Co. v. Rose, 257 Ill. 257 Ill. App. 92. This rule is based upon the theory that the claim of ownership by defendant is inconsistent with the theory that she might have surrendered the chattel on demand and removes the necessity for demand, if one had been necessary.

It is next urged that plaintiff failed to show title and right to possession of the car as a gift causa mortis. The facts

The West Town Land Company, when the exchange of automobiles was made, testified that Birmingham Insurance Broker, the salesman, told her the car in question was not his wife's and that it was his.

As against this evidence defendant introduced the sales contract and other documentary evidence purporting to show that the car was purchased by Mrs. Baker, and the evidence of Mrs. Baker herself, who testified to the circumstances under which the automobile was purchased; that she was by occupation a waitress in a restaurant, receiving \$20. per week salary and tips averaging \$5.00 per day. Mrs. Baker denied having ever applied any of Birmingham's pay checks as part payment for the car in question.

The trial court, who heard the evidence and had an opportunity to observe the witnesses, found that the car belonged to William Birmingham, and after a careful examination of the record was not disposed to attach that finding as being against the manifest weight of evidence.

It is urged as a matter of law, aside from the facts of the case, that plaintiff will not lie in favor of plaintiff because no demand was made on the West Town Land Company for possession of the car preliminary to the hearing, we cannot agree with this contention, however. That both parties claimed the right of possession and title to this chattel is undisputed, and under such circumstances demand is not necessary to enable either to maintain recovery against the other. It was not held in Barnes v. Barnes, 207 Ill. 207 Ill. App. 25. This rule is based upon the theory that the ownership by defendant is inconsistent with the theory that she might have transferred the chattel on demand and removed the necessity for demand, if one had been necessary.

It is next urged that plaintiff failed to give title and right to possession of the car as a respondeat superior. The facts

upon which the gift causa mortis is founded disclose that William Etchingham, while living separate and apart from his wife, was not divorced and that no proceedings for divorce were then pending; that Etchingham had a daughter, Mildred, who together with her mother and one Nellie Dolan, was present at the County Hospital when her father died, and she testified that immediately prior to her father's death, in the presence of these witnesses, Etchingham stated that he expected to die and gave the automobile to his wife. Nellie Dolan, called on behalf of plaintiff, testified that Etchingham died about midnight of June 28, 1930, after an illness of several days; that there were present at the time of his death, besides herself, Ida Etchingham and Mildred, and that Etchingham said that he wanted his wife Ida to have the car and gave it to her. Plaintiff was not permitted to testify with reference to the gift causa mortis. There is no countervailing proof on this question of fact.

The general rule applicable to gifts of this character requires a clearly and intelligently manifested intention to make a present gift in view of approaching death, and in consummation of such intention a delivery of the property to or for the use of the intended donee. However, the delivery may be symbolical, and where there is a controversy concerning the gift between relatives of the deceased and persons not related, slight evidence of the delivery will be sufficient in the absence of fraud or undue influence. (First National Bank of Chicago v. O'Byrne, 177 Ill. App. 473.) Actual delivery of the automobile could, of course, not be made under the circumstances, and symbolical delivery by transfer of the key was made impossible by the fact that Mrs. Becker then had possession of the car. Under these circumstances we are of the opinion that the gift was sufficiently

are of the opinion that the gift was sufficiently
 Hooker then had possession of the car. Under these circumstances
 my transfer of the car was made inadmissible by the fact that Mrs.
 Cooper, not so much under the circumstances, and symmetrical delivery
 IV L. 473. (2) Actual delivery of the automobile could be
 on such evidence. (3) Gift of Automobile v. Cooper
 evidence of the delivery will be sufficient in the absence of direct
 between delivery of the automobile and the delivery of the gift
 symmetrical, and where there is a delivery consisting of the gift
 the age of the intended donee. However, the delivery may be
 intention of such transfer a delivery of the property to the
 to make a present gift in view of the circumstances, and in some
 character requires a timely and intelligently manifested intention
 of the donor. The general rule applicable to gifts of this
 kind is that the gift must be made with the intention of giving
 there is no substantial gift on this question of fact.
 permitted to testify with reference to the gift of the car.
 wife to have the car and give it to her. Plaintiff was not
 Hooker and witness, and that Hooker said that he wanted his
 there were present at the time of his death, besides himself, the
 evening of June 22, 1900, after an illness of several days; that
 called on behalf of plaintiff, testifies that Hooker died about
 expected to die and gave the automobile to his wife, Belle Colan,
 death. In the presence of these witnesses, Hooker stated that he
 other died, and she testified that immediately after to her father's
 and one Belle Colan, was present at the County Hospital when her
 that Hooker had a daughter, married, who together with her mother
 divorced and that no proceedings for divorce were then pending;

consummated to meet the requirements of the authorities upon this subject and vest title in plaintiff as donee.

Several propositions of law were submitted to the court, some of which were allowed and others rejected. An examination of these, however, discloses no error, and there is no inconsistency between the rulings of the court and the various propositions submitted and the judgment as entered.

For the reasons stated, the judgment of the trial Court will be affirmed.

AFFIRMED.

WILSON, F.J. AND NEBEL, J. CONCUR.

34722

FRED ROUTH,
For the Use of, Etc.,

Appellee,

v.

BROADCASTER CORPORATION,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 636

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

A conditional judgment in the sum of \$126.50 was entered in the Municipal Court of Chicago against the defendant, as garnishee, on November 22, 1929, pursuant to which a scire facias was served on the defendant, reciting in substance the entry of a judgment in the aforementioned sum, and commanding the garnishee to appear on January 9, 1930, to show cause why final judgment should not be entered against him. The garnishee failing to appear, the court on January 9, 1930, entered judgment against the defendant in the sum of \$157.45, representing the sum of \$126.50 together with interest and costs of the garnishment proceeding. Thereafter on April 10, 1930, the defendant, as garnishee, entered its special and limited appearance, and moved to vacate the final judgment of January 9, 1930, and in support of its motion filed a petition reciting the proceedings leading up to the entry of the final judgment on January 9, 1930, and setting forth section eight of the Garnishment Act, which provides that when a person shall have been informed as a garnishee upon an attachment or other writ issued out of any court of record, and shall fail to appear or make discovery as by the Garnishment Act required, the court may enter a conditional judgment against such garnishee for the amount of plaintiff's demand or judgment against the original defendant, and thereafter issue a scire facias commanding the garnishee to show cause why such judgment

THIRD PARTY
FOR THE USE OF, 1931

APPEALS

V.

RECEIVED IN CONNECTION

APPEALS

GENERAL TERM

MUNICIPAL COURT

OF CHICAGO

262 I.A. 636

Opinion filed June 18, 1931

THE JUDICIAL BRANCH delivered the opinion of the court.
 A conditional judgment in the sum of \$125.00 was
 entered in the Municipal Court of Chicago against the defendant, as
 garnished, on November 23, 1929, pursuant to which a notice was
 served on the defendant, requiring in substance the entry of a
 judgment in the aforementioned sum, and commanding the garnished to
 appear on January 3, 1930, to show cause why final judgment should
 not be entered against him. The garnished failing to appear, the
 court on January 3, 1930, entered judgment against the defendant in
 the sum of \$125.00, representing the sum of \$125.00 together with
 interest and costs of the garnishment proceedings. Thereafter on
 April 10, 1930, the defendant, as garnished, moved for special
 and limited appearance, and moved to vacate the final judgment of
 January 3, 1930, and in support of his motion filed a petition
 reciting the proceedings leading up to the entry of the final judg-
 ment on January 3, 1930, and setting forth section eight of the
 Garnishment Act, which provides that when a person shall have been
 informed as a garnished party in accordance with this Act he shall
 at any court of record, and shall still be bound to appear in such capacity
 as by the Garnishment Act required, the court may enter a conditional
 judgment against such garnished for the amount of plaintiff's demand
 or judgment against the original defendant, and thereafter issue a
 writ of sequestration to show cause why such judgment

should not be made final, and that if such garnishee, after being served with process or notified as required by law, shall fail to appear and make discovery, the court shall confirm such judgment to the amount of the judgment against the original defendant and award execution for the same and costs. The petition then proceeds to point out the variance between the conditional judgment in the sum of \$126.50 and the judgment as finally entered in the sum of \$157.45, and avers that the entry of the latter judgment was illegal and void, and prays that the same be vacated, annulled and set aside. Upon consideration of the motion and petition the court on May 9, 1930, overruled defendant's motion. This appeal is prosecuted to reverse the judgment of the trial court and remand the cause with instructions to vacate the judgment of January 9, 1930.

Only two grounds are specified in Section 469, Chap. 37, Cahill's Ill. Rev. Stats. 1927, for setting aside and vacating a judgment of the Municipal Court after the expiration of thirty days: (1) where the petition sets forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the judgment to be vacated, set aside or modified by a bill in equity; and (2) where errors of fact appear in the proceedings which might have been corrected at common law by the writ of error coram nobis. Defendant's petition alleges neither of these grounds, nor does it set forth the fundamental requisite of a petition of this character, namely, a meritorious defense to plaintiff's claim.

The sole error complained of is that the judgment is void. While we are not disposed to pass upon the merits of this contention, it appears clearly that the judgment, if void, would constitute an error of law appearing on the face of the record, and not an error of fact such as is contemplated by the provisions of the

which has been made final, and that it was affirmed, after being
served with process or notified as required by law, shall fail to
appear and make discovery, the court shall continue such judgment to
the amount of the judgment against the original defendant and award
execution for the same and costs. The petition then proceeds to
point out the variance between the constitutional judgment in the sum of
\$125.00 and the judgment as finally entered in the sum of \$127.45,
and avers that the entry of the latter judgment was illegal and void,
and prays that the same be vacated, annulled and set aside. Upon
consideration of the motion and petition the court on May 2, 1930,
overruled defendant's motion. This record is presented to reverse
the judgment of the trial court and remand the cause with instructions
to vacate the judgment of January 9, 1930.

Only two grounds are specified in Section 400, Chap.
17, Smith's Ill. Rev. Stat. 1927, for setting aside and vacating
a judgment of the judicial court after the expiration of thirty
days: (1) where the petition sets forth grounds for vacating,
setting aside or modifying the same, which would be sufficient to
cause the judgment to be vacated, set aside or modified by a bill in
equity; and (2) where errors of that nature in the proceedings which
might have been corrected at common law by the writ of error remain
unreversed. Defendant's petition alleges neither of these grounds, nor
does it set forth the fundamental requisites of a petition of this
character, namely, a recitation of reasons to plaintiff's claim.

The sole error complained of is that the judgment
is void. While we are not disposed to pass upon the merits of this
contention, it appears clearly that the judgment, if void, would
constitute an error of law appearing on the face of the record, and
not an error of fact such as is contemplated by the provisions of the

aforementioned statute and authorities construing the same. It is the established rule in this state that errors of law in the entry of a judgment appearing on the face of the record cannot serve as the basis of an application to the Municipal Court more than thirty days after the entry of the judgment to vacate the same. (Doyle v. Fellows, 207 Ill. App. 5.) If defendant wished to have this court pass upon his contention that the judgment was void because of the variance between the amount of the conditional and the final judgment, he should have prosecuted a writ of error from the final judgment of January 9, 1930, instead of appealing from the refusal of the court to vacate the judgment upon the motion and petition of defendant filed on April 10, 1930.

Ninety days having elapsed subsequent to the entry of the judgment, the Municipal Court had lost jurisdiction to vacate the same except upon one of the two grounds mentioned in the statute, and neither of these grounds being presented to the trial court nor to this court, the order appealed from should be, and is accordingly affirmed.

AFFIRMED.

WILSON, F.J. AND HEBEL, J. CONCUR.

elemental state and authorities concerning the same. It is
the established rule in this state that errors of law in the entry
of a judgment appearing on the face of the record cannot serve as
the basis of an application to the municipal court more than thirty
days after the entry of the judgment to vacate the same. Smith v.
Yildes, 207 Ill. App. 6.) It defendant asked to have this court

rest upon his contention that the judgment was void because of the
variance between the amount of the conditional and the final
judgment, he should have presented a writ of error. From the final
judgment of January 2, 1930, entered at Springfield from the return
of the court to vacate the judgment upon the motion and petition
of defendant filed on April 10, 1930.

It is the duty of the court to set aside the entry of
the judgment, the municipal court has no jurisdiction to vacate the
same except upon one of the grounds mentioned in the statute,
and neither of those grounds being presented to the trial court nor
to this court, the order requested from should be, and is accordingly

affirmed.

APPEAL FROM THE MUNICIPAL COURT OF SPRINGFIELD, ILLINOIS.

RECEIVED, J. J. AND K. J. J. J.

34740

JAMES CULLEN,

Appellee,

v.

LOUIS EISENBERG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 636⁴

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago against defendant to recover the sum of \$2250. with interest thereon from January 19, 1929, under an alleged agreement entered into between the parties, by which defendant assumed to pay for paving the street in front of the premises purchased by him from plaintiff, the paving having been done after defendant acquired title to the property. The cause was tried before the court without a jury, resulting in a judgment for plaintiff in the aforementioned sum with interest, and this appeal is prosecuted to reverse that judgment.

The essential facts, about which there is substantially no dispute, disclose that on April 10, 1929, plaintiff and his wife entered into a written real estate contract with defendant for the sale of three vacant lots. The purchase price of the premises in question was designated in the contract as \$12,750, of which \$10,500 was to be paid in cash, and the defendant was to assume a paving contract at the price of \$25 per front foot, aggregating \$2250, when the same became due and payable. The contract stipulated, among other provisions, that the "buyer assumes assessment for paving by private contract."

JAMES T. ...

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v.

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SEC. I. A. 636

Opinion filed June 15, 1931

MR. JUSTICE ... delivered the opinion of the

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...

Plaintiff brought suit in the Municipal Court of Chicago against defendant to recover the sum of \$2500. with interest thereon from January 13, 1929, under an alleged agreement entered into between the parties, by which defendant assumed to pay for having the street in front of the premises purchased by him from plaintiff, the having having been done after defendant acquired title to the property. The case was tried before the court without a jury, resulting in a judgment for plaintiff in the aforementioned sum with interest, and this appeal is presented to reverse that judgment.

...

The essential facts, about which there is substantial dispute, disclose that on April 10, 1929, plaintiff and his wife entered into a written real estate contract with defendant for the sale of three vacant lots. The purchase price of the premises in question was designated in the contract as \$11,750, of which \$10,500 was to be paid in cash, and the defendant was to execute a promissory note at the price of \$200 per front foot, aggregating \$2000, when the same became due and payable. The contract stipulated, among other provisions, that the buyer assumed responsibility for paying by private contract."

On May 20, 1929, plaintiff executed and delivered to the defendant, Louis Eisenberg, and Louis Sokolaky a warranty deed to the premises in question, at which time \$10,000 consideration was paid for the property, the remaining \$500 cash payment required having been paid as earnest money when the contract was entered into.

It further appears from the evidence that the paving work was finished June 19, 1929, and that shortly thereafter a bill in the sum of \$3250 was rendered to plaintiff. Plaintiff having failed to pay the same, Robert R. Anderson Company instituted suit against plaintiff in the Municipal Court of Chicago on October 28, 1929, and recovered judgment for the aforementioned amount with interest. Afterwards on April 26, 1930, plaintiff paid the judgment in full and thereafter instituted suit against the defendant in the Municipal Court of Chicago, claiming as damages the amount which he was obliged to pay to the paving contractor. Defendant did not appear at the trial and no evidence was offered in his behalf. An affidavit of merits was filed by defendant, however, wherein it was averred that he did not have possession of the real estate contract signed by him, nor of the agreement between Robert R. Anderson Company and plaintiff; that no notice was served upon him of the suit against plaintiff, and that he was given no opportunity to defend said proceeding.

It is urged as grounds for reversal: (1) that the paving agreement was to be performed within a reasonable time; that it was the intent as expressed by the agreement to make the owner of the property liable for the work, and that when the contractor failed to perform for a year, during which plaintiff parted with his title, the latter was thereby released from his obligation and payment by him thereafter was voluntary and no recovery could be had thereon; (2) that the judgment against plaintiff is founded on the obligation contained in the written agreement between plaintiff and the

On May 20, 1930, plaintiff executed and delivered to the defendant, Louis Rosenberg, and Lewis Rosenberg, a warranty deed to the premises in question, at which time \$10,000 consideration was paid for the property, the remaining \$200 cash payment required having been paid in earnest money when the contract was entered into. It further appears from the evidence that the money was furnished June 12, 1929, and that shortly thereafter a bill in the sum of \$2000 was rendered to plaintiff. Plaintiff having failed to pay the same, Robert A. Anderson company instituted suit against plaintiff in the Municipal Court of Chicago on October 20, 1930, and recovered judgment for the aforementioned amount plus interest. Plaintiff on April 22, 1931, voluntarily paid the judgment in full and thereafter instituted suit against the defendant in the Municipal Court of Chicago, claiming as against the amount which he was obliged to pay to the plaintiff, judgment. His suit against the defendant was entered in his docket. An affidavit of service was filed by defendant, however, wherein it was averred that he did not have possession of the real estate concerned, and that he was not the person who executed the deed. Plaintiff and defendant both received notice upon him of the suit against plaintiff, and that he was given an opportunity to answer the suit. It is urged as grounds for reversal: (1) that the party agreement was to be performed within a reasonable time; that it was the intent as expressed by the agreement to make the owner of the property liable for the work, and that when the contractor failed to perform for a year, during which plaintiff parted with his title, the latter was thereby released from his obligation and payment by him thereafter was voluntary and no recovery could be had thereon; (2) that the judgment against plaintiff is founded on the obligation contained in the written agreement between plaintiff and the

Anderson Company, which was not made known to defendant, and to which he was not a party; (3) that plaintiff having conveyed the property to the defendant and Sokolsky and the work having been done after they acquired title thereto, it became their obligation and not that of plaintiff; (4) that there was a material variance between the averments in plaintiff's statement of claim and the proofs by reason of which defendant's motion made at the close of plaintiff's case to find in favor of defendant should have been sustained.

With reference to the first contention, it is urged that plaintiff was not liable under his contract with the Anderson Company after he had conveyed the property in question to defendant. This contention is based upon a recital in the contract between plaintiff and the Anderson Company providing, "in the event of the sale of the whole or any portion of the property represented by us on this contract, to make provision in the contract of sale for the assumption of this obligation by the purchaser of this property". Counsel argues that this provision expresses the intention of the parties to impose the liability for the pavement on whomever should become the owner of the real estate benefitted by the pavement, and that the Anderson Company having failed to perform the work within a reasonable time, plaintiff had the right to sell his property, and having done so, ceased to be obligated under his contract with the Anderson Company; and that consequently plaintiff was not liable for the judgment entered against him. We cannot agree with this contention, however. The agreement between plaintiff and the Anderson Company was in the form of a proposal to pave the street in front of the property in question at \$25 per foot, and contained a provision that the signer of the agreement, being the plaintiff herein, agreed to "accept the aforesaid proposition and agreed to pay the amount shown opposite our signatures", which in the instant case amounted to \$2250. While it is true that the contract also provided that

interests Company, which was not known to defendant, and to which he was not a party; (3) that Plaintiff having conveyed the property to the defendant and defendant and the work having been done after they acquired title thereto, it became their obligation and not that of Plaintiff; (4) that there was a material variance between the averments in Plaintiff's statement of claim and the grounds by reason of which defendant's motion made at the trial of Plaintiff's case to find in favor of defendant should have been sustained.

With reference to the first contention, it is urged that Plaintiff was not liable under his contract with the defendant. Plaintiff after he had conveyed the property in question to defendant, this contention is based upon a recital in the contract between Plaintiff and the defendant whereby providing, "in the event of the sale of the whole or any portion of the property represented by an on this contract, to make provision in the contract of sale for the satisfaction of this obligation by the purchaser of this property."

Plaintiff argues that this provision represents the intention of the parties to impose the liability for the payment on whoever should become the owner of the real estate benefitted by the payment, and that the defendant Company having failed to perform the work at this time, Plaintiff had the right to sell his property, and having done so, ceased to be obligated under his contract with the defendant Company; and that consequently Plaintiff was not liable for the judgment entered against him. He cannot agree with this contention, however. The agreement between Plaintiff and the defendant Company was in the form of a contract to have the street in front of the property in question at his cost, and contained a provision that the right of the agreement, being the Plaintiff's, should be assigned to the defendant and agreed to pay the amount shown opposite on the statement, which is the amount now amounted to \$1000. While it is true that the contract also provided that

in the event of a sale of the property before the indebtedness became due, provision should be made for assumption of the obligation by the purchaser, this provision in no sense released plaintiff, after signing the contract, from his obligation to pay the amount designated in the proposal which had been accepted by him and constituted a contract and an obligation to the Anderson Company.

It is further urged, however, that when plaintiff sold his property to defendant, it operated as a release from this obligation, - in other words, that there was a novation under which defendant became liable for the contractual price. The rule of law with reference to novations requires (1) a previous valid obligation such as expressed in the instant case under the agreement between Anderson Company and the plaintiff; (2) a valid agreement of all the parties to a new contract, which would have required a new agreement between Anderson, plaintiff and defendant; (3) the extinguishment of the old contract, which, in the instant case, was never effected; and (4) the validity of the new contract which was never executed. Kiefer v. Ries, 331 Ill. 38. Consequently we are of the opinion that the theory of novation does not apply. Plaintiff therefore remained liable under the contract with the Anderson Company, and had no alternative except to pay the judgment founded on his legal obligation.

It is next urged that defendant did not assume the Anderson contract, but only assumed the assessment for paving, as provided in his agreement with plaintiff. The plain meaning of the language used in the contract between the parties thereto clearly implies an assumption by defendant of an assessment against the property and an obligation to pay therefor. And since defendant had failed to pay the contractor, as the result of which suit was entered against plaintiff, defendant under the aforementioned

in the event of a sale of the property before the indebtedness becomes due, provision should be made for assumption of the obligation by the purchaser. This provision in no sense released plaintiff after signing the contract, from his obligation to pay the amount designated in the proposal which had been accepted by him and was attached to a contract and an obligation to the Anderson company. It is further urged, however, that when plaintiff sold his property to defendant, it operated as a release from this obligation, - in other words, that there was a novation which released defendant from the obligation to pay the contract price. The rule of law also releases to defendant (1) a previous valid obligation such as expressed in the contract and under the agreement between Anderson Company and the plaintiff; (2) a valid agreement of all the parties to a new contract, which would have constituted a novation between Anderson, plaintiff and defendant; (3) the extinguishment of the old contract, which, in the instant case, was never effected; and (4) the validity of the new contract which was never executed. King v. King, 221 Ill. 2d, 221 Ill. 2d. Consequently we are of the opinion that the theory of novation does not apply. Plaintiff therefore remained liable under the contract with the Anderson Company, and had no alternative course to pay the judgment rendered on his legal obligation. It is now urged that defendant did not assume the Anderson contract, but only assumed the amount due the plaintiff, as provided in his agreement with plaintiff. The plain meaning of the language used in the contract between the parties shows clearly implied an assumption by defendant of an obligation against the property and an obligation to pay thereby. And since defendant had failed to pay the contract, on the basis of which suit was entered against plaintiff, defendant under the circumstances

provision became liable by reason of his assumption of the obligation.

Counsel complain further that defendant was not notified of the suit against plaintiff and had no opportunity to interpose a defense. Not having been a party to the suit between the Anderson Company and plaintiff, defendant could not under the circumstances have defended the Anderson Company suit. Moreover, defendant concedes in his brief that he "did assume to pay the fair and reasonable amount of the cost of the pavement." Since according to the record the work was approved by the City and the price fixed at \$25 per foot, aggregating \$2250, of which defendant clearly had notice when he made his agreement to purchase the property from plaintiff, the reasonable cost of the pavement could not very well have been an issue in any event, but if it was an issue, defendant had full opportunity to raise that question upon the trial of the instant proceeding in the Municipal Court. This he failed to do and therefore should not be heard to complain thereof upon appeal.

It appears from the record that demand for the paving work was made on defendant at the completion of the same, but that he failed to pay therefor. This necessitated the filing of suit by the Anderson Company against plaintiff. It also indicates that defendant knew of the existence of the claim and should have then taken steps to ascertain whether the work was properly done, if there was an contention to the contrary, and whether the amount claimed was reasonable, if there was any doubt about that question.

Defendant also contends that plaintiff's liability on the paving contract having ceased when the property was transferred to defendant, payment by plaintiff thereafter was a mere voluntary payment and cannot be recovered in an action at law. The general doctrine with reference to voluntary payments thus contended for is sound, but the cases cited by defendant have no application

provision persons liable by reason of his assumption of the obligation.

General complaint further that defendant was not

permitted of the suit against plaintiff and had no opportunity to
interpose a defense. Not having been a party to the suit between
the Anderson Company and plaintiff, defendant could not under the
circumstances have obtained the Anderson Company suit. However,

defendant contends in his brief that the "Bill of Exchange" was the

bill and receivable amount of the cost of the property. Since

according to the record the bill was approved by the City and the
price fixed at \$50 per foot, aggregating \$1000, of which defendant

clearly had notice when he made his agreement to purchase the property
from plaintiff, the reasonable cost of the property could not very

well have been an issue in any event, but it was an issue,

defendant had full opportunity to raise that question upon the trial
of the instant proceeding in the Municipal Court. This he failed to
do and therefore should not be heard to complain thereof upon appeal.

It appears from the record that demand for the

paying work was made on defendant at the completion of the same, but

that he failed to pay therefor. This necessitated the filing of

suit by the Anderson Company against plaintiff. It also indicates

that defendant knew of the existence of the claim and should have

then taken steps to ascertain whether the work was properly done,

if there was an contention to the contrary, and whether the amount

claimed was reasonable. It there was any doubt about that question.

Defendant also contends that plaintiff's liability

on the paying contract having ceased when the property was turned

over to defendant, payment by plaintiff therefor was a mere

voluntary payment and cannot be recovered in an action at law. The

General Medical and Surgical Association of the State of New York

for its record, but the case cited by defendant have no application

to the instant proceeding because, as we view the situation, plaintiff's payment of the judgment was not a voluntary payment, but rather the satisfaction of an existing legal obligation for which he was liable.

Defendant's brief states that he does not

"desire to shirk his liability for the fair and reasonable charges for the pavement done by the Anderson Company. Defendant recognizes and concedes his liability to pay for the work done by the Anderson Company as much as the work was reasonably worth, but is unwilling to be held up by a 'scheme' between the Anderson Company and the plaintiff permitting a judgment to be entered in an ex parte hearing on a contract which was never made known to him. " " " ."

There is nothing to justify the assumption that this was a scheme entered into between plaintiff and the Anderson Company. Defendant's affidavit of merits raises no question as to the reasonableness of the charge, and therefore he cannot be heard to urge the point on appeal.

For the reasons stated, the judgment of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

to him."

For the reasons stated, the judgment of the trial court will be affirmed.

• • • • •

34759

WILBUR BURDE, a Minor, etc.,
(Plaintiff) Defendant in Error,

v.

WILCOX TRANSPORTATION CO.,
(Defendant) Plaintiff in Error.

55
ERROR TO

SUPERIOR COURT

COOK COUNTY.

262 LA. 436
Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Wilbur Burde, a minor, by William Burde, his father and next friend, as plaintiff, brought suit in the Superior Court of Cook County to recover for injuries alleged to have been sustained by him, through the negligence of defendant while driving its motor truck, which ran into and injured plaintiff.

The record discloses that on January 8, 1930, the attorney then representing defendant notified defendant of his intention to withdraw from the case, and that defendant retained no other attorney to represent it. On June 25, 1930, more than six months thereafter, the case, when regularly reached for trial, was tried before the court and a jury on an ex parte hearing, resulting in a verdict and judgment for plaintiff in the sum of \$10,000. No appeal was prosecuted from this judgment, although execution thereon was duly served upon the defendant and an actual levy made upon its property; nor did defendant move to vacate said judgment or to have the levy released by posting a bond to secure the same. On September 25, 1930, defendant sued out this writ of error, but no application for a writ of supersedeas was ever made.

As ground for reversal it is first urged that the case was not at issue when tried in that no similiter was filed to defendant's pleas. The record in the case, however, discloses the following recital:

Following recital:

Defendant's plea. The record in the case, however, discloses the case was not at issue when trial in that no answer was filed to

as ground for reversal it is first urged that the

no application for a writ of superseas was ever made.

September 22, 1930, defendant sued out this writ of error, but

have the levy released by posting a bond to secure the same. On

its rectify; now did defendant move to vacate said judgment as to

was duly served upon the defendant and an actual levy made upon

appeal was presented from this judgment, although execution thereon

in a verdict and judgment for plaintiff in the sum of \$10,000. No

tried before the court and a jury on an ex parte hearing, resulting

months thereafter, the case, when regularly reached for trial, was

other attorney to represent it. On June 25, 1930, more than six

intention to withdraw from the case, and that defendant retained no

attorney then representing defendant notified defendant of his

The record discloses that on January 8, 1930, the

motor truck, which ran into and injured plaintiff.

ed by him, through the negligence of defendant while driving the

of back injury to recover for injuries alleged to have been sustain-

and next listed, as plaintiff, brought suit in the Superior Court

William Garber, a minor, by William Garber, his father

Mr. Justice Wilson delivered the opinion of the court.

Opinion filed June 18, 1931

(Defendant) Plaintiff in error.

WILSON TRANSPORTATION CO.,

COOK COUNTY.

(Plaintiff) Defendant in error.

WILSON GARBER, a minor, etc.,

WILSON TO

SUPERIOR COURT

"This cause being called for trial ex parte, comes the plaintiff to this suit by his attorney and issues being joined it is ordered that a jury come."

In the case of Bansberry v. Holoway, 245 Ill. App. 592, we had occasion to pass upon a similar situation. There, as here, the record contained a recital that the issues were joined and the cause heard by a jury. This court in its opinion said:

"We must indulge the presumption that issue was joined or that defendant by proceeding to trial, waived the filing of the similiter to the general issue."

Then passing to the further question as to the necessity for filing a similiter, the court said:

"While technically considered a similiter should have been filed, yet it has been held that the filing of similiter to a plea of general issue is a mere matter of form and certainly judgments ought not to be disturbed because some mere form has not been observed. * * We think there was no error in proceeding with the trial in the absence of the defendant without the filing of a similiter."

We regard the foregoing as the correct rule and decisive of defendant's first contention.

It is next pointed out that the first count of the declaration contains the following allegation:

"the father and mother have assigned, transferred and relinquished their right to recover for moneys expended, incurred and to be expended and laid out in the future for medical services, surgical and medical treatment, nursing and medicines for said plaintiff and have assigned, transferred and relinquished their right to recover for any wages and earnings, during the minority of plaintiff, and said father and mother of said plaintiff hereby assign, transfer and relinquish their right, as aforesaid, to said plaintiff and minor."

With reference to the foregoing allegation it is urged that the language used should be construed as a release pro tanto. We cannot agree with this contention, however. There is certainly nothing in the allegation which can be construed as a release of the defendant; it is merely an assignment and relinquishment of the parents' right to recover for moneys expended, incurred and to be expended for

"This cause being called for trial on this
taken the plaintiff to this suit by his attorney and
issues being joined it is ordered that a jury come."

In the case of McIntyre v. McIntyre, 223 Ill. App. 3d, we had
occasion to pass upon a similar situation. There, as here, the
record contained a recital that the issues were joined and the cause
heard by a jury. This court in its opinion said:
"We must inquire the circumstances that issue
was joined or that defendant is proceeding to trial
involved the filing of the complaint to the general issue."

Then passing to the further question as to the necessity for filing
a complaint, the court said:

"This is substantially the same as the situation in
have been filed, but it has been held that the filing of
complaint as a condition precedent to the filing of a
form and certainly defendant could not be allowed to
proceed to trial without having filed a complaint. We
think there was an error in proceeding with the trial in
the absence of the defendant without the filing of a
complaint."

We regard the holding in the context rule and doctrine of
defendant's first complaint.

It is now pointed out that the first count of the
complaint contains the following allegations:

"The Plaintiff and mother have assigned, transferred and po-
sessed their right to recover for money expended, in-
curred and to be expended and lost in the various law
medical services, surgical and hospital treatment, nursing
and medicines for said plaintiff and have expended, ex-
posed and relinquished their right to recover for any
wages and savings, during the absence of plaintiff, and
said father and mother for said plaintiff's bodily injury,
damages and relinquished their right, as aforesaid, to said
plaintiff and wife."

This reference to the foregoing allegations it is urged that the law-
yers need should be construed as a release erga omnes. We cannot
agree with this contention, however. There is certainly nothing in
the allegation which can be construed as a release of the defendant;
it is merely an assignment and relinquishment of the parents' right
to recover for money expended, incurred and to be expended for

medical services, surgical and medical treatment, nursing and medicines for their son, and an assignment and relinquishment of their right to recover for any wages and earnings during his minority. The latter claim is absolutely separable from the claim for personal injuries, and the release of one, or even a judgment as to one, does not affect the other. (Clancy v. McBride, 338 Ill. 35.)

Defendant's last contention is that three of the jurors who were impanelled to try the case were not the same persons who signed the verdict. The abstract of record fails to show who the jurors were that signed the verdict or who were impanelled to try the case, and under the settled practice we will not go to the record to find grounds for reversal. Furthermore the validity of the verdict does not depend on its being reduced to writing and signed by the members of the jury, but whatever may be pronounced as the verdict by the jury in open court, whether in writing or verbal, through the foreman, is to be regarded as their verdict. The record in this case recites:

"Being duly elected, tried and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence. After hearing all of the evidence adduced say 'We the jury find the defendant guilty and assess the plaintiff's damages at the sum of Ten Thousand Dollars.'"

The so-called verdict is merely a memorandum of evidence of the real verdict of the jury; the actual verdict is represented by the foregoing order. (Griffin v. Larned, 111 Ill. 432.) It is conceded by defendant's brief that the record imports verity. That being true, the statement in the record that a jury duly elected and sworn to try the issues found the defendant guilty and assessed the plaintiff's damages at \$10,000, conclusively binds this court to accept the fact that the verdict was rendered as shown by the record,

that
We find/no error was committed by the trial court,
and the judgment will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND NEBEL, J. CONCUR.

medical services, surgical and medical treatment, nursing and medicines for their sick, and no assignment and relinquishment of their right to recover for any wages and earnings during his minority. The latter claim is absolutely separable from the claim for personal injuries, and the release of one, or even a judgment as to one, does not affect the other. (Graham v. Hendrix, 128 Ill. 35.)

Defendant's last contention is that three of the jurors who were impaneled to try the case were not the same persons who signed the verdict. The abstract of record fails to show who the jurors were that signed the verdict or who were impaneled to try the case, and under the settled practice we will not go to the record to find persons for removal. Furthermore the validity of the verdict does not depend on the being reduced to writing and signed by the members of the jury, but whatever may be pronounced as the verdict by the jury in open court, whether in writing or verbal, through the foreman, is to be regarded as their verdict. The

verdict in this case verified:

"That duly elected, tried and sworn well and truly to try the issues joined herein and a true verdict rendered according to the evidence. After hearing all of the evidence adduced by the jury and the defendant guilty and assess the plaintiff's damages at the sum of Ten Thousand Dollars."

The so-called verdict is merely a recitation of evidence of the jury verdict at the jury. The actual verdict is recited by the jury being ordered. (Graham v. Hendrix, 128 Ill. 35.) It is contended by defendant's brief that the record imports verity. That being true, the statement in the record that a jury duly elected and sworn to try the issues found the defendant guilty and assessed the plaintiff's damages at \$10,000, conclusively binds this court to accept the fact that the verdict was rendered as shown by the record, that no error was committed by the trial court, and the judgment will accordingly be affirmed.

34787

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel, EMILY
BENKA,

(Complainant) Appellee,

v.

DAVID MIZNER,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 637

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The relatrix, Emily Benka, on April 6, 1930, filed a bastardy complaint against defendant in the Municipal Court of Chicago, charging that on the 7th day of November, 1929, she was delivered of a male child that by law was deemed a bastard, and that defendant was the father of the child. The cause was tried before the court and a jury, resulting in a verdict of guilty upon which judgment was entered.

It appears from the evidence that the relatrix had known defendant for about sixteen years; that at various times she had loaned him sums of money aggregating \$1,000; that on Saturday, February 16, 1929, defendant asked her to come over to his soft drink parlor at 4958 Winchester Avenue, Chicago, at 7:30 P.M., stating that he would pay her the money. Relatrix testified that there were five rooms in the back of defendant's soft drink parlor, one of which was furnished as a bedroom; that she arrived there about 7:30 P.M. on the aforementioned date, and entered the rear portion of the premises by a side entrance; that there were some people in the saloon but no one in the rear rooms; that defendant told her to go to the back of the building after he had given her a check for the money, and that while there he persuaded her to go into the bedroom where she had intercourse with him.

2621A.037

Opinion filed June 15, 1931

into the bedroom where she had intercourse with him.
a check for the money, and that while there he persuaded her to go
told her to go to the back of the building after he had given her
people in the room but no one in the next room; that defendant
parties of the parties by a side entrance; that there were some
about 9:30 P. M. on the aforementioned date, and entered the room
one of which was furnished as a bedroom; that she arrived there
there were five men in the back of defendant's well known parties,
telling that he would pay her the money. Defendant testified that
think while at this headquarters Avenue, Chicago, at 7:30 P. M.,
February 18, 1931, defendant asked her to come over to his wife
had issued the same on money and told her to wait in the hallway,
known defendant for about fifteen years; that he visited there the
it appears from the evidence that the parties had
with judgment was refused.

before the court and a jury. Presiding in a building at 1111 North
that defendant was the father of the child. The case was tried
delivered of a male child part of law was deemed a bastard, and
Chicago, stating that on the 7th day of November, 1930, she was
a bastardly complaint against defendant in the Municipal Court of
The defendant, Emily Jones, on April 6, 1931, filed

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel, EMILY
JONES,
(Complainant) against
J. A. [Name]
DAVID ALLEN,
(Defendant) Defendant.

Relatrix testified further that the last time she had menstruated prior to the birth of the child was on January 28, 1929; that the child was a boy born on November 7, 1929, and that she had never had intercourse with any man other than defendant during the months of January, February and March, 1929.

It appears further from the evidence that relatrix was a married woman, who had been living separate and apart from her husband for approximately two years prior to February 16, 1929; that she was divorced from her husband on the ground of desertion in May, 1929, and she testified that she had not seen her husband at any time during the years 1928 and 1929, he having deserted her in 1927.

Defendant testified in his own defense that he had known relatrix for about sixteen years, admitted owing her the money and the payment thereof by check, but denied having had intercourse with her.

Two other witnesses, John Spajdl and John Knebl, testified on behalf of defendant. Knebl stated that he knew both the relatrix and defendant and had seen both of them in the rear of defendant's soft drink parlor on February 16, 1929; that he and Spajdl had attended a theatre that afternoon and came to defendant's place of business between seven and eight o'clock; that relatrix came in a little later and sat in the kitchen with him, defendant and Spajdl until nearly twelve o'clock; that defendant and relatrix were talking about something pertaining to business and he saw defendant give her some sort of paper about nine o'clock in the evening, and that defendant and relatrix were not alone together during the evening except for a few minutes when he and Spajdl went into the toilet together, and then returned to the kitchen where defendant and relatrix were still seated.

Relatrix testified further that the last time she had communicated prior to the birth of the child was on January 20, 1937; that the child was a boy born on November 7, 1936, and that she had never had intercourse with any man other than defendant during the months of January, February and March, 1936.

It appears further from the evidence that Relatrix

was a married woman, who had been living separately and apart from her husband for approximately two years prior to February 16, 1937; that she was divorced from her husband on the ground of desertion in May, 1935, and she testified that she had not seen her husband at any time during the years 1935 and 1937, he having married her in 1937.

Defendant testified in his own defense that he had known Relatrix for about sixteen years, admitted owing her the money and the payment thereof by check, but denied having had intercourse with her.

Two other witnesses, John Spajdi and John Knudt, testified on behalf of defendant. Knudt stated that he knew both the Relatrix and defendant and had seen both of them in the last of defendant's self again prior to February 16, 1937; that he and Spajdi had attended a theatre that afternoon and came to defendant's place of business between seven and eight o'clock; that Relatrix came in a little later and sat in the kitchen with him, defendant and Spajdi until nearly nine o'clock; that defendant and Relatrix were talking about something pertaining to business and he saw defendant give her some sort of paper about nine o'clock in the evening, and that defendant and Relatrix were not alone together during the evening except for a few minutes when he and Spajdi went into the hall together, and then returned to the kitchen where defendant and Relatrix were still seated.

Spajdl's testimony was substantially to the same effect. He testified further that he went to the toilet several times, being absent just a few minutes each time; that occasionally when customers came in defendant would go out to wait on them and then return.

It is first urged on behalf of defendant that the verdict is contrary to the weight of the evidence. Actions brought under this statute are in their nature civil and require only a preponderance of the evidence. In a prosecution for bastardy both parties are competent witnesses. The court heard these witnesses and others who testified in the proceeding and every intendment should be indulged in favor of the jury's verdict. There is no substantial dispute about the essential facts that defendant had known relatrix for a great many years; that he owed her money and that she came to his place of business on the evening in question to receive the same, where the parties were together and an opportunity for sexual intercourse was afforded them. We see no reason for disturbing the verdict as being contrary to the weight of the evidence.

It is further urged that relatrix having been a married woman at the time the child was conceived, the presumption of legitimacy should be controlling. The present amendment to the act entitled "An Act concerning Bastardy", Cahill's Ill. R. S., Chap. 17, dropped the word "unmarried" before the word "woman". Prior to the amendment it was held, as contended by defendant, that a married woman could not prosecute under the statute on a complaint for bastardy. By taking out the word "unmarried" the legislature evidently intended to broaden the scope of the statute. There was at common law a strong legal presumption that the husband is the father of a child born in wedlock. This presumption still exists under our decisions, but is not conclusive. If it appears

When defendant came in defendant would go out to wait on them and times being about just a few minutes each time; that occasionally effect. He testified further that he went to the toilet several times. Defendant's testimony was substantially to the same effect.

It is first urged on behalf of defendant that the verdict is contrary to the weight of the evidence. Various points are made in their nature civil and require only a presentation of the evidence. In a prosecution for perjury both parties are competent witnesses. The court heard these witnesses and others who testified in the proceedings and every relevant fact is brought in favor of the jury's verdict. There is no substantial dispute about the essential facts that defendant had known relative to a grant many years; that he owed her money and that she came to his place of business on the evening in question to receive the same, where the parties were together and an opportunity for sexual intercourse was afforded them. We see no reason for disturbing the verdict as being contrary to the weight of the evidence.

It is further urged that restraint having been a married woman at the time the child was conceived, the presumption of legitimacy should be controlling. The present amendment to the act entitled "An act concerning bastardy", Chapter 111, R. L., Chapter 17, changes the word "unmarried" before the word "woman". Prior to the amendment it was said, as contended by defendant, that a married woman could not prosecute under the statute on a complaint for bastardy. By taking out the word "unmarried" the Legislature evidently intended to broaden the scope of the statute. There was no reason for a strict legal construction that the husband is the father of a child born in wedlock. This construction still exists under our law, but is not conclusive. If it appears

from the proof that there was no possibility of access to the mother on the part of the husband at the time of the conception of the child, the legal presumption is overcome. It was so held in Robinson v. Ruprecht, 191 Ill. 424. In People v. Gleason, 211 Ill. App. 380, wherein the court said:

"While the legal presumption obtains that every child born in wedlock is legitimate, still it is a presumption which is rebuttable when the proof conclusively shows that the husband had no power of procreation or that the circumstances were such as to render it impossible that he could be the father of the child, and such child will be adjudged to be a bastard."

While it is undisputed in the instant case that relatrix was a married woman when the act of intercourse with defendant is alleged to have taken place, February 16, 1929, yet the evidence is clear that she had not lived with her husband for approximately two years. Her decree of divorce obtained in May, 1929, was based upon allegations and proof that her husband had deserted her in 1927. There is no countervailing proof on this phase of the case, and we are therefore constrained to find that the legal presumption which usually exists where a married woman files the complaint was overcome by undisputed evidence showing that her husband could not have been the father of the child.

Counsel argues that for reasons of public decency and morality a married woman should not be heard to say that she had no intercourse with her husband and that her offspring is spurious. We quite agree that whenever the facts warrant and the statute does not prohibit, courts should indulge in the presumption of legitimacy of the offspring. Courts are sometimes powerless, however, to fix the policy of the state and must follow the intent of legislative enactments. In the instant case the removal of the word "unmarried" from the statute indicates an intention on the part of the legislature to extend the support provided for

from the fact that there was no possibility of access to the mother on the part of the husband at the time of the conception of the child, the legal presumption is overcome. It was so held in Robinson v. Robinson, 101 Ill. 444. In People v. Simpson, 211 Ill.

App. 350, wherein the court said:

"While the legal presumption operates that every child born in wedlock is legitimate, still it is a presumption which is rebuttable when the facts conclusively show that the husband had no power of procreation at the time the child was conceived, or when it is impossible that he would be the father of the child, and such child will be adjudged to be a bastard."

While it is undisputed in the instant case that relatively soon after marriage when the act of intercourse with defendant is alleged to have taken place, February 15, 1937, yet the evidence is clear that she had not lived with her husband for approximately two years. Her dates of divorce obtained in May, 1937, was based upon allegations and proof that her husband had deserted her in 1937. There is no corroborating proof on this phase of the case, and we are therefore constrained to find that the legal presumption which usually exists that a married woman lives and cohabits with her husband is overcome by undisputed evidence showing that her husband could not have been the father of the child.

Counsel argues that for reasons of public decency and morality a married woman should not be held to any child born out of wedlock with her husband and that her offspring is illegitimate. We quite agree that whenever the facts warrant and the statute does not provide, courts should inquire in the presumption of legitimacy of the offspring. Courts are sometimes powerless, however, to fix the policy of the state and must follow the intent of legislative enactments. In the instant case the removal of the word "unwedded" from the statute indicated an intention on the part of the legislature to extend the support provided for

bastard children to married, as well as unmarried, women, where circumstances warrant. No cases decided under the amended statute are cited to support defendant's contention.

For the reasons stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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34829

LEONA WILBUR,

Appellee,

v.

KABO CORSET COMPANY, a
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 637²

Opinion filed June 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit against defendant in the Municipal Court of Chicago for \$55.00. Trial was had before the court, without a jury, resulting in a finding and judgment for plaintiff in the aforementioned sum, from which this appeal is prosecuted.

The facts disclose that plaintiff was employed by defendant as stenographer on July 31, 1929, at \$27.50 a week. Plaintiff testified that when she was employed the office manager told her that after she had been with the firm "a while" she would receive two weeks vacation with pay. On July 3, 1930, defendant discharged plaintiff. A. V. Olson, office manager for defendant, testified that he had criticised plaintiff for coming to work late on several occasions; that on the day in question she was absent from the office for about half an hour, as a result of which a dispute arose between Olson and plaintiff, and she was discharged.

According to the undisputed evidence the employment was from week to week. Plaintiff testified that the time during which she was to remain with the firm in order to be entitled to her two weeks vacation was not definitely fixed, but she thought defendant would give her a vacation after she had worked there "possibly a year". At the time of her dismissal, plaintiff was paid up to the end of the week during which she was discharged.

The rule is well settled that the employment of

THE COURT

IN

AND

THE COURT

THE COURT

THE COURT

862 T.A. 837

Opinion filed June 12, 1931

THE JUSTICE DELIVERED THE OPINION OF THE COURT.
 Plaintiff brought suit against defendant in the
 Municipal Court of Chicago for \$25.00. Trial was had before the
 court, without a jury, resulting in a finding and judgment for
 plaintiff in the aforementioned sum, from which this appeal is now
 brought.

The facts disclose that plaintiff was employed by
 defendant as stenographer on July 31, 1928, at \$27.00 a week.
 Plaintiff testified that when she was employed the office manager told
 her that after she had been with the firm "a while" she would
 receive two weeks vacation with pay. On July 3, 1930, defendant
 discharged plaintiff. A. F. Olson, office manager for defendant,
 testified that he had advised plaintiff for coming to work late
 on several occasions; that on the day in question she was absent from
 the office for about half an hour, as a result of which a dispute
 arose between Olson and plaintiff, and she was discharged.
 According to the undisputed evidence the employment

was from week to week. Plaintiff testified that the time during
 which she was to remain with the firm in order to be entitled to
 her two weeks vacation was not definitely fixed, but she thought
 defendant would give her a vacation after she had worked there
 "practically a year". At the time of her dismissal, plaintiff was
 paid up to the end of the week during which she was discharged.
 The rule is well settled that the employment of

a person for an indefinite period at a weekly rate of compensation is an employment at will and can be terminated without notice by either party. (Gibson v. Fidelity & Casualty Co., 233 Ill. 49; Fuchs v. Weibert, 233 Ill. App. 538.) It therefore appears that defendant was within its rights when it terminated plaintiff's employment either for cause or without a stated reason. Inasmuch as the alleged agreement for a vacation with pay was at most vague and uncertain and depended upon plaintiff's continuance in the employment of defendant, we fail to see any ground upon which the judgment can rest.

Accordingly the judgment of the trial court will be reversed with findings of fact here.

REVERSED WITH FINDINGS OF FACT.

WILSON, P.J. AND HEBEL, J. CONCUR.

FINDINGS OF FACT.

We make the following findings of fact: That plaintiff was employed by defendant at a salary of \$27.50 per week for an indefinite period; that no definite agreement was made between the parties by which plaintiff was to receive a vacation for two weeks with pay; that plaintiff was discharged by defendant before the expiration of one year; that defendant had a right to terminate the employment at will, and that plaintiff was paid for the entire time during which she rendered services for defendant up to and including the end of the week during which she was discharged.

a person for an indefinite period of a weekly rate of compensation
in an employment at will and can be terminated without notice by
either party. (Lindsey v. Lindley, 333 Ill. 40; 201 Ill. 40;
Lindsey v. Lindley, 333 Ill. 40; 201 Ill. 40.) It therefore appears that
defendant was within his rights when he terminated plaintiff's em-
ployment either for cause or without a stated reason. Inasmuch as
the alleged agreement for a vacation with pay was at will and
uncertain and depended upon plaintiff's continuance in the employment
of defendant, we fail to see any ground upon which the judgment can
be reversed. Accordingly the judgment of the trial court will be
reversed with findings of fact here.
REVEREND WITH FINDINGS OF FACT.

WITNESSES: J. J. AND W. H. J. COOPER.

WITNESSES: J. J. AND W. H. J. COOPER.

As was the following findings of fact, 1942
plaintiff was employed by defendant at a salary of \$67.50 per week
for an indefinite period; that no definite agreement was made between
the parties by which plaintiff was to receive a vacation for two
weeks after one year; that plaintiff was discharged by defendant before
the expiration of one year; that defendant had a right to terminate
the employment at will, and that plaintiff was paid for the entire
time during which she rendered services for defendant up to and
including the end of the week during which she was discharged.

34599

FRANK MERA,

Appellee,

v.

PHILIP J. KEALY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 637³

Opinion filed June 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago in the sum of \$785.32 for medical services rendered by the plaintiff, after a trial of the cause was had before the court.

The first point made by the defendant is that the cause was not at issue at the time of the trial, and he contends that the plaintiff filed a statement of claim, to which the defendant appeared and filed an affidavit of merits; that thereafter the plaintiff, without notice, filed what is termed and endorsed as an additional count to the statement of claim filed, in which the plaintiff alleged that the claim was upon an account stated; that the defendant was not ruled to file an affidavit of merits, and, therefore, the case was not ready for trial.

From the record it appears that at the time the plaintiff was allowed by the court to file an additional count to the statement of claim, the parties to the cause were present, and it will be presumed that at the time of the trial this additional count was in the court file, and if the defendant wished to complain, as contended for, that was the time to do so, and not wait until after the court had entered judgment.

It also appears that the defendant offered no evidence, but it was admitted in his affidavit of merits that the doctor's services were rendered at the defendant's request; that

JAMES H. HARRIS

Appellate

V.

WILLIAM J. HARRIS

Appellant

Opinion filed May 12, 1931

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal by the defendant from a judgment

entered in the Municipal Court of Chicago in the sum of \$750.00 for medical services rendered by the plaintiff, after a trial of the case was had before the court.

The first point made by the defendant is that the

case was not at issue at the time of the trial, and he contends that the plaintiff filed a statement of claim, to which the defendant

appeared and filed an affidavit of denial; that thereafter the plaintiff, without notice, filed what is termed and endorsed as an

additional count to the statement of claim filed, in which the plaintiff alleged that the claim was upon an account stated; that the defendant was not asked to file an affidavit of denial, and, therefore, the case was not ready for trial.

From the record it appears that at the time the

plaintiff was allowed by the court to file an additional count to the statement of claim, the parties to the cause were present, and it will be presumed that at the time of the trial this additional count was in the court file, and if the defendant wished to complain as contended for, that was the time to do so, and not wait until

after the court had entered judgment.

It also appears that the defendant offered no

evidence, but it was admitted in his affidavit of denial that the doctor's services were rendered at the defendant's request; that

\$2,028.80 was paid to the plaintiff, but denied that a balance was due. That was the only question before the court, whether or not a balance was due the plaintiff. It has been held by this court that in a fourth class action in the Municipal Court of Chicago the claim is what the evidence makes it, Luria v. Brewer, 248 Ill. App. 525, and if the evidence is to the effect that money is due the plaintiff, whether upon an open account or upon a stated account, the court under this doctrine would be justified in finding for the plaintiff.

Evidence of an admission of liability is admissible under the statement of claim filed, wherein it appears from the allegation that the defendant promised to pay the balance due, amounting to the sum of \$785.32.

The next question to be considered is did the court admit improper evidence offered by the plaintiff based upon the evidence seeking to identify the signature of the defendant. For that purpose the affidavit of merits and a letter purporting to have been signed in the handwriting of the defendant were offered and received in evidence. The letter, the subject of this controversy, is as follows:

"Chicago, Ill. July 14, 1928.

Gentlemen:

At present I am starting a business after 9 months' preliminary work. I have had little or no income for a year. This bill will be paid in full - most of it this year but none before September - a suit will not hasten payment but will only run up costs and delay settlement. I have no desire to evade payment but cannot do the impossible.

P.J. Kealy."

J. A. Kealy, the attorney in the case and a brother of the defendant, was called to the stand and examined under Section 33 of the Municipal Court Act. He testified that he saw the defendant sign the affidavit of merits; that he would not like to swear that it was the signature of the defendant but that "it looks like it." From the evidence that the defendant signed the affidavit

\$2,000.00 was paid to the plaintiff, but denied that a balance was due. That was the only question before the court, whether or not a balance was due the plaintiff. It has been held by this court that in a fourth class action in the Municipal Court of Chicago the claim is what the evidence makes it. Smith v. Brown, 348 Ill. App. 535, and if the evidence is to the effect that money is due the plaintiff, whether upon an open account or upon a stated account, the court under this doctrine would be justified in finding for the plaintiff.

Evidence of an admission of liability is admissible under the statement of claim filed, wherein it appears from the allegation that the defendant promised to pay the balance due, amounting to the sum of \$700.00.

The next question to be considered is did the court admit hearsay evidence offered by the plaintiff based upon the evidence seeking to identify the signature of the defendant. For that purpose the affidavit of notice and a letter purporting to have been signed in the handwriting of the defendant were offered and received in evidence. The latter, the subject of this controversy, is as follows:

Chicago, Ill. July 14, 1932.

Testament
At present I am writing a business letter to you. I have had little or no income for a year. This bill will be paid in full - most of it this year but some before September - a bill will not be paid until I have no more bills to pay and they are all paid. I have no desire to evade payment but cannot do so. Respectfully,
J. J. Keely."

J. J. Keely, the attorney in the case and a brother of the defendant, was called to the stand and examined under oath. He testified that he saw the bill of the Municipal Court Act. He testified that he saw the defendant sign the affidavit of notice; that he would not like to swear that it was the signature of the defendant but that it looks like it. From the evidence that the defendant signed the affidavit

of merits, we have a right to assume that the signature is genuine.

There was also testimony offered on behalf of the plaintiff by his attorney Lorne Milne, to the effect that the signatures to Plaintiff's Exhibit 1, being the affidavit of merits, and Plaintiff's Exhibit 2, the letter purporting to have been signed by the defendant, were in the same handwriting. However, the original affidavit of merits is not made a part of the record before us nor was it certified to this court for an examination, and so we are not in a position to consider this evidence. It was the duty of the defendant to incorporate Exhibit 1 in the record, which if included would have aided this court in passing upon the point made by the defendant. The trial court had the right to make comparison of Exhibit 2 with the signature of the defendant to the affidavit of merits offered as Exhibit 1, with or without the aid of experts. Stitzel v. Miller, 250 Ill. 72. Therefore, for failure to include all of the exhibits in the record this court will not pass upon the question as it is now presented to us, but will consider the exhibits properly admitted by the trial court.

The question as to whether the record supports the judgment depends largely upon Exhibit 2, which is in evidence. This exhibit is a letter dated June 29, 1928, at Kansas City, Missouri, and addressed to the defendant. It is signed by Hall & Robinson, attorneys for the plaintiff, and in substance, requests the payment of a claim for \$786.70, due the plaintiff from the defendant, and endorsed upon the face of the letter are the words quoted in full in this opinion, signed by the defendant. This letter, together with the admission by the defendant that the bill of the plaintiff would be paid in full, is sufficient in and of itself to sustain the Court's finding.

We are unable to find any error in the record that would justify a reversal of the Court's finding. Therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

of notice, we have a right to assume that the signature is genuine. There was also testimony offered on behalf of the plaintiff by his attorney James Allen, to the effect that the signature to Plaintiff's Exhibit 1, being the affidavit of notice, and Plaintiff's Exhibit 2, the letter purporting to have been signed by the defendant, were in the same handwriting. However, the affidavit of notice is not made a part of the record before us nor was it certified to this court for an examination, and so we are not in a position to consider this evidence. It was the duty of the defendant to introduce Exhibit 1 in the record, which it intended would have aided this court in passing upon the point made by the defendant. The trial court had the right to make comparison of Exhibit 2 with the signature of the defendant to the affidavit of notice offered as Exhibit 1, with or without the aid of experts. Miller v. Miller, 203 Ill. 72. Therefore, for failure to introduce all of the exhibits in the record this court will not pass upon the question as it is now presented to us, but will consider the exhibits properly admitted by the trial court.

The question as to whether the record supports the judgment depends largely upon Exhibit 2, which is in evidence. This exhibit is a letter dated June 26, 1922, at Kansas City, Missouri, and addressed to the defendant. It is signed by Will S. Robinson, attorney for the plaintiff, and in substance, repeats the payment of a claim for \$750.00, due the plaintiff from the defendant, and returned upon the face of the letter and the words printed in full in this opinion, signed by the defendant. This letter, together with the admission by the defendant that the bill of the plaintiff would be paid in full, is sufficient in and of itself to sustain the court's finding.

We are unable to find any error in the record that would justify a reversal of the court's finding. Therefore, the judgment is affirmed. THOMAS J. ATWOOD.

34608

MARCELLA KAIDER,

Appellee,

v.

JACOB KAIDER,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

262 I.A. 637⁴

Opinion filed June 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

Marcella Kaider, the complainant, obtained a decree of divorce from the defendant, Jacob Kaider, on service by publication. The decree further provides that she have the sole care, custody and education of the three children, and the court reserved jurisdiction concerning questions of the care and future support of the minor children, so far as the defendant Jacob Kaider was concerned.

On April 4, 1930, complainant filed a petition, which alleged the entry of a decree of divorce by publication on the ground of desertion; that under the terms of the decree she was given the custody of the children, with the reservation above quoted; that the defendant deserted and abandoned his three children for a period of seven years and has been living in the State of Michigan; that a warrant now having issued on the grounds of child desertion and abandonment that said Jacob Kaider will be brought into Chicago, and into the jurisdiction of this Court within the next week; that petitioner fears that if the said defendant, Jacob Kaider is brought into this state and into the jurisdiction of this Court by the above named warrant within the next week, that he will again remove to the State of Michigan and out of the jurisdiction of this Court, unless restrained by an order of this Court.

On the same day the court entered an order that a writ of ne exeat issue instantanter staying the defendant Jacob Kaider

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APPEALS

V.

JACOB KATZER

vs. JACOB KATZER

APPEAL

Opinion filed June 15, 1931

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252 E. A. 337

in a question of law, the court delivered the opinion of the court. The court further provides that she have the sole care, custody and education of the three children, and the court reserved jurisdiction concerning questions of the care and future support of the minor children, as far as the interests of Jacob Katzer are concerned.

On April 4, 1930, complaint filed a petition, which alleged the entry of a decree of divorce by publication on the ground of desertion; that under the terms of the decree she was given the custody of the children, with the responsibility above stated; that the defendant deserted and abandoned his three children for a period of seven years and has been living in the State of Michigan; that a warrant now being issued on the grounds of child desertion and abandonment that said Jacob Katzer will be brought into Chicago, and into the jurisdiction of this court within the next year; that petitioner prays that it be decreed, Jacob Katzer be brought into this state and into the jurisdiction of this court by the above named warrant within the next week, that he will again remove to the State of Michigan and out of the jurisdiction of this court, unless restrained by an order of this court.

On the same day the court entered an order that a writ of habeas corpus be issued against the defendant Jacob Katzer.

from departing into parts beyond this state and out of the jurisdiction of the Court, and fixing defendant's bond at \$1,000.

Alias ne exeat was issued on April 14, 1930, and was returned by the Sheriff executed, by arresting the within named Jacob Kaider on April 14, 1930, and he having failed to give bond, by committing him to the county jail. Thereafter, on April 17, 1930, the defendant was released from custody. On April 14, 1930, the same day that the defendant was arrested (and while he was under arrest), the court entered an order as follows:

"On motion of Solicitor for Complainant, this cause now coming on to be heard on petition for summons to issue against Jacob Kaider, defendant herein, and on petition for order of support of the three minor children, the court being duly advised in the premises and having jurisdiction of the parties and of the subject matter, the defendant Jacob Kaider now appearing in open court, in person and by solicitor.

The Court having heard the testimony of the parties and the witnesses in open court further finding that a final decree of divorce was entered herein on December 28, 1927, by publication and on the grounds of desertion, and that by the terms of said decree it was provided as follows: 'The Court hereby reserves all right concerning all questions of the care and future support of said minors, in so far as the defendant, Jacob Kaider, herein is concerned.'

It is ordered, adjudged and decreed that the defendant, Jacob Kaider, pay the sum of fifteen dollars (\$15.00) each week for the support of the three (3) minors, Valentina, Irene and Raymond, until the further order of this Court, payments to date from April 1, A. D. 1930."

It appears from the record that on May 2, 1930, the verified petition of Jacob Kaider, the defendant, was filed and presented to the court, after due notice to the complainant, alleging that at the time the order of April 14, 1930, was entered, the petitioner was before the Court under arrest and under duress, having been brought into the jurisdiction of the Court from the City of Dearborn, Wayne, County, and State of Michigan, on a warrant falsely charging him with non-support of his minor children; that on December 28, 1927, a decree of divorce was entered on

from appearing into court beyond this date and out of the jurisdiction of the Court, and fixing defendant's bond at \$1,000.00. A writ of Habeas Corpus was issued on April 14, 1930, and was returned by the Sheriff executed, by arresting the within named Jacob Kaiser on April 14, 1930, and he having failed to give bond, by committing him to the county jail. Thereafter, on April 17, 1930, the defendant was released from custody. On April 18, 1930, the same day that the defendant was arrested (and while he was under arrest), the court entered an order as follows:

"On motion of Solicitor for Complainant, this court has caused to be heard on petition for writ of Habeas Corpus against Jacob Kaiser, defendant herein, and on petition for writ of arrest of the within named Kaiser, the court being satisfied in the premises and finding jurisdiction of the parties and of the subject matter, the defendant Jacob Kaiser was appearing in open court, in person and by solicitor. The court having heard the testimony of the parties and the witnesses in a court further finding that a final decree of divorce was entered herein on December 12, 1927, by publication and on the grounds of desertion, and that by the terms of said decree it was provided as follows: 'The court hereby declares all right concerning all questions of the care and custody of said minor, as to her as the defendant, Jacob Kaiser, herein is concerned.' It is ordered, adjudge and decreed that the defendant, Jacob Kaiser, pay the sum of fifteen dollars (\$15.00) each week for the support of the minor (D) Kaiser, herein named, until the further order of this court, payments to date from July 1, 1927.

It appears from the record that on May 2, 1930, the verified petition of Jacob Kaiser, the defendant, was filed and presented to the court, after the notice to the complainant, alleging that at the date of April 14, 1930, was returned, the petition was before the court under arrest and under bond, having been brought into the jurisdiction of the court from the City of Monterey, County, and State of California, as a warrant lawfully charging him with non-support of his minor children; that on December 12, 1927, a decree of divorce was entered on

publication service for adultery and desertion; that petitioner was not represented and that the allegations of the bill as to desertion were absolutely untrue and false; that there is no basis either in the bill or in the evidence for the charge of adultery; that the charge of desertion was untrue because the complainant drove petitioner out of his home in 1923; that she was then living with one Joseph Zak; that petitioner continued to send money to complainant for the support of said children until March 16, 1929, under an agreement with the complainant that he should contribute \$15.00 per month until the complainant remarried; that complainant did remarry about March 16, 1929, and that she married a wealthy man and did not desire petitioner to send any more money for the children; that matters remained in statu quo until April 10, 1930, when a Chicago officer or deputy sheriff appeared in Dearborn, Michigan, where petitioner resided, and arrested him on a warrant charging non-support; that petitioner was brought to Chicago to the Municipal Court of Chicago on April 12, 1930, and placed in a cell, where he was detained until April 14, 1930, when said cause came up before his Honor, Judge Ehler, and was dismissed for want of prosecution and petitioner discharged; that he was not released when discharged by the Municipal Court, but was taken by another officer before said Judge Charles A. Williams, of the Superior Court, and was in custody of said officer when said order was entered.

It also appears from the record that the petitioner further says that two of the older children are employed and earning wages, and that the only child that is not earning his support is the youngest, Raymond, who is thirteen years of age; that petitioner has a complete defense to said bill for divorce and prays that said decree of divorce be set aside on the ground that it is not based either on the bill or the evidence, and that the order entered on

petitioner arrived for military and desertion; that petitioner was not represented and that the allegations of the bill as to desertion were completely untrue and false; that there is no basis either in the bill or in the evidence for the charge of desertion; that the charge of desertion was untrue because the complainant knew petitioner out of his home in 1922; that she was then living with one Joseph Lee; that petitioner continued to send money to complainant for the support of said child until March 15, 1925, under an agreement with the complainant that he should contribute \$15.00 per month until the complainant remarried; that complainant did remarry about March 15, 1925, and that she married a wealthy man and did not continue petitioner to send any more money for the child; that no more remained in said fund until April 15, 1925, when a Chicago officer or deputy sheriff appeared in person, advised where petitioner resided, and arrested him on a warrant charging non-support; that petitioner was brought to the Municipal Court of Chicago on April 15, 1925, and placed in a cell, where he was detained until April 15, 1925, when said court came up before his Honor, Judge Miller, and was discharged for want of prosecution and petitioner discharged; that he was not released upon bail as alleged by the Municipal Court, but was taken by another officer before said Judge Charles A. Williams, of the Superior Court, and was in custody of said officer when said order was entered.

It also appears from the record that the petitioner further says that two of the other children are supported and maintained, and that the only child that is not getting his support is the youngest, named, who is thirteen years of age; that petitioner has a complete release to said bill for divorce and says that said decree of divorce has not come in the ground that it is not based either on the bill or the evidence, and the order entered on

April 14, 1930, be set aside on the ground that said order was entered while petitioner was under duress and not voluntarily within the jurisdiction of the court.

The motion further prayed for leave to file special appearance and for a rule on complainant to answer defendant's petition, which prayer of the petitioner was on May 2, 1930, denied, to which exception was taken. The defendant appealed from this order.

The defendant contends that a decree of divorce, when notice to defendant is by publication, may be opened up for the purpose of filing an appearance and an answer upon the defendant's complying with the provisions of Section 19, Chapter 23 of the Chancery Act. From the defendant's petition filed in this cause on May 2, 1930, it will appear whether or not he brought himself within the provisions of this act. In this petition the defendant admits that he had knowledge that the complainant remarried on or about March 16, 1929, and we have the right to assume that defendant was notified of the divorce proceeding filed by his wife, and knew that a decree was entered in that proceeding. The defendant, if he wishes to bring himself within the terms of Section 19, in order to be allowed to appear and defend, must set up facts that would justify the court in the entry of an order for such purpose. The facts in this petition justify the conclusion that the defendant had knowledge of this divorce proceeding, and that he was in receipt of notice required to be sent to him by mail. His application was not made within one year after notice of the entry of the decree, and upon this point the court was fully justified in denying the relief prayed for in his petition.

It is urged with earnestness that the defendant was brought into court by an abuse of process, and that courts will not permit the wrongful use of process in order that the complainant

April 14, 1930, he set aside on the ground that said order was entered while petitioner was under arrest and not voluntarily within the jurisdiction of the court.

The motion further prayed for leave to file special

appearance and for a rule on complaint to answer defendant's petition, which prayer of the petitioner was on May 2, 1930, denied, to which exception was taken. The defendant appeared from this order. The defendant contends that a decree of divorce, when

notice to defendant is by publication, may be opened up for the purpose of filing an appearance and an answer upon the defendant's

complying with the provisions of section 18, Chapter 33 of the Statutes. From the defendant's petition filed in this cause on May 2, 1930, it will appear whether or not he brought himself within the provisions of this act. In this petition the defendant admits

that he had knowledge that the complaint remained on or about March 18, 1928, and he has the right to assume that defendant was notified of the divorce proceeding filed by his wife, and knew that a decree was entered in that proceeding. The defendant, if he

wishes to bring himself within the terms of section 18, in order to be allowed to appear and defend, must set up facts that would justify the court in the entry of an order for such purpose. The facts in this petition justify the conclusion that the defendant had knowledge

of this divorce proceeding, and that he was in receipt of notice required to be sent to him by mail. His application was not made within one year after notice of the entry of the decree, and upon this point the court was fully justified in denying the relief

prayed for in his petition. It is urged with earnestness that the defendant was

brought into court by an abuse of process, and that courts will not permit the wrongful use of process in order that the complaint

may gain an advantage by such wrongful act.

From the facts before us, it is apparent that the warrant issued for child abandonment, upon which the defendant was brought into this jurisdiction before the Municipal Court of Chicago, was not prosecuted, and the defendant was discharged. Upon his discharge by order of the Municipal Court, he was immediately taken into custody by the sheriff upon an alias writ of ne exeat, and it is fair to assume that this writ was issued upon the petition of the complainant in order that the court might have jurisdiction to enter the order of \$15.00 per week for the support of the children of the defendant. If the defendant had taken advantage of his rights when he appeared in open court with his solicitor, the court would, upon a proper petition, have considered the facts, and no doubt, would have entered an order discharging the defendant. Practices of the kind appearing in this record are never approved by this court, or any other court, but the defendant did not complain when he appeared on April 14, 1930, when the order was entered for the support of the children, after the court had heard testimony of the parties and the witnesses in open court. The record does not disclose that objection was made nor question raised by the defendant concerning the jurisdiction of the court. Having failed to object, the defendant cannot raise the question at this time.

It also appears from the record that the appeal is not from the order entered for the support of the children, but rather from the order denying the relief prayed for in the defendant's petition filed on May 2, 1930, and the point is made that this order is not an appealable order. However, we have considered the merits brought to our attention, and we are of the opinion that there is no error in the record that would justify a reversal of the order denying the relief prayed for.

ORDER AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

may gain an advantage by which wrongful act.

From the facts before me, it is apparent that the

warrant issued for said defendant, upon which the defendant was

brought into this jurisdiction before the Municipal Court of

Chicago, was not protected, and the defendant was discharged. Upon

his discharge by order of the Municipal Court, he was immediately

taken into custody by the sheriff upon an alias writ of RE HABERE, and

it is felt as certain that this writ was issued upon the petition of

the complainant in order that the court might have jurisdiction

to enter the order of \$125.00 per week for the support of the children

of the defendant. If the defendant had taken advantage of his rights

when he appeared in open court with his solicitor, the court would,

upon a proper petition, have considered the facts, and no doubt,

would have entered an order discharging the defendant. Petitions of

the kind appearing in this record are never approved by this court,

or any other court, but the defendant did not complain when he

appeared on April 14, 1930, when the order was entered for the

support of the children, after the court had heard testimony of the

plaintiff and the witness in open court. The record does not dis-

close that objection was made nor question raised by the defendant

concerning the jurisdiction of the court. Having failed to object,

the defendant cannot raise the question at this time.

It also appears from the record that the appeal is

not from the order entered for the support of the children, but

rather from the order denying the relief prayed for in the defendant's

petition filed on May 2, 1930, and the point is made that this order

is not an appealable order. However, as has been stated the matter

brought to our attention, and we are of the opinion that there is

no error in the record that would justify a reversal of the order

denying the relief prayed for.

ORDER AFFIRMED.

WILSON, J. J. and WILSON, J. J. COVENE.

34623

HAROLD L. LARSEN,

Appellee,

v.

WESTERN PLUMBING SUPPLY CO.,
a Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2621A.637

Opinion filed June 15, 1931

MR. JUSTICE REBEL delivered the opinion of the court.

This is an action in assumpsit to recover the sum of \$2,000 which plaintiff paid to the defendant as a deposit on a certain lease. The case was tried before the court and a jury, and a verdict was returned for the plaintiff in the sum of \$2,196. After the plaintiff remitted the sum of \$196, the court overruled defendant's motion for a new trial and entered judgment on the verdict, from which the defendant appeals to this court.

It appears from the evidence that on or about February 23, 1928, the plaintiff negotiated with one John J. Tyne, president of the defendant corporation, for a lease on the premises known and described as 3000-02 West Fillmore street, Chicago, to be occupied as an automobile, gasoline, greasing and service station, John L. Francis accompanied plaintiff at these negotiations, and there is some evidence that Tyne was advised by the plaintiff and Francis, prior to the execution of the lease, that they were to operate this filling station in partnership, and that because of Francis previous experience and extensive acquaintanceship the application for the necessary permits, etc. would be made in his name. The lease was executed on February 24, 1928, at the office of John E. Owens, defendant's attorney, and contained, among others, the following provisions:

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1881

Opinion filed June 15, 1951

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1906

THE UNIVERSITY OF CHICAGO

On the 11th day of March, 1934, the defendant was ordered to pay the sum of \$10,000 into the court as a deposit on a certain issue. The case was tried before the court and a jury, and a verdict was returned for the plaintiff in the sum of \$2,125. After the verdict returned the sum of \$1,000, the court overruled defendant's motion for a new trial and entered judgment on the verdict. From which the defendant appeals to this court.

It appears from the evidence that on or about February 11, 1935, the defendant conspired with one John I. Tracy, President of the defendant corporation, for a lease on the premises known and described as 2000-02 West Williams Street, Chicago, to be employed as an automobile, gasoline, exercising and service station. John I. Francis accompanied plaintiff at these negotiations, and that in such evidence that they was advised by the plaintiff and Francis, prior to the execution of the lease, that they were to operate this filling station in partnership, and that because of Francis previous experience and extensive acquaintance with the application for the necessary permits, etc. would be made in his name. The lease was executed on February 24, 1935, at the office of John E. Green, defendant's attorney, and consisted, among other

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"The Lessee does hereby agree to use his best efforts to obtain any and all frontage consents, permits and/or licenses as may be or are required by law for the erection and/or operation of an automobile, gasoline and greasing station upon the demised premises and the lessee shall, on or before April 23rd, 1928, notify the Lessor in writing whether or not the lessee has been able to obtain such frontage consents, permits and/or licenses as aforesaid.

In the event that the Lessee shall so notify the lessor, on or before April 23rd, 1928, that he has been unable to obtain the necessary frontage consents, permits and/or licenses for said purposes as aforesaid, then this lease shall terminate and end as of the date hereof and the lessor agrees to repay unto the lessee any and all sums theretofore paid by the lessee or deposited in Escrow as a result thereof."

At the time of the execution of the lease, and pursuant to the terms thereof, plaintiff deposited with Owens the sum of \$2,000, and Owens delivered a receipt therefor to the plaintiff.

It further appears from the evidence of the plaintiff that a few days after February 24, Francis, on behalf of the plaintiff, made inquiries at the office of the West Park Commissioners about the procedure necessary to obtain a driveway permit, which permit was essential in order to install and operate a service station on the demised premises, and thereafter the plaintiff and Francis personally went to the offices of the Board, where they were advised that their application had been received and referred to the Improvement Committee, of which one Dahlman was chairman.

It further appears from the evidence offered by the plaintiff that a few days later both the plaintiff and the defendant went to see Dahlman with respect to the driveway permit, and thereafter until the denial of the permit by the Board, plaintiff and Francis went to Dahlman's office, or to the office of the West Park Board, practically every day with the object of obtaining favorable action on their driveway permit; that at the same time plaintiff and Francis went to see one Sullivan, who was Chief Clerk of the Bureau of Fire Prevention of the City of Chicago, in order to

"The licensee does hereby agree to use his best efforts to obtain any and all necessary permits, licenses and/or licenses as may be or are required by law for the operation and/or operation of an automobile, gas-line and growing station upon the demand premises, and the licensee shall, on or before April 21st, 1933, notify the board in writing whether or not the licensee has been able to obtain such necessary permits, licenses and/or licenses as aforesaid. In the event that the licensee shall so notify the board, on or before April 21st, 1933, that he has been unable to obtain the necessary permits, licenses and/or licenses for said purpose as aforesaid, then this license shall terminate and as of that date hereby and the licensee agrees to repay unto the board any and all sums of money paid by the licensee or deposited in favor as a result thereof."

At the time of the execution of the license, and pursuant to the terms thereof, Plaintiff deposited with them the sum of \$2,000, and thereupon delivered a receipt therefor to the Plaintiff. It further appears from the evidence of the Plaintiff that a few days after February 24, 1933, on behalf of the Plaintiff, made inquiries at the office of the West Park Commissioners about the procedure necessary to obtain a driveway permit, which permit was essential in order to install and operate a new station on the demand premises, and thereafter the Plaintiff and Francis personally went to the office of the board, where they were advised that their application had been received and referred to the laymen's committee, of which one Francis was chairman. It further appears from the evidence offered by the Plaintiff that a few days later both the Plaintiff and the defendant went to see Francis with respect to the driveway permit, and thereafter until the denial of the permit by the board, Plaintiff and Francis went to Francis's office, or to the office of the West Park Board, practically every day with the object of obtaining favorable action on their driveway permit; that at the same time Plaintiff and Francis went to see one Sullivan, who was Chief Clerk of the Bureau of Fire Prevention of the City of Chicago, in order to

secure the proper petition on which to obtain frontage consent signatures; that after two or three conferences with Sullivan, he advised them that in view of the fact that there was a tank already in the ground on the premises it would ^{not} be necessary to obtain frontage consents, and that the only permit necessary for them to obtain was a driveway permit from the West Park Board, and that Tyne, president of the defendant corporation, was advised of this fact by the plaintiff.

It further appears from the evidence that plaintiff and Francis requested Tyne to extend the time for them to procure the necessary permits until May 1; that he agreed to such extension and referred them to defendant's attorney Owens, who wrote a letter extending the time, as requested, until May 1, 1928; that thereafter, on April 28, 1928, for reasons which do not appear in the record, the West Park Board denied Francis's application for a driveway permit, and notice of such denial was mailed by the Board to Francis, and the plaintiff on April 30, 1928, mailed a registered letter to Tyne, advising him of the action of the Board, and requesting the return of the \$2,000.

The evidence offered by the plaintiff was disputed by the defendant's evidence, and numerous errors are assigned as to the admissibility of evidence, the overruling of defendant's motions made at the close of the plaintiff's case, as well as at the close of all the evidence, and that the verdict of the jury is against the manifest weight of the evidence.

The first objection to be considered is whether the court admitted incompetent evidence over the objection of the defendant. The complaint is that the court erred in allowing the witness Eileen Mikkelsen, a former employee of the West Chicago Park Commissioners, to testify that she kept the records of the Park Board and that they were not correct or complete. The plaintiff

seems the proper position in which to obtain knowledge as to
whether or not there was any conversation with anyone, he
advised them that in view of the fact that there was a talk already
in the ground on the premises it would be necessary to obtain
frontage evidence, and that the only person necessary for them to
obtain was a driveway permit from the West Park Board, and that they
President of the National Highway Board, was advised of this fact
by the plaintiff.

It further appears from the evidence that plaintiff
and Evans requested them to extend the time for them to procure
the necessary permit until May 1; that he agreed to such extension
and returned them to defendant's attorney Owen, who wrote a letter
extending the time, as requested, until May 1, 1933; that thereafter,
on April 28, 1933, for reasons which do not appear in the record, the
West Park Board denied Evans's application for a driveway permit,
and notice of such denial was mailed by the board to Evans, and
the plaintiff on April 30, 1933, mailed a registered letter to Evans
advising him of the action of the board, and requesting the return
of the \$2,000.

The evidence offered by the plaintiff was disputed
by the defendant's evidence, and numerous errors are assigned as
to the admissibility of evidence, the overruling of defendant's
motions made at the close of the plaintiff's case, as well as at
the close of all the evidence, and that the verdict of the jury is
against the manifest weight of the evidence.

The first objection to be considered is whether the
court excluded incompetent evidence over the objection of the
defendant. The complaint is that the court acted in allowing the
witness Allen Williams, a former employee of the West Chicago Lumber
Company, to testify that he had the records of the West
Park Board and that they were not correct or complete. The plaintiff

replies to this contention that the records show that she was a minute clerk of the Board, and that her evidence was to the effect that the Board at its meeting on April 28, 1928, denied the plaintiff's application for a permit, and that such action should have been incorporated by her in the official record book of the Board, but that by some omission or mistake on her part she neglected to make proper entry. The record itself merely discloses that the application for a permit was made by the plaintiff through John L. Francis, and was referred to the Improvement Committee of the Board; that no entry appears in the record that any further action had been taken in granting or denying the issuance of a permit for the installation of two twenty-foot driveways upon the property described in the lease; and, further, it appears from the evidence of the plaintiff that there was proof of the loss of a certain letter, a true copy of which was offered and received in evidence, which letter purported to be signed by the West Chicago Park Commissioners, under date of April 30, 1928, and addressed to John L. Francis, informing him that at the Board meeting on April 28, 1928, his request for two-twenty-foot driveways was presented, and denied by the Board. The general rule is that it is proper to show by parol evidence facts omitted to be stated upon the record of a municipal or public corporation, unless the law expressly and imperatively requires all matters to appear of record and makes the record the only evidence. 2 Dillon on Munic. Corp. (5th ed.) Sec. 557; County of Vermilion v. Knight, 2 ILL. 97; (1 Scammon) School Directors v. Kimmel, 31 Ill. App. 537.

Our attention has not been called to any provision of the statutes of this State that would make such evidence inadmissible. The objection that the agency of the witness was not established, except by her testimony, and therefore is not admissible, is beside the question. The question is, was she present and able

regard to this contention that the records show that she was a min-
or clerk of the Board, and that her evidence was to the effect that
the Board at its meeting on April 22, 1926, denied the plaintiff's
application for a permit, and that such action should have been
insisted upon by her in the official record book of the Board, but
that by some omission or mistake on her part she neglected to make
proper entry. The record itself clearly discloses that the appli-
cation for a permit was made by the plaintiff through John A.
Francis, and was referred to the Improvement Committee of the Board;
that no entry appears in the record that any further action had
been taken in granting or denying the issuance of a permit for
the installation of two twenty-foot driveways upon the property
described in the lease; and, further, it appears from the evidence
of the plaintiff that there was proof of the loss of a certain
letter, a true copy of which was offered and received in evidence,
which letter purported to be signed by the erstwhile Board
Commissioner, under date of April 22, 1926, and addressed to John
A. Francis, informing him that at the Board meeting on April 22,
1926, his request for two twenty-foot driveways was presented, and
denied by the Board. The general rule is that it is proper to show
by parol evidence facts omitted to be stated upon the record of a
municipal or public corporation, unless the law expressly and
imperatively requires all matters to appear of record and makes the
record the only evidence. 5 Allen on Evid. 127. (2d ed.) Sec.
327; Society of Trustees v. Wright, 1 Ill. 57; (1 Freeman) 229.
Chicago v. Kansas, 21 Ill. App. 227.
Our attention has not been called to any provision
of the statutes of this State that would make such evidence inad-
missible. The objection that the agency of the witness was not
established, except by her testimony, and therefore is not admissible,
in this case, is not the question. The question is, was she present and this

to testify to the action of the Board? Her presence and her position at the Board meeting at the time are not questioned, so far as appears from the record. The weight of the evidence is for the jury, and unless it is manifestly against the weight of the evidence this court is obliged to give way to the verdict of the jury. It does appear that the defendant offered in evidence the same letter offered by the plaintiff, in which the Park Board denied the issuance of a permit for the two driveways. The offering of this letter by the defendant and the receipt of it in evidence, waived any objection that was made, and therefore it was not reversible error for the trial court to admit this parol evidence.

There was also objection to the proof offered by the plaintiff regarding a conversation of the plaintiff and Francis Tyne, several days after the lease was signed, to the effect that Tyne, defendant's president, told the plaintiff and Francis to go down and see Mr. Owens, the attorney for the defendant, who would draft a contract for an extension. This evidence was not erroneous for the reason that it was admitted beyond question that the \$2,000 was deposited and a receipt given by the attorney for such deposit. The fact that the time within which the plaintiff was to use his best endeavor to obtain a permit for the installment of this gasoline service station was extended to May 1, 1928, was not contradicted, nor was the fact that the money was deposited; but these facts are substantiated by a letter of Owens addressed to the plaintiff.

The defendant offered to prove by the records of the West Chicago Park Commissioners that on May 23, 1928, John T. Tyne, the president of the defendant company, applied for a permit for two-twenty-foot driveways for the property mentioned in the lease to the parties to this litigation, which was granted. This

to testify to the action of the Board of Commissioners and the
position at the board meeting at the time now not mentioned, so
far as appears from the record. The weight of the evidence is for
the jury, and unless it is manifestly against the weight of the
evidence this court is obliged to give way to the verdict of the
jury. It does appear that the defendant offered in evidence the
same letter offered by the plaintiff, in which the two boards denied
the issuance of a permit for the two drivers. The offering of
this letter by the defendant and the receipt of it in evidence,
advised any objection that was made, and therefore it was not
reversible error for the trial court to admit this parcel evidence.

There was also objection to the oral statement by the
plaintiff regarding a conversation of the plaintiff and Francis
with Tyne, several days after the issue was signed, to the effect
that Tyne, defendant's president, told the plaintiff and Francis
to go down and see Mr. Brown, the attorney for the defendant, who
would draft a contract for an extension. This evidence was
not admissible for the reason that it was admitted beyond question
that the \$2,000 was deposited and a receipt given by the attorney
for such deposit. The fact that the time within which the plaintiff
was to sue his debt underwent to obtain a permit for the installment
of this parcel evidence was extended to May 1, 1936, was
not controverted, nor was the fact that the money was deposited; but
these facts are substantiated by a letter of Brown addressed to the
plaintiff.

The defendant offered to prove by the records of
the Board of Commissioners that on May 22, 1936, John J.
Tyne, the president of the defendant company, applied for a permit
for two-hundred-dollar drivers for the property mentioned in the
issue in the action to this litigation, which was granted. This

evidence, we understand, was offered to show that the plaintiff did not act in good faith in his application for a permit to conduct the business under consideration. Upon what ground this evidence is admissible is not made clear. It would not bind the plaintiff. The only ground upon which he would be entitled to recover from the defendant would be his ability to bring himself within the terms of his lease, and prove that he acted in good faith, and therefore could recover the amount deposited, and this position is fortified by the instruction offered by the defendant and read to the jury in these words:

"The court instructs the jury that if they find from a preponderance of the evidence that the plaintiff did not use his best efforts to obtain frontage consents, permits, and/or licenses as required in the lease in question then you will find the issues for the defendant."

The conclusion reached by the court upon this question applies equally to the contention of the defendant that the court erred in not allowing the defendant to show damages by way of recoupment. If the plaintiff did not use his best efforts to obtain a permit, then he was not in a position to recover, and if he did, then under the terms of the lease he was entitled to a judgment, and the jury was so instructed. The defendant complains that no instruction was given to the jury that the burden of proof was upon the plaintiff, and that he must make out his case by a preponderance of the evidence. The rule is that if a party wishes a jury to be instructed upon any particular rule of law it is his duty to present such an instruction to the trial court, and failing to do so the party in default will not be heard to complain. This rule applies in this case, and failure to present such an instruction, the defendant is not in a position to complain on this appeal.

It is contended further that the court erred in giving to the jury instruction numbered 2, which is as follows:

evidence, we understand, was offered to show that the plaintiff did not act in good faith in his application for a permit to conduct the business under consideration. Upon what ground this evidence is admitted is not made clear. It would not mind the plaintiff. The only ground upon which he would be entitled to recover from the defendant would be his ability to bring himself within the terms of his lease, and prove that he acted in good faith, and therefore could recover the amount deposited, and this position is fortified by the instruction offered by the defendant and read to the jury in these words:

"The court instructs the jury that if they find from a preponderance of the evidence that the plaintiff did not use his best efforts to obtain a lease, consent, permit, and/or license as required in the lease in question then they will find for recovery for the defendant."

The conclusion reached by the court upon this question applies equally to the contention of the defendant that the court erred in not allowing the defendant to show damages by way of reimbursement. If the plaintiff did not use his best efforts to obtain a permit, then he was not in a position to recover, and if he did, then under the terms of the lease he was entitled to a judgment, and the jury was so instructed. The defendant explains that no instruction was given to the jury that the burden of proof was upon the plaintiff, and that he must make out his case by a preponderance of the evidence. The rule is that if a party wishes a jury to be instructed upon any particular rule of law it is his duty to present such an instruction to the trial court, and failing to do so the party in default will not be heard to complain. This rule applies in this case, and failure to present such an instruction, the defendant is not in a position to complain on this ground.

It is contended further that the court erred in giving to the jury instruction numbered 7, which is as follows:

"The jury are instructed that it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof, because he has testified to a state of facts which are denied by the testimony of the defendant. In such a case, in arriving at the truth, the jury have a right to take into consideration every fact and circumstance proved on the trial, such as the situation of the parties, their acts at the time of the transaction, and afterwards, so far as they appear in evidence; as well as their appearance on the witness stand, and their manner of testifying in the case."

Criticism is made that the jury were not free to consider all the evidence; that the instruction does not enumerate all the evidence for the jury to consider, and does not refer to the number of witnesses, their interest or lack of interest, their intelligence or lack of it, and their candor or lack of same. This instruction is to the effect that because the plaintiff testified to a state of facts which are denied by the testimony of the defendant it does not necessarily follow that the plaintiff failed to establish his case by a preponderance of the evidence. The instruction tells the jury that in order to arrive at the truth, the jury have a right to take into consideration every fact and circumstance proved on the trial, which means that every fact and circumstance testified to by witnesses on the trial is to be considered by the jury. We are of the opinion that the jury were not misled by this instruction under the facts in this case, and while the instruction may be subject to criticism, still the giving of such instruction was not such harmful error as would justify a reversal.

There is considerable conflict in the evidence, and, of course, the jury are to weigh this evidence and return a verdict. The witnesses appeared in court and testified, and the jury were better able to consider the evidence and weight it than we are. This court will not reverse unless the verdict is manifestly against the weight of the evidence, and under this rule we would not be warranted in substituting our judgment for that of the jury which returned the verdict.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

WILSON, F.J. AND FRIEND, J. CONCUR.

"The jury was instructed that it does not necessarily follow that a plaintiff called to establish his case by a preponderance of proof, because he has testified to a state of facts which are denied by the testimony of the defendant. In such a case, in arriving at the truth, the jury have a right to take into consideration every fact and circumstance proved on the trial, such as the admission of the parties, their acts at the time of the transaction, and afterwards, so far as they appear in evidence; as well as their appearance on the witness stand, and their manner of testifying in the case."

Criticism is made that the jury were not free to consider all the evidence for or against the plaintiff; that the instruction does not emphasize all the evidence for the jury to consider, and does not refer to the number of witnesses, their interest or lack of interest, their intelligence or lack of it, and their candor or lack of candor. This instruction is to the effect that because the plaintiff testified to a state of facts which are denied by the testimony of the defendant it does not necessarily follow that the plaintiff failed to establish his case by a preponderance of the evidence. The instruction tells the jury that in order to arrive at the truth, the jury have a right to take into consideration every fact and circumstance proved on the trial, which means that every fact and circumstance testified to by witnesses on the trial is to be considered by the jury. As one of the opinions that the jury were not misled by this instruction under the facts in this case, and while the instruction may be subject to criticism, still the giving of such instruction was not such harmful error as would justify a reversal.

There is considerable conflict in the evidence, and, of course, the jury are to weigh this evidence and return a verdict. The witnesses appeared in court and testified, and the jury were better able to consider the evidence and weight it than we are. This court will not reverse unless the verdict is manifestly against the weight of the evidence, and under this rule we would not be warranted in substituting our judgment for that of the jury which returned the verdict.

The judgment is therefore affirmed.

34668

S. FRAGER AND D. SAPERSTEIN,
copartners, doing business as
ALBANY BARGAIN HOUSE,

Appellees,

v.

S. SIKKENSTEIN & SONS, INC.,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 638

Opinion filed June 15, 1931

MR. JUSTICE HESSEL delivered the opinion of the court.

This case comes before this court on motion of the appellees (plaintiffs below) to strike the bill of exceptions from the record and for an affirmance of the judgment rendered against the defendant in the Municipal Court of Chicago.

From the record it appears that the plaintiffs filed a First Class action in the Municipal Court of Chicago, to which the defendant was made a party, and upon the trial, on May 23, 1930, the court entered a judgment for \$1,167.80, from which judgment the defendant appeals to this court.

On the same day an order was entered by the court allowing the defendant sixty days within which to file its bill of exceptions. On the sixtieth day, which was July 22, 1930, the bill of exceptions now filed as a part of the record in this court was presented to John J. Rooney, Judge of said court, and the following appears as noted on the bill of exceptions:

"The above and foregoing bill of exceptions presented to me this 22nd day of July, 1930, during the absence of Judge Albert B. George on vacation."

Thereafter, on the 15th day of September, 1930, the same bill of exceptions was tendered to the Honorable Albert B. George, one of the judges of the Municipal Court, who presided at the trial and signed and certified the same and ordered it filed nunc pro tunc

ALBERT A. GEORGE, Plaintiff,
vs.
E. W. WILSON & SONS, INC., Defendant.

Appeal from the Circuit Court of Cook County, Illinois.

E. W. WILSON & SONS, INC., Plaintiff,
vs.
ALBERT A. GEORGE, Defendant.

Appeal from the Circuit Court of Cook County, Illinois.

2008-1-1-1008

Opinion filed May 15, 1931

MR. JUSTICE HENRY delivered the opinion of the court.
This case comes before this court on motion of the
appellant (plaintiff below) to strike the bill of exceptions from
the record and for an affirmance of the judgment rendered against the
defendant in the Municipal Court of Chicago.

From the record it appears that the plaintiff filed
a first class action in the Municipal Court of Chicago, to which the
defendant was made a party, and upon the trial, on May 23, 1930, the
court entered a judgment for \$1,187.00, from which judgment the
defendant appeals to this court.

On the same day an order was entered by the court
allowing the defendant sixty days within which to file his bill of
exceptions. On the sixtieth day, which was July 22, 1930, the bill
of exceptions was filed as a part of the record in this court was
presented to John J. Kennedy, Judge of said court, and the following
appears as noted on the bill of exceptions:

"The above and foregoing bill of exceptions was
presented to me this 22nd day of July, 1930, during the absence
of Judge Albert A. George on vacation."

Thereafter, on the 18th day of September, 1930, the same bill of
exceptions was introduced to the Honorable Albert A. George, one of
the judges of the Municipal Court, who presided at the trial and
signed and certified the same and ordered it filed with the same

as of July 22, 1930.

- 2 -

It is the contention of the plaintiffs that the bill of exceptions is not properly in the record and should be stricken from said record by this court, for the reason that it was not signed or certified by the judge before whom the cause was tried within the sixty days allowed in the order of May 23, 1930, and that no statutory reason was made to appear to cure this irregularity. Section 81, Chap. 110, Cahill's Ill. Rev. St. provides, in part, as follows:

" * * * in case the judge before whom the cause has heretofore been or may hereafter be tried, is, by reason of death, sickness, or other disability, unable to * * * allow and sign a bill of exceptions * * * then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, * * * shall allow and sign a bill of exceptions."

The Supreme Court in the case of People v. Rosenwald, 266 Ill. 546, construed this provision of the statute with respect to when under its terms it is proper to present a bill of exceptions to a judge other than the trial judge, and the court uses this language:

"It has been held that the words 'other disability' in the phrase 'by reason of death, sickness or other disability' should be construed to be a physical or mental disability of like character to death or sickness, by which the trial judge is disabled from the performance of judicial functions, and his absence from the district or circuit, merely, does not authorize the allowance and signing of a bill of exceptions by another judge."

This decision is controlling and was followed by the Appellate Court in Schwartz v. Brinks Chicago City Express Company, 198 Ill. App. 381, and Koscal v. Wolfson, 215 Ill. App. 1. There was no recital of facts when the bill of exceptions was presented to Judge Rooney, except that he signed it during the absence of the trial judge on a vacation. This is not a sufficient recitation to bring it within the terms of the statute, and the record is equally silent as to any recitation of facts why the bill of exceptions was not presented within the time fixed in the order allowing the filing when the hunc pro tunc order was entered by the trial judge, Albert B. George.

as of July 22, 1930.

- 2 -

It is the contention of the plaintiff that the bill

of exceptions is not properly in the record and should be stricken

from said record by this court, for the reason that it was not signed

or certified by the judge before whom the cause was tried within the

sixty days allowed in the order of May 22, 1930, and that no statutory

reason was made to appear to cure this irregularity. Section 21,

Chap. 110, Smith's Ill. Rev. St. provides, in part, as follows:

" * * * in case the judge before whom the cause was heard-
before been or may hereafter be tried, is, by reason of
death, absence, or other disability, unable to
allow and sign a bill of exceptions " * * * then the judge
who succeeds such trial judge, or any other judge of the
court in which the cause was tried, holding such court
recessed, " * * * shall allow and sign a bill of exceptions."

The Supreme Court in the case of Franklin v. Franklin,

206 Ill. 346, construed this provision of the statute with respect

to when under its terms it is proper to present a bill of exceptions

to a judge other than the trial judge, and the court made this

language:

" It has been held that the words 'other disability' in
the phrase 'by reason of death, absence or other disability'
should be construed to be a disability or actual disability
of like character to death or absence, by which the trial
judge is excluded from the performance of judicial functions,
and his absence from the district or circuit, merely, does
not authorize the allowance and signing of a bill of
exceptions by another judge."

This decision is controlling and was followed by the

Appellate Court in Franklin v. Franklin, 216 Ill. App. 1.

193 Ill. App. 301, and Franklin v. Franklin, 216 Ill. App. 1. There was

no recital of facts when the bill of exceptions was presented to

Judge Kennedy, except that he signed it during the absence of the trial

judge on a vacation. This is not a sufficient recitation to bring

it within the terms of the statute, and the record is equally silent

as to any recitation of facts why the bill of exceptions was not

presented within the time fixed in the order allowing the filing when the

and the said order was entered by the trial judge, Albert B. Kennedy.

The only thing that this court can do is to allow plaintiffs' motion to strike the bill of exceptions from the record, and we quote from the language used by this court in the case of Koscal v. Wolfson, et al., 215 Ill. App. 1, in support of our position, in these words:

"In view of the rulings on this subject, the seeming harshness of the situation is one that can be obviated only by proper recitals made by the judge to whom the bill is presented or otherwise preserved in the record, or by recourse to the legislature. But the statute bearing on the subject cannot be stretched to cover a situation like this, even if the explanation could be deemed as setting forth such a 'disability' as is contemplated by section 81 of the Practice Act (J. & A. Par. 8618). (See Rosenwald case, supra, p. 553.)"

The defendant suggests that this motion was not made in apt time, for the reason that it was permitted to file its brief before this motion was made, and calls to our attention facts that are not a part of the record. We can consider only such facts as appear in the record. The bill of exceptions is therefore stricken from the files.

As none of the assignments of error rest on the common-law record, the judgment must be affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The only thing that this court can do is to allow
plaintiff's motion to strike the bill of exceptions from the
record, and to quote from the language used by this court in the
case of Harrell v. Harrell, 215 Ill. App. 1, in support of
our position, in these words:

"In view of the rulings on this subject, the seeming
harshness of the situation is one that can be avoided
only by proper restraint made by the judge to whom the
bill is presented or otherwise preserved in the record,
or by remission to the legislature. But the statute dealing
with the subject cannot be stretched to cover a situation
like this, even if the legislature could be induced to
amend the statute. The bill of exceptions is a creature of
the statute and is not a creature of the court."
(see Harrell case, supra, p. 225.)

The defendant suggests that this motion was not made
in apt time, for the reason that it was permitted to file the
brief before this motion was made, and calls to our attention facts
that are not a part of the record. We can consider only such facts
as appear in the record. The bill of exceptions is the vehicle
to bring from the trial.
In case of the establishment of error rest on the
common-law record, the judgment must be affirmed.
Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

Ill. App. 1, 225.

34692

TONY TALLARICO,

Appellee,

v.

UNION ASSURANCE SOCIETY, LIMITED,
OF LONDON, ENGLAND, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2621A.838²⁻

Opinion filed June 15, 1931

MR. JUSTICE REBEL delivered the opinion of the court.

This is a first-class case filed in the Municipal Court of Chicago by the plaintiff against the defendant to recover under a fire insurance policy issued by the defendant for alleged loss by fire. The case was tried before the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$1500, upon which verdict judgment was entered after motions for a new trial and in arrest of judgment had been overruled. From this judgment the defendant prosecutes this appeal.

The plaintiff's original statement of claim, filed on November 30, 1926, alleged, in substance, that the defendant, on October 24, 1925, in consideration of a premium of \$27.45 paid by the plaintiff, made and delivered to the plaintiff its certain insurance policy, No. 66564, for \$1500, insuring plaintiff against all direct loss and damage by fire to the contents of premises occupied by plaintiff, in a brick building known as 524 South Robey street, Chicago, Illinois, consisting of furniture, fixtures, groceries and butcher supplies; that the policy covered the property during the term commencing October 24, 1925, at noon, and ending October 24, 1926, at noon; and that during the term of the policy, on January 12, 1926, from causes unknown to the plaintiff, the plaintiff suffered a direct loss by fire to the property located in the

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Opinion filed June 15, 1931

MR. JUSTICE BRIDGES delivered the opinion of the court.

This is a first-class case filed in the Municipal

Court of Chicago by the plaintiff against the defendant to recover under a fire insurance policy issued by the defendant for alleged loss by fire. The case was tried before the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$1000.

Upon this verdict judgment was entered after motion for a new trial and is now on appeal. The judgment has been reversed. From this judgment the defendant presents this appeal.

The plaintiff's original statement of claim, filed

on November 30, 1928, alleged, among other things, that the defendant, on October 20, 1928, in consideration of a premium of \$75.00 paid by

the plaintiff, made and delivered to the plaintiff the certain

insurance policy, No. 88864, for \$1000, insuring plaintiff against

all direct loss and damage by fire to the contents of premises occupied by plaintiff, in a brick building known as 824 South Wabash

street, Chicago, Illinois, consisting of furniture, fixtures,

fixtures and other contents; that the policy covered the property

during the term commencing October 21, 1928, at noon, and ending

October 21, 1929, at noon; and that during the term of the policy,

on January 12, 1929, from causes unknown to the plaintiff, the plain-

premises aforesaid, and that the property was of the value of \$3,000.

It is also alleged that the plaintiff gave direct and immediate notice of the loss to defendant on or about January 13, 1926, and stated the amount and value of the property damage; and defendant received said report and proof as a satisfactory proof of loss for said claim and fire, and that he complied with each and every requirement, condition and agreement in the policy contained and required to be performed, excepting only such as were waived by the defendant.

Motion to strike this statement of claim was denied and defendant afterwards filed an affidavit of merits thereto.

On January 21, 1930, plaintiff, by leave of court, filed an amended statement of claim, which contained the same allegations as the original statement of claim, except in relation to the matter of giving notice and making proof of loss. As to those matters, plaintiff alleged, in his amended statement of claim, that he gave direct and immediate notice of the loss to the defendant on or about January 13, 1926, and stated in detail therein the amount and value of the property destroyed; that in, "the latter part of February, 1926, plaintiff demanded payment of the benefits under said policy, and thereupon the defendant accused the plaintiff that the fire was caused by the direct act of the plaintiff; that because of the refusal of the defendant to pay the moneys due under its policy, it did not become necessary for plaintiff to give notice to the defendant of the occurrence of the fire or file proof of loss as required in and by said policy."

Defendant's affidavit of merits denied issuance of any policy in the terms stated, and denied substantially all other averments of the amended statement of claim, including the extent and amount of loss; and further alleged that the policy was void because of a chattel mortgage on the fixtures; that the action was

premises destroyed, and that the property was of the value of \$2,000.

It is also alleged that the plaintiff gave direct and immediate notice of the loss to defendant on or about January 15, 1936, and stated the amount and value of the property damaged; and defendant received said report and proof as a satisfactory proof of loss for said claim and fire, and that he complied with each and every requirement, condition and agreement in the policy contained and required to be performed, excepting only such as were waived by the defendant.

Notice to strike this statement of claim was denied and defendant afterwards filed an affidavit of notice thereto. On January 21, 1936, plaintiff, by leave of court, filed an amended statement of claim which contained the same allegations as the original statement of claim, except in relation to the matter of giving notice and making proof of loss. As to those matters, plaintiff alleged, in his amended statement of claim, that he gave direct and immediate notice of the loss to the defendant on or about January 15, 1936, and stated in detail therein the amount and value of the property destroyed; that in "the latter part of February, 1936, plaintiff demanded payment of the benefits under said policy, and thereupon the defendant advised the plaintiff that the fire was caused by the direct act of the plaintiff; that because of the refusal of the defendant to pay the money due under its policy, it did not become necessary for plaintiff to give notice to the defendant of the occurrence of the fire or the proof of loss as required in and by said policy."

Defendant's affidavit of notice denied insurance of any policy in the terms stated, and denied substantially all other statements of the amended statement of claim, including the extent and amount of loss; and further alleged that the policy was void because of a chattel mortgage on the firework; that the action was

not maintainable because not commenced within twelve months after the fire and that the loss by fire was the result of the willful and intentional act and procurement of the plaintiff.

The evidence of the plaintiff was substantially as follows: That the policy issued by the defendant, dated October 28, 1925, payable to the plaintiff in the event of loss by fire, was offered and received in evidence over the objection of the defendant; that the plaintiff closed the store about 8:30 or 8:45 on the night of January 12, 1926, securely locking the doors; went to his lodging house and ate dinner, and then went to a union meeting about two miles from the store, where he remained until between 10:00 and 11:00 o'clock at night, and then went home, arriving there about 12:00 o'clock midnight; that he did not return to the store after leaving there between 8:30 and 8:45 in the evening, and that he first heard of the fire about 1:00 o'clock on the morning of January 13, 1926, when some police officers came to his room and told him that there had been a fire in his store, which started about 12:30 A. M., and charged him with having set fire to the premises, and placed him under arrest; that on January 14, or 15, 1926, one Dr. Henry Henkin, a friend of the plaintiff, telephoned the defendant's agents, telling them that there had been a fire in the store; that on or about the 2nd or 3rd of March, the plaintiff, for the first time, went back to the store, remained a few minutes, and afterwards, with his friend Dr. Henkin, went to the office of the agents and demanded payment for the loss, and that the agents denied liability; that at the time of the fire plaintiff had on hand a large quantity of stock; the value of which was testified to upon the trial, and appears in the record.

The defendant's evidence is to the effect that on the night in question Emmett McHugh, a police officer of the City

not maintainable because not concerned with the issue of the
the five and that the issue by five was the result of the killing
and intentional act and procurement of the plaintiff.
The evidence of the plaintiff was substantially as follows:
That the policy issued by the defendant, dated January 13, 1938,
payable to the plaintiff in the event of death by fire, was delivered
and received in evidence over the objection of the defendant;
that the plaintiff closed the store about 8:30 at 8:45 on the
night of January 13, 1938, normally locking the doors; went
to his lodging house and ate dinner, and then went to a union
meeting about two miles from the store, where he remained until
between 10:00 and 11:00 o'clock at night, and then went home,
arriving there about 11:00 o'clock midnight; that he did not
return to the store after leaving there between 8:30 and 8:45
in the evening, but that he first heard of the fire about
1:00 o'clock on the morning of January 13, 1938, when some
police officers came to his room and told him that there had been
a fire in his store, which started about 12:30 A. M., and destroyed
his wife's car and the premises, and placed him under
arrest; that on January 14, at 10, 1938, one Mr. Henry Henkin,
a friend of the plaintiff, telephoned the defendant's agents,
telling them that there had been a fire in the store; that on or
about the 14th or 15th of March, the plaintiff, for the first time,
went back to the store, remained a few minutes, and afterwards, with
his friend Mr. Henkin, went to the office of the agents and demanded
payment for the loss, and that the agents denied liability; that
at the time the plaintiff had on hand a large quantity of
stock; the value of which was testified to upon the trial, and
appears in the record.
The defendant's evidence is to the effect that on
the night in question, shortly after 11 o'clock, a police officer of the City

of Chicago, testified that together with police officer Touhy, he was in an automobile, driving west on Harrison street; that when the machine neared the corner of Harrison and Robey streets, which was about 12:30 A. M. on January 13, 1936, he saw a man closing the door of the meat market on the northwest corner of the intersection; that he tried the door after the man had gone, and found it locked, and upon looking inside saw a small fire in the center of the store; that when the witness turned around he saw that this man had started to run; that he turned east at Congress street, and the witness then lost sight of him; that a few minutes after they arrived at the corner of Robey and Congress streets a squad of detectives arrived on the scene, and some of them joined these officers; that they found tracks of this man in the snow; traced him to his lodging house, and there found him in bed; that they saw his wet shoes, also his overcoat and hat, all of which were identified by the witness; and that they then placed him under arrest.

It appears that the damage caused by fire was slight; that the fire was extinguished by the fire department by using hand pumps. It was denied by witnesses for the defendant that the plaintiff notified any of the agents of the defendant regarding the loss; that the plaintiff never appeared in the office of the agents in the early part of March and demanded payment for the loss, but that some three or four months later the plaintiff did come to the office and make inquiry about the matter, and was told that they knew nothing about it, and it was suggested that he go and see the adjuster who had been interested in the loss on the building, and that he might know something about it. The plaintiff called upon the adjuster the same day and was told by him that the loss had never been given to him for adjustment, and that he knew nothing about it.

In rebuttal the plaintiff denied that he was at the

at Chicago, testified that together with police officer Tamm, he was in an automobile, driving west on Harrison street; that when the machine reached the corner of Harrison and Hoboy streets, which was about 12:30 A. M. on January 12, 1935, he saw a man closing the door of the west market on the northwest corner of the intersection; that he tried the door after the man had gone, and found it locked, and upon looking inside saw a small fire in the center of the stove; that when the witness turned around he saw that this man had started to run; that he turned around at Congress street, and the witness then lost sight of him; that a few minutes after they arrived at the corner of Hoboy and Congress streets a squad of detectives arrived on the scene, and some of them joined these officers; that they found tracks of this man in the snow; crossed him to his lodging house, and there found him in bed; that they saw his wet shoes, also his overcoat and hat, all of which were identified by the witness; and that they then placed him under arrest.

It appears that the damage caused by fire was slight; that the fire was extinguished by the fire department by using hand pumps. It was denied by witnesses in the defendant that the plaintiff notified any of the agents of the defendant regarding the loss; that the plaintiff never appeared in the office of the agents in the early part of March and demanded payment for the loss, but that some three or four months later the plaintiff did come to the office and make inquiry about the matter, and was told that they knew nothing about it, and it was suggested that he go and see the adjuster who had been interested in the loss on the building, and that he might know something about it. The plaintiff called upon the adjuster the same day and was told by him that the loss had never been given to him for adjustment, and that he knew nothing about it. In rebuttal the plaintiff denied that he was at the

store at 12: 30 A. M. on January 13, 1928, as testified to by officer McHugh.

There was also offered in evidence by the plaintiff a weather bureau report, to which objection was made and from which it appears that there was a slight snow fall on the night in question.

In addition to the policy of insurance of the defendant there was a policy of insurance on the same property issued by the Newark Fire Insurance Company, payable to the plaintiff in the sum of \$1500 in the event of loss.

In the case before us, the defendant makes the contention that the cause of action set forth in the amended statement of claim was barred by the provision of the policy that no action thereon for the recovery of any claim shall be sustainable unless commenced within twelve months next after the fire; that the plaintiff proceeded on the theory of making proof of loss, which the defendant accepted as a satisfactory proof of loss, and in the amended statement of claim, the plaintiff proceeded on the theory that the defendant denied liability and waived the making of the proper proofs of loss, which amended statement of claim states a new or different cause of action.

This question was before us in the case of Tallarico v. Newark Fire Insurance Company, General Number 34430; in the opinion we stated:

"It is well to have in mind that the plaintiff alleged in the original statement that he complied with each and every requirement of said policy, except only such performance as had been waived by the defendant. The rule uniformly announced has been that if additional counts in a declaration state a new cause of action or a different cause of action from that originally stated, a plea of the statute of limitations is good. In the instant case, however, performance in the filing of a notice and proof of loss was excused by the denial of liability for the loss by the defendant. This evidence of waiver would have been competent under the plaintiff's original statement of claim. That being so it cannot be logically or truthfully said that the amended

Record of 12: 30 A. M. on January 18, 1935, as testified to by

Officer McNulty.

There was also offered in evidence by the plaintiff

a weather bureau report, to which objection was made and from which it appears that there was a slight snow fall on the night in question.

In addition to the policy of insurance of the

defendant there was a policy of insurance on the same property issued

by the New York Life Insurance Company, payable to the plaintiff in

the sum of \$1000 in the event of loss.

In the case before us, the defendant makes the con-

cession that the cause of action set forth in the amended statement

of claim was barred by the provision of the policy that no action

thereon for the recovery of any claim shall be maintainable unless

commenced within twelve months next after the time that the claim

first proceeded on the theory of making proof of loss, which the

defendant accepted as a satisfactory proof of loss, and in the amended

statement of claim, the plaintiff proceeded on the theory that the

defendant denied liability and waived the making of the proper proof

of loss, which amended statement of claim states a case on different

facts of action.

This question was before us in the case of Kellogg

v. New York Life Insurance Company, General Number 24130, in the

opinion so stated:

"It is well to have in mind that the plaintiff alleged in the original statement that he complied with each and every requirement of said policy, except only such part as had been waived by the defendant. The rule was totally concerned with the fact that it constituted a new cause of action or a different cause of action from that originally stated, a view of the nature of limitations is good. In the instant case, however, the waiver in the filing of a notice and proof of loss was excused by the denial of liability for the loss by the defendant. This evidence of waiver would have been competent under the plaintiff's original statement of claim. That being so it cannot be logically or truthfully said that the amended

statement of claim stated a different cause of action. The amended statement made specific that which was alleged in general terms in the original statement of claim. Chicago General Ry. Co. v. Carroll, 189 Ill. 273. We conclude, therefore, that the filing of the amended statement of claim was not barred by the policy limitation of one year."

and in the instant case we will follow that conclusion, as controlling in regard to the question which is again before this court.

Over the defendant's objection, plaintiff introduced in evidence plaintiff's Exhibits 5 and 9, inclusive, being the record and complaint for preliminary examination of plaintiff in the Municipal Court of Chicago on a charge of arson, showing that the state's attorney had entered a nolle prosequi to this complaint after it was filed; and also the record in the criminal case against the plaintiff in the Municipal Court of Chicago, and information filed and proceedings had thereon, charging plaintiff with malicious injury to the property of another, and the opinion of the Appellate Court, in which opinion the court reversed the conviction of the plaintiff upon that charge, and remanded the cause.

The defendant suggests that what criminal proceedings, if any, were had or taken against the plaintiff, or the result of such criminal proceedings, were wholly immaterial in this case. While the suggestion is made, no citation of authorities was presented to the court.

From the authorities, the general rule supported by the great weight of authority is to the effect that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be given in evidence in a purely civil action, to establish the truth of the facts on which it was rendered. 31 A. L. R. Annot. 262, cites a great number of cases in support of this rule, among which the following are from this State.

Corbley v. Wilson, 71 Ill. 209.
Schreiner v. High Court, 35 Ill. App. 576.
Illinois Central R.R. Co. v. Quirk, 51 Ill. App. 807.
Young v. Copple 52 Ill. App. 547.
Kitterman v. People, 181 Ill. App. 682.
Watson v. Kanneier, 203 Ill. App. 31.

The purpose of this evidence offered by the plaintiff was to show that he was charged with crime and in the one case the finding that the plaintiff was guilty was reversed by the Appellate Court; and in the other, the case was dismissed by the State's Attorney on behalf of the People, and therefore the jury might infer from these facts that the plaintiff was not guilty of the charge made that he caused the fire in question.

If the loss was the result of willful and intentional act and procurement of the plaintiff, the defendant had the right to offer this defense in the case now before us, and it assumed the burden of establishing the plaintiff's guilt notwithstanding the reversal of a crime charge by the Appellate Court, or the order of nolle prosequi entered in the arson cases. No doubt these exhibits influenced the jury in passing upon the question whether the fire was caused by the willful act or procurement of the plaintiff. The defendant in the instant case was not a party to the criminal proceedings, and therefore could not take part in the trial to which it was a stranger. The result of the prosecution in both of the criminal cases, if any, did not bind the defendant here. The question of fact involved herein is a close one, and it was error to admit these exhibits in evidence, as they were prejudicial.

Other questions have been raised on this appeal, but in view of the fact that another trial of the case is necessary, we will not pass upon them at this time.

For the reason that the admission of these exhibits was prejudicial and reversible error, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The purpose of this evidence offered by the plaintiff was to show that he was charged with crime and in the case the finding that the plaintiff was guilty was reversed by the appellate court; and in the other, the case was dismissed by the State's Attorney on behalf of the people, and therefore the jury might infer from these facts that the plaintiff was not guilty of the charge made that he caused the life in question.

If the issue was the result of willful and intentional act and procurement of the plaintiff, the defendant had the right to offer this defense in the case now before us, and it caused the burden of establishing the plaintiff's guilt notwithstanding the reversal of a crime charge by the appellate court, or the order of reversal entered in the known cases. He doubts these exhibits influenced the jury in passing upon the question whether the life was caused by the willful act or procurement of the plaintiff. The defendant in the instant case was not a party to the criminal proceedings, and therefore could not take part in the trial to which it was a stranger. The result of the prosecution in both of the criminal cases, if any, did not bind the defendant here. The question of fact involved herein is a close one, and it was error to admit these exhibits in evidence, as they were prejudicial.

Other questions have been raised on this appeal, but in view of the fact that another trial of the case is necessary, we will not pass upon them at this time.

For the reason that the admission of these exhibits was prejudicial and reversible error, the judgment is reversed and the case remanded.

WILSON, J., and REINHOLD, J., concur.

Submitted on appeal, the case was argued, and the court rendered its decision on the merits of the case.

34709

ANDERSON AND LIND MANUFACTURING
COMPANY,

Appellee,

v.

MICHAEL BUSA, et al., (Madison
& Kedzie State Bank, Trustees,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

262 I.A. 638²

Opinion filed June 15, 1931

MR. JUSTICE HESSEL delivered the opinion of the court.

The Madison & Kedzie State Bank, as trustee, one of the defendants in the court below and the appellant herein, brings this appeal from a decree in favor of the complainant, Anderson and Lind Manufacturing Company. The decree established a mechanic's lien in favor of the complainant for the amount of \$4,026.70, with interest at the rate of five per cent from March 29, 1928, and was based upon a report and recommendations of a master in Chancery, to which objections and exceptions were filed and overruled.

The complainant filed its bill of complaint on May 11, 1928, in which it charged that the premises therein described were owned by George Florence and Shirley Florence, his wife, and that they entered into a written agreement with Michael Busa, as general contractor, whereby he agreed to erect a building on said premises. Thereafter Busa entered into a written contract with the complainant, by which the complainant agreed to furnish mill work on said proposed buildings for the contract price of \$29,000, of which 85 per cent ^{was} to be paid from time to time, and final payment made 90 days after the last delivery of materials; that the last delivery occurred on October 15, 1927; that on December 13, 1927, a subcontractor's notice of lien was served upon the owners, George Florence and Shirley Florence, his wife.

The complaint filed by the complainant on May 11, 1938, in which it was alleged that the premises therein described were owned by George Lawrence and Shirley Lawrence, his wife, and that they entered into a written agreement with Mitchell Jones, Jr., General Contractor, whereby he agreed to erect a building on said premises. Thereafter Jones entered into a written contract with the complainant, by which the complainant agreed to purchase all work on said premises for the sum of \$20,000.00, plus or minus as may be found due by him to the complainant at the time of completion of the work. The complainant alleges that the last delivery occurred on December 17, 1937, and that on December 17, 1937, a notice of lien was served upon the owner, George Lawrence and Shirley Lawrence, his wife.

The bill also makes certain parties defendant as the unknown owner or owners, holder or holders of certain notes secured by and described in each of ~~two~~ deeds of trust from George Florence and Shirley Florence to the Madison & Kedzie State Bank, a corporation, as trustees, who had, or claimed to have, some interest in and to said premises, which interests, if any, were subject and subordinate to the rights and lien of the complainant. Attached to the bill is an affidavit that the names of the owners are unknown. A summons in chancery was issued and returned by the sheriff served on certain of the defendants. On September 18, 1929, the complainant caused an affidavit of non-residence to be filed as to certain of the defendants. On November 13, 1929 an answer was filed by the defendant, Madison & Kedzie State Bank as trustee to the effect that it was trustee under two trust deeds securing an indebtedness aggregating \$105,000, which was valid and outstanding, and claiming that the lien of said trust deeds and the bonds outstanding thereunder were superior and paramount to the right title and interest of the complainant, and that the bill of complaint was not filed in apt time.

It is first contended by the defendant before this court that the defendants as the unknown owners or holders of certain notes secured by and described in each of the deeds of trust in question were not legally made parties defendant and were not properly before the court, and that the decree therefore is erroneous in adjudicating their several interests.

From the record it appears that the Madison & Kedzie State Bank, as trustee, was authorized by the trust deeds to appear and answer for the unknown owners or holders of the notes, and did file an answer, in part, as follows:

"Further answering this defendant says that in both of said trust deeds above mentioned, it was provided that this defendant should be deemed a representative of the bond-

The bill also makes certain parties defendants as the
unknown owner or owners, holder or holders of certain notes secured
by and described in each of the bonds of trust from George F. Jones
and Chas. F. Jones to the Madison & Natick State Bank, a corporation,
as trustee, the bill, as claimed to have, some interest in and to
said premises, which interests, if any, were subject and subordinate
to the rights and lien of the complainant. Attached to the bill is
an affidavit that the names of the owners are unknown. A summons in
chancery was issued and returned by the sheriff served on certain
of the defendants. On September 16, 1938, the complainant moved on
affidavit of non-residence to be tiled as to certain of the defendants.
On November 11, 1938 a motion was filed by the defendant, Madison
& Natick State Bank as trustee to the effect that it was trustee under
two trust bonds securing an indebtedness aggregating \$100,000, which
was valid and outstanding, and claiming that the lien of said trust
bonds and the bonds outstanding thereunder were superior and pre-
ferred to the right title and interest of the complainant, and that
the bill of complaint was not tiled in due time.
It is first contended by the defendant before this
court that the defendants as the unknown owners or holders of certain
notes secured by and described in each of the bonds of trust in
question were not legally notified defendants and were not properly
before the court, and that the answer thereto is erroneous in
adjoining their several interests.
From the record it appears that the Madison & Natick
State Bank, as trustee, was authorized by the trust bonds to appear
and answer for the unknown owners or holders of the notes, and
did file an answer, in part, as follows:
"I have answered this defendant who has in part
of said trust bonds notified, it was notified that
this defendant should be deemed a representative of the bond-

holders and that in any action, suit or proceeding affecting the said bonds and trust deeds, that it should not be necessary to make any bond holder or note holder a party, but that this defendant should be deemed a representative of their interests therein and pursuant to the terms of said trust deeds, this defendant files herein its answer in its own behalf, as trustee, under the said trust deeds and also in behalf of the various owners and holders of the bonds and interest thereby secured, aggregating on this day the sum of \$105,000.00 and interest thereon from August 11, 1937."

The Chancellor had jurisdiction of these defendants, upon the filing of this answer, for all purposes, and the defendant, Madison & Kedzie State Bank, trustee, is not in a position at this time to raise the question of want of proper service upon these defendants.

We are of the opinion that this trustee was authorized, under the terms of the trust deeds, to appear for and on behalf of the holders of the bonds and notes, and that the question of defective service by publication need not be considered.

We agree with the defendant that as a rule a subcontractor cannot amend his bill of complaint by stating a new cause of action, at any time subsequent to the four months period of limitation after the date of final payment, but whether this rule is pertinent will appear from the pleadings in the record. The original bill was filed on May 11, 1928, in which it was charged that the final delivery of materials was made on October 15, 1927, and that final payment was to be made 90 days after the last delivery, which would make the date of payment January 15, 1928. The filing of this bill of complaint was within the statutory time limit provided by the limitations of the Mechanic's Lien Law, Chapter 82, Sec. 33, Cahill's Ill. Rev. Stats. After the original bill was filed, it was amended on January 16, 1930, so as to change the date of last delivery of materials from October 15, 1927, to March 29, 1928. This amendment does not state a new cause of action, but relates to the date of the filing. The bill of complaint was filed in apt time.

believe and that in any action, suit or proceeding affecting the said bonds and trust deeds, that it should not be necessary to make any bond holder a party, but that this defendant should be deemed a representative of their interests therein and consent to the terms of said trust deeds, this defendant files herein its answer in the form of a counterclaim, under the said trust deeds and also in detail of the various terms and conditions of the bonds and interest thereby secured, aggregating on this day the sum of \$105,000.00 and interest thereon from January 11, 1937.

The defendant has jurisdiction of these defendants upon the filing of this answer, for all purposes, and the defendant Madison & Nelson State Bank, Chicago, Illinois, in its position of plaintiff to raise the question of the validity of the bonds and trust deeds.

In its position of plaintiff this defendant has jurisdiction, under the terms of the trust deeds, to request for and on behalf of the holders of the bonds and notes, and that the question of collective service by publication need not be considered.

It agrees with the defendant that as a rule a counterclaim cannot be filed at a later date than the date of filing of the original bill of complaint, but that this rule is subject to the discretion of the court. The original bill of complaint was filed on May 11, 1938, in which it was charged that the final delivery of materials was made on October 15, 1937, and that final payment was to be made 30 days after the last delivery, which would make the date of payment January 15, 1938. The filing of this bill of complaint was within the statutory time limit provided by the limitations of the defendant's last law, Chapter 33, Sec. 25, Illinois Statutes. After the original bill was filed, it was amended on January 15, 1938, so as to change the date of last delivery of materials from October 15, 1937, to March 15, 1938. This amendment does not raise a new cause of action, but relates to the date of the filing. The bill of complaint was filed in its final

The Supreme Court in the case of Material Service Corp. v. Ford, 341 Ill. 80, in its decision held that the complainant had four months from the date of payment within which to file its bill of complaint, and in that opinion the court said:

"The words 'within four months after the time that the final payment is due the sub-contractor' are not ambiguous or of doubtful meaning, and there is nothing in the way of context, hardship or absurd consequences which requires or permits imputing to the plain language a meaning which it does not express and will not bear. Final payment was not due plaintiff in error from Blakeslee until July 10, 1934, and the bill filed within four months thereafter was in ample time. As to reasons of policy suggested by defendants in error why the period of limitation should begin with the last delivery rather than when the last payment becomes due, it is sufficient to say that such question is for the legislature and the argument should be addressed to it rather than to the court."

The point is made that Shirley Florence was not personally served with a sub-contractor's notice, and therefore her interest cannot be made subject to the lien in this case. The facts are established in the record that George Florence and Shirley Florence, his wife, were the owners of the premises in question. The Master in Chancery in his report found that George Shirley was served with such notice, but the report is silent as to personal service of notice upon Shirley Florence, one of the defendants. The court decree finds that all of the material allegations in the bill of complaint were duly established. The bill charges that such a notice was personally served upon George Florence and Shirley Florence his wife, which fact is fully established by the evidence in the Master's certificate of evidence filed in this proceeding, wherein it appears that Ole A. Anderson, a witness for the complainant, testified that he served such a notice personally upon George Florence and Shirley Florence, his wife, on December 13, 1937. The question therefore arises whether the finding of the Master in Chancery upon the question of the service of this sub-contractor's notice is binding upon the court so that it may not consider the facts as they appear in the record, and does the

finding of the Master in Chancery bind the Chancellor in the absence of an objection or exception to the Master's report? Wolfe v. Bradberry, et al., 140 Ill. 578., determines this question where the court in its opinion said:

"Appellant contends, that the court could make no other findings than those set forth in the master's report. We know of no rule of practice, which forbids the Court to make additional findings upon the coming in of the master's report, besides those set forth in the report, if the evidence accompanying the report warrants and supports such additional findings. The court is not confined, in its review of the evidence, to the mere question of ascertaining whether the exceptions filed to the report, or any of them, should be sustained. When the master's report is returned into court, the party objecting to it may file exceptions, 'upon the hearing of which the whole evidence is brought forward, and passes in review before the court.' (McClay, Admr. v. Norris, 4 Gilm. 370.)"

The defendant does not charge the complainant with fraudulent conduct, but contends that where the complainant and the bondholders are innocent of wrong-doing the loss must fall upon the complainant, who failed to notify the trustee bank that its claim was unpaid until May 11, 1928, when the bill of complaint was filed and after the funds were paid out by the trustee. This contention is not borne out by the record. Philip Kent, an officer of the defendant bank, testified that he was advised on September 29, 1927, that there was due the complainant the sum of \$4,000 for materials for the completion of the work upon the building in question, and of this the bank had knowledge through its agent Kent.

The defendant urges that the decree does not, as a matter of law, establish that the complainant had a lien prior to the to the lien of the bondholders. There is a finding in the decree, however, which answers this contention. It is as follows:

"that the said several liens of the complainant and said intervening petitioners, are of equal priority between themselves, and that said liens are in all respects prior, superior and paramount to the rights, title and interest of all parties defendant to this case and all persons

finding of the Master is obviously binding on the defendant in the absence of an objection or exception to the Master's report? Wells v. Hargrave, 211, 140 Ill. 575, determines this question where the court in its opinion said:

"Appellant contends, that the court should make no other findings than those set forth in the master's report. We know of no rule of practice, which forbids the court to make additional findings when it is satisfied that the master's report, besides being correct in its facts, is also correct in its conclusions. It is the duty of the court to review the evidence, and to determine whether the exceptions filed by the master, or any of them, should be sustained. When the master's report is returned into court, the party objecting to it may file exceptions, upon the hearing of which the whole evidence is brought forward, and passed in review before the court." (Wells v. Hargrave, 211, 140 Ill. 575.)

The defendant does not charge the complainant with fraudulent conduct, but contends that where the complainant and the bondholders are innocent of wrongdoing the issue must fall upon the complainant, who failed to notify the trustee bank that its claim was unpaid until May 11, 1908, when the bill of complaint was filed and after the funds were paid out by the trustee. This contention is not borne out by the record. Philip Kent, an officer of the defendant bank, testified that he was advised on September 26, 1907, that there was due the complainant the sum of \$4,000 for materials for the completion of the work upon the building in question, and at this time the bank had knowledge through its agent Kent.

The defendant argues that the device does not, as a matter of law, establish that the complainant had a lien prior to the lien of the bondholders. There is a finding in the record, however, which answers this contention. It is as follows:

"That the said several liens of the complainant and said intervening parties, are of equal priority between themselves, and said liens are in all respects prior superior and paramount to the rights, title and interest of all parties defendant to this case and all persons

claiming by, through or under them or any part thereof."

Having considered the record in this case, we find no error such as would justify a reversal of this decree, and it is accordingly affirmed.

DECREE AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

claiming by showing we never took an any part thereof.

Having considered the report in this case, we find
no error such as would justify a reversal of this action, and it is
accordingly affirmed.

W. H. HARRIS.

W. H. HARRIS, A. J. AND F. H. HARRIS, J. J. HARRIS.

W. H. HARRIS (1883)

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W. H. HARRIS, A. J. AND F. H. HARRIS, J. J. HARRIS.

W. H. HARRIS, A. J. AND F. H. HARRIS, J. J. HARRIS.

34716

EUGENE LUFMAN, BEN BYCHER and
MANNIE WASSERMAN, for the use
of R. Sukert,

APPELLANT,

v.

CAREFUL CLEANERS, INC., a Corp.,

APPELLEE.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

262 I.A. 638⁴

Opinion filed June 15, 1931

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered by one of the judges of the Municipal Court of Chicago vacating a final judgment rendered against the Careful Cleaners, Inc. after more than 70 days had passed from the date of the rendition of the final judgment to the date of the filing of the petition.

The plaintiff in this case having obtained a judgment in the Municipal Court, filed an affidavit for garnishee summons with the clerk of the court, and thereupon a summons was duly issued and served on the Careful Cleaners, Inc., a corporation. On February 10, 1930, the return day, the garnishee failed to appear and answer, and a conditional judgment was entered against it for the sum of \$170. and costs, together with an order for the issuance of a writ of scire facias, which writ was thereafter issued and served on the garnishee and made returnable on March 7, 1930. On the return day the garnishee failing to appear in answer to the writ of scire facias, the court entered a final judgment against it.

It also appears that on May 21, 1930, after more than 70 days had passed since the entry of the judgment, the garnishee presented its petition to vacate the conditional and final judgment. Leave was given to the plaintiff to file a counter-affidavit to the petition, and upon filing such affidavit the case came up for hearing. The court heard the evidence offered on behalf of the garnishee corporation and the plaintiff. The

ROBERT LUNAN, NEW SYDNEY and
WILLIAM WASSERMAN, for the use
of R. L. Lunan,

APPELLANT,

CARROLL L. LUNAN, INC., a corp.,
APPELLEE.

262 I.A. 338

Opinion filed June 12, 1931

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered by one of

the judges of the Municipal Court of Chicago vesting a final judgment rendered against the Garretts, Inc. After more than 75 days had passed from the date of the rendition of the final judgment to the date of the filing of the petition.

The plaintiff in this case herein obtained a judgment

in the Municipal Court, filed an affidavit for garnishee summons

with the clerk of the court, and thereupon a summons was duly issued

and served on the Garretts, Inc., a corporation. On

February 10, 1930, the return day, the garnishee failed to appear

and answer, and a conditional judgment was entered against it for

the sum of \$170. and costs, together with an order for the issuance

of a writ of certiorari, which writ was thereafter issued and

served on the Garretts and made returnable on March 7, 1930. On

the return day the Garretts failed to appear in answer to the

writ of certiorari, the court entered a final judgment against it.

It also appears that on May 11, 1930, after more

than 75 days had passed since the entry of the judgment, the

Garnishee presented its petition to vacate the conditional and

final judgment. Leave was given to the plaintiff to file a counter-

affidavit to the petition, and upon filing such affidavit the

case came up for hearing. The court heard the evidence offered on

behalf of the garnishee corporation and the plaintiff. The

testimony of S. Kosovski, president of the garnishee corporation, was to the effect that upon being served with the garnishment summons, he telephoned Harry Tobin, attorney for the plaintiff, and told him that Lufman, one of the judgment debtors, was no longer in the garnishee's employ, and asked whether it would be necessary for him to go to court; that Tobin stated that in view of that fact if a registered letter were sent to him setting forth the facts given over the telephone, the garnishee need not appear in court; that Kosovski, in pursuance of this conversation, sent a registered letter to Tobin. Kosovski further testified that sometime later the garnishee was again served with a summons (scire facias), which was brought to his attention by Kaplan, the vice-president of the garnishee corporation; and that on May 12, 1930, upon receipt of a letter from the firm of Kessler, Tobin and Miller, advising the garnishee that a judgment had been entered against it, he first consulted his attorney relative to the matter. Kosovski further testified, over the objection of the plaintiff, that Lufman, a judgment debtor, worked for the garnishee in 1928 for a period not exceeding 5 weeks, and that the last time he worked was on October 27, 1928. Over the objection of plaintiff's attorney, the Court permitted to be introduced in evidence a check stub marked Defendant's Exhibit 3, to prove the last day that Lufman worked for the garnishee; the witness further testified that he did not call up Tobin at the time the garnishee was served with the scire facias, and that he did not go to see a lawyer with reference to this writ.

Plaintiff, on the other hand, offered as a witness Harry Tobin, who testified that Kosovski did call him on February 6, 1930, relative to the garnishment summons returnable on February 10, 1930, and that he told Kosovski that it would be necessary for the garnishee to appear in court; that a letter would not be sufficient in view of the fact that he had an application from

testimony of G. Kozovskii, President of the Garnishes Corporation, was to the effect that upon being served with the Garnishment summons, he telephoned Henry Tobin, attorney for the Plaintiff, and told him that William, one of the judgment debtors, was no longer in the Garnishes's employ, and asked whether it would be necessary for him to go to court; that Tobin stated that in view of that fact a registered letter was sent to him setting forth the facts given over the telephone, the Garnishes need not appear in court; that Kozovskii, in pursuance of this conversation, sent a registered letter to Tobin. Kozovskii further testified that sometime later the Garnishes was again served with a summons (like latter), which was brought to his attention by William, the Vice-President of the Garnishes Corporation; and that on May 12, 1930, upon receipt of a letter from the firm of Kessler, Tobin and Miller, advising the Garnishes that a judgment had been entered against it, he first consulted his attorney relative to the matter. Kozovskii further testified, over the objection of the Plaintiff, that William, a judgment debtor, worked for the Garnishes in 1928 for a period not exceeding 5 weeks, and that the last time he worked was on October 27, 1928. Over the objection of Plaintiff's attorney, the court permitted to be introduced in evidence a check duly mailed to Plaintiff's attorney, to prove the last day that William worked for the Garnishes; the witness further testified that he did not call up Tobin at the time the Garnishes was served with the latter summons, and that he did not go to see a lawyer with reference to this writ. Plaintiff, on the other hand, offered as a witness Henry Tobin, who testified that Kozovskii did call him on February 6, 1930, relative to the Garnishment summons returnable on February 10, 1930, and that he told Kozovskii that it would be necessary for the Garnishes to appear in court; that a letter would not be sufficient in view of the fact that he had an application from

Lufman in which the statements made therein by Lufman did not correspond to the representations made by Kosovski. He further testified that on the return day of the garnishment, he received a letter and upon his appearance in court presented the letter to the judge presiding, stating that he did not deem it a sufficient answer to the garnishment summons, and requested that a conditional judgment be entered against the garnishee.

There is no controversy between the parties that the petition to vacate a judgment in the Municipal Court after the expiration of 30 days from the entry of the judgment amounts to a new suit, and the petition stands as a declaration presenting new issues. The petition as a declaration must allege such facts as would permit a court of equity to interfere with the enforcement of a judgment, where the judgment debtor could not avail himself of his defense at law for the reason that he was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmingled with fault or negligence on his own part.

The contention is made by the plaintiff that the garnishee neglected to avail itself of the protection of the law, but on the contrary boldly disregarded its process, and after more than 70 days from the date of the final judgment first sought to assert its defense. The facts in the instant case seem to indicate that the garnishee has a defense to this action, and it also appears that a telephone conversation was had prior to the date when the conditional judgment was entered, and as a result of this conversation a registered letter was mailed to the plaintiff and produced upon the trial of the issues involved in this proceeding by the plaintiff's attorney, which is in part as follows:

"Wish to inform you that Eugene Lufman was in our employ for about two weeks, and that was about a year ago. As we do not know where he is now employed, beg to remain."

return in which the statements made therein by Lukman did not correspond to the representations made by Kosovski. He further testified that on the return day of the government, he received a letter and upon his appearance in court presented the letter to the judge presiding, stating that he had been in a collision with the government, and requested that a conditional judgment be entered against the plaintiff. There is no controversy between the parties that the

petition to vacate a judgment in the Municipal Court after the expiration of 10 days from the entry of the judgment amounts to a new writ, and the petition stands as a declaration presenting new issues. The petition as a declaration must allege such facts as would entitle a court of equity to interfere with the enforcement of a judgment, where the judgment debtor could not avail himself of his defense at law for the reason that he was prevented from so doing by the fraud of the opposite party, or by accident or mistake unattended with fault or negligence on his own part.

The contention is made by the plaintiff that the defendant neglected to avail himself of the protection of the law, but on the contrary he fully investigated the matter, and after some three days from the date of the final judgment filed sought to vacate his defense. The facts in the instant case seem to indicate that the plaintiff has a defense to this action, and it also appears that a telephone conversation was had prior to the date when the conditional judgment was entered, and as a result of this conversation a registered letter was mailed to the plaintiff and returned upon the trial of the issues involved in this proceeding by the plaintiff's attorney, which is as follows:

"Also to inform you that Eugene Lukman was in our office for about two weeks, and that was about a year ago. He is no longer with us, and he is now employed, but to remain."

The question whether the writing of this letter created an assurance that the garnishee need not take any further steps in the litigation induced by the telephone conversation with the attorney was for the court.

These facts are the subject of the controversy in this lawsuit. The trial court was in a better position to pass upon the facts, the credibility of the witnesses and to weigh the evidence. We are restricted to the record in passing upon this question, and can only act if the facts appearing therein are against the manifest weight of the evidence.

The question of whether the garnishee acted with diligence is one largely of fact for the trial court to determine from the evidence produced in support of the petition. The presumption is that in passing judgment wherein the case is one before the court he will consider only the competent evidence in the record.

In view of the conclusion that a trial is necessary in the garnishment proceeding in this case, we will not comment upon the evidence except as is necessary to pass upon the question before us. We believe from an examination of the petition that it states sufficient facts to justify the court in considering the evidence offered by both sides and in entering the order appealed from. The order, accordingly is affirmed.

ORDER AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The question whether the writing of this letter existed or
assumes that the witnesses need not take any further steps in the
investigation initiated by the telephone conversation with the attorney
was for the court.

These facts are the subject of the controversy in
this case. The trial court was in a better position to judge
upon the facts, the credibility of the witnesses and to weigh the
evidence. We are restricted to the record in passing upon this
question, and can only say that the facts as stated herein are
against the weight of the evidence.
The question is whether the witnesses acted with
diligence to and largely of fact for the trial court to determine
from the evidence produced in support of the petition. The pre-
sumption is that in passing judgment wherein the ends is and before
the court he will consider only the competent evidence in the

record.
In view of the conclusion that a trial is necessary
in the permanent proceeding in this case, we will not comment
upon the evidence except as is necessary to pass upon the question
before us. We believe from an examination of the petition that it
states sufficient facts to justify the court in concluding the
evidence offered by both sides and in entering the order appealed
from. The order, accordingly is affirmed.

ORDER AFFIRMED.

WILLIAM, J. J. and others, v. WILSON.

34728

PETER STAMPER, a Minor, by JOHN
STAMPER, his father and next
friend,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

262 I.A. 639'

Opinion filed June 15, 1935

MR. JUSTICE HEBEL delivered the opinion of the court.

This is a suit filed in the Superior Court of Cook County by Peter Stamper, a minor, by his next friend, as plaintiff, against the City of Chicago, a municipal corporation, as defendant, to recover damages for personal injuries alleged to have been sustained by him. The case was tried before the court and a jury, and upon the verdict rendered finding the defendant guilty and assessing the plaintiff's damages at \$12,000, judgment was entered, after a motion for a new trial was overruled. From this judgment the defendant appeals.

The declaration alleges, in substance, that on August 6, 1928, the plaintiff was a child four years of age and too young to exercise any care for his own safety; that he was walking along and upon a certain public sidewalk of the defendant, alongside a fence in the rear of the Marsh Public School building on the east side of Escanaba avenue, a public street within the corporate limits of the City of Chicago, and when he reached a point about 100 feet from 98th street, in said City, a large heavy section of an iron fence weighing about 500 pounds, which the defendant had negligently, carelessly and improperly permitted and left to stand loosely balanced against a permanent fence surrounding the school property,

JOHN H. HANCOCK, a member of the
Board of Directors, his father and next
friend,

Appellee,

CITY OF CHICAGO, a municipal
corporation,

Appellant,

Appellee

Superior Court

202 I.A. 688

Opinion filed June 15, 1935

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

This is a suit filed in the Superior Court of Cook County by Peter Stenger, a minor, by his next friend, an plaintiff, against the City of Chicago, a municipal corporation, an defendant, to recover damages for personal injuries alleged to have been sustained by him. The case was tried before the court and a jury, and upon the verdict rendered finding the defendant guilty and assessing the plaintiff's damages at \$12,500, judgment was entered, after a motion for a new trial was overruled. From this judgment the defendant appeals.

The defendant alleges, in substance, that on or about August 2, 1932, the plaintiff was a child four years of age and two years to exercise any care for his own safety; that he was walking along and upon a certain public sidewalk at the defendant, alongside a fence in the rear of the Naval Public School building on the east side of Lawrence Avenue, a public street within the corporate limits of the City of Chicago, and when he reached a point about 100 feet from 92nd street, in said City, a large heavy section of an iron fence weighing about 500 pounds, which the defendant had negligently, carelessly and improperly permitted and left to stand loosely balanced against a permanent fence surrounding the school property.

without fastening or safeguarding it for a period of many months prior to the happening of the accident, fell over upon the plaintiff and injured him. It also alleges the giving of statutory notice to the City of Chicago of the accident. There was added to this declaration, by amendment on May 1, 1930, a paragraph alleging the relinquishment by John Stamper, the father of the plaintiff, all of said father's rights to recover from the defendant for all moneys expended for medical, surgical and hospital treatment of said plaintiff resulting from the injuries or alleged negligence averred in the declaration; and that said father also relinquished to his son all his, said father's, rights to his son's wages and earnings during his minority and the right to sue and recover from said defendant and all others for all losses or diminution of said wages or earnings resulting from said injuries, to which declaration the defendant filed a plea of the general issue and a plea of non-ownership, non-operation and non-control.

The facts in the record are substantially that this plaintiff boy was with his mother on the date of the accident, August 6, 1928, that while walking upon a sidewalk in the rear of the Marsh School on the east side of Escanaba avenue, about 100 feet from 98th street, a large heavy section of an iron fence, which had been unfastened and was leaning upon the fence surrounding the school property next to the sidewalk, fell upon and injured the plaintiff. This section of fence had been unfastened and removed from the permanent fence some months before the accident happened. The only conflict in the evidence seems to be as to the position of this loose section of fence at the time of the accident, whether it was standing upon the sidewalk or upon the ground of the school.

It is contended by the defendant that the declaration is insufficient to support the judgment. The declaration, in

without limiting or prejudicing it for a period of many months prior to the happening of the accident, tell over upon the plaintiff and injured him. It also alleges the giving of statutory notice to the City of Chicago of the accident. There was added to this declaration, by amendment on May 1, 1930, a paragraph alleging the relinquishment by John Stanger, the father of the plaintiff, all of said father's rights to recover from the defendant for all moneys expended for medical, surgical and hospital treatment of said plaintiff resulting from the injuries or alleged negligence occurred in the declaration; and that said father also relinquished to his son all his said father's rights to his son's wages and earnings during his minority and the right to sue and recover from said defendant and all others for all losses or damages of said wages or earnings resulting from said injuries, to which declaration the defendant filed a plea of the general issue and a plea of non-shipment, non-operation and non-control.

The facts in the record are substantially that this plaintiff boy was with his mother on the date of the accident, August 6, 1928, that while walking upon a sidewalk in the rear of the Marsh School on the east side of Exchange Avenue, about 100 feet from 92nd Street, a large heavy section of an iron fence, which had been weakened and was leaning upon the fence surrounding the school property next to the sidewalk, fell upon and injured the plaintiff. This section of fence had been weakened and removed from the permanent fence some months before the accident happened. The only conflict in the evidence seems to be as to the position of this loose section of fence at the time of the accident, whether it was standing upon the sidewalk or upon the ground at the school. It is contended by the defendant that the declaration is insufficient to support the judgment. The declaration, in

substance, is made a part of this opinion and it will not be necessary to repeat the allegation upon which the plaintiff's case is predicated. The record discloses that no demurrer was filed by the defendant, nor a motion/^{made}in arrest of judgment after the verdict.

We held in the case of Fleming v. City of Chicago, 360 Ill. App. 496, that the rule is that pleadings before judgment are most strongly construed against the pleader, and that after judgment this rule is reversed, and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment. In passing upon this point, the court said:

"The rule by which pleadings before judgment are construed against the pleader after judgment, is reversed and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment. If the declaration states a cause of action, however defectively, or imperfectly, and the issue joined requires proof of the facts defectively stated, it is sufficient, and although the declaration is demurrable it will be sufficient to sustain the judgment after a verdict. Smith v. Rutledge, 332 Ill. 150; Roumbos v. City of Chicago, 333 Ill. 70. The only plea filed at any time by the defendant is the general issue, and it is now too late to urge that which might have been cured by proper amendments. Parties cannot speculate upon the result of a trial and raise the question of the sufficiency of the allegations for the first time after the judgment. The defendant is precluded from making the objection at this time. Devine v. Chicago City Ry. Co., 167 Ill. App. 361. We are unable to agree with the contention of the defendant that the declaration does not state a cause of action, and we believe it is sufficient to sustain the judgment after the verdict."

This rule is applicable to the declaration in the instant case in which is alleged a cause of action, and the allegations set forth in the declaration are sufficient to sustain the judgment.

The defendant denies liability, for the reason that the section of iron fence which it is claimed fell over on the sidewalk and injured the plaintiff, was in fact at the time of the accident upon school property under the management and control of the Board of Education of the City of Chicago, a separate municipal entity. This was a question of fact for the jury and was passed

...is made a part of this opinion and it will not be
necessarily to repeat the allegations upon which the plaintiff's case
is predicated. The record discloses that no demurrer was filed by
the defendant, nor a motion ^{made} for arrest of judgment after the verdict.
...of the case of Wright v. City of Chicago,
350 Ill. App. 406, that the rule is that pleadings before judgment
are most strongly construed against the pleader, and that after
judgment this rule is reversed, and the pleading upon which the
judgment is based is liberally construed for the purpose of sustaining
the judgment. In passing upon this point, the court said:

"The rule of which plaintiff before judgment was complaining
against the pleader that judgment is reversed and the
pleading upon which the judgment is based is liberally
construed for the purpose of sustaining the judgment. It
the declaration states a cause of action, however defectively,
or imperfectly, and the issue joined resolves itself of the
issue defectively stated. It is established, and although the
declaration is defective it will be sufficient to sustain
the judgment after a verdict. Wright v. Chicago, 350 Ill.
App. 406; Chicago v. City of Chicago, 350 Ill. App. 406. The only time
it is now too late to raise this which might have been cured
by proper amendments. Parties cannot complain upon the
result of a trial and raise the question of the sufficiency
of the allegations for the first time after the judgment. The
defendant is excluded from making the objection to this
time. Wright v. Chicago, 350 Ill. App. 406. The
we are unable to agree with the contention of the defendant
that the declaration does not state a cause of action, and
we believe it is sufficient to sustain the judgment after
the verdict."

This rule is applicable to the declaration in the
instant case in which is alleged a cause of action, and the
allegations set forth in the declaration are sufficient to sustain
the judgment.
The defendant denies liability, for the reason that
the section of town laws which it is claimed fell upon on the
defendant and injured the plaintiff, was in fact at the time of the
accident upon whose property under the management and control of
the board of trustees of the city of Chicago, a separate municipal
entity. This was a question of fact for the jury and was known

upon when the verdict was returned contrary to this contention. However, the rule is that it is the duty of the defendant to remove obstructions from public streets and sidewalks and to safeguard its streets for travel by persons upon them. In the case of Hanrahan v. City of Chicago, 289 Ill. 400, the Supreme Court in passing upon this same question, said:

"The weight of authority in this country is, that where the duty of keeping the streets in reasonably safe condition for travel by pedestrians using due care, is vested in incorporated villages and cities, such duty requires such municipalities to remove all obstructions and dangers below, on and above the surface of the streets that are dangerous to travelers thereon, and that such obstructions include dangerous awnings and other overhead structures or fixtures. For failure to exercise due care in discovering and removing the same such municipalities are liable for personal injuries occasioned thereby. (Day v. Inhabitants of Milford, 5 Allen, 98; Grove v. City of East Wayne, 45 Ind. 429; Bohen v. City of Waseca, 50 Am. Rep. 564; Byne v. City of Americus, 6 Ga. App. 48; Larson v. City of Grand Forks, 3 Dak. 307; City of Purcell v. Stubblefield, 41 Okla. 563; Wheeler v. City of Fort Dodge, 131 Iowa, 566; Eason v. City of Ottumwa, 102 id. 99.) The declaration stated a cause of action and the court ruled properly in so holding."

Applying this rule to the facts, the defendant is liable for the injuries to the plaintiff, due to the failure of the City to remove this section of fence or to protect the plaintiff or passerby from danger after it had knowledge of its position on the sidewalk.

It is also contended that the court erred in refusing to submit to the jury the defendant's interrogatories numbered one and two. There are two reasons why this refusal was not erroneous. One is that the record does not show that they were submitted by the defendant to the plaintiff's attorney before argument, as is required by Chapter 110, Section 79, Cahill's Ill. Rev. Stats. This provision has been held by the Supreme Court in the case of P. C. C. etc. Ry. Co. v. Smith, 207 Ill. 486, to be mandatory, and that where a party to a suit requests a special finding, it must be submitted to the adverse party before the commencement of the argument to the jury. To the same effect is the case of Chicago City Ry. Co. v. Jordan, 215 Ill. 390.

upon whom the verdict was returned contrary to this contention.
However, the rule is that it is the duty of the defendant to remove
obstructions from public streets and sidewalks and to maintain
the streets for travel by persons upon them. In the case of Harwood
v. City of Chicago, 328 Ill. 400, the Supreme Court in passing upon
this same question, said:

"The weight of authority in this country is
that where the duty of keeping the streets in reasonably safe
condition for travel by pedestrians using the same, is vested
in incorporated cities and villages, such duty requires each
municipality to remove all obstructions and dangerous
and unsafe conditions of the streets and sidewalks
to travelers passing, and that such obstructions include
garbage barrels and other overhead structures or fixtures,
the failure to remove such obstructions is a negligent act
for which the municipality is liable for damages to persons
injured. Harwood v. City of Chicago, 328 Ill. 400, 119
Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119,
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The other reason is that the point was not raised in the trial court by the defendant's written motion for a new trial, and for this reason we are precluded from considering the interrogatories submitted by the defendant. Kehl v. Abram, 210 Ill. 218; Ottawa etc. R. R. Co. v. McMath, 91, Ill. 104.

The defendant complains of the giving of the plaintiff's instructions numbered one and two, which are as follows:

"1. The court instructs the jury that a city of this state has the entire control over its public street and is charged with the duty to exercise reasonable care and diligence to have and keep its said streets and sidewalks thereon in a reasonably safe condition for public use and travel in the usual and ordinary manner."

"2. The court instructs you that a city is obliged to exercise reasonable care and diligence to keep its streets and sidewalks reasonably safe for public travel, and this is a duty the performance of which it can not delegate to any other corporation or person who is not its agent or servant."

The criticism made of these instructions is that as the street or sidewalk in question was not defective in any particular, they are not applicable to the facts in evidence. The defendant, however, requested, and there was given to the jury, an instruction to the same effect, in these words:

"3. You are instructed that the City of Chicago is not an insurer against accident. It is bound to use ordinary care to see that its streets are kept in a reasonably safe condition for ordinary travel thereon by persons using due care and caution for their own safety; and if you believe from the evidence that the defendant did not fail to use such care then you should find the defendant, City of Chicago, not guilty."

By these two instructions of the plaintiff, and the defendant's instruction, the jury were properly instructed. While the instructions of the plaintiff are abstract in form, which the court could have properly refused, still in view of the fact that the same principle is applied in the instruction of the defendant, there was no error in giving them.

The other reason is that the point was not raised in the trial court by the defendant's written motion for a new trial, and for this reason we are precluded from considering the instructions submitted by the defendant. Lehl v. Brown, 210 Ill. 318; Stevens etc. v. B. Co. v. Memphis, 91 Ill. 104.

The defendant complains of the giving of the plaintiff's instructions numbered one and two, which are as follows:

"1. The court instructs the jury that a city of this state has the entire control over its public streets and is charged with the duty to maintain reasonable care and diligence to have and use the said streets and sidewalks in a reasonably safe condition for public use and travel in the normal and ordinary manner."

"2. The court instructs the jury that a city is bound to exercise reasonable care and diligence to keep its streets and sidewalks reasonably safe for public travel, and this is a duty which it cannot avoid by delegating to any other person or person who is not its agent."

The criticism made of these instructions is that as the street or sidewalk in question was not defective in any particular, they are not applicable to the facts in evidence. The defendant, however, responded, and there was given to the jury, an instruction to the same effect, in these words:

"3. The court instructs that the City of Chicago is not an insurer against accident. It is bound to use ordinary care to see that its streets are kept in a reasonably safe condition for ordinary travel under the use of the same and within the limits of duty; and it can believe from the evidence that the defendant did not fail to use such care when you should find the defendant, City of Chicago, not guilty."

By these two instructions of the plaintiff, and the defendant's instructions, the jury were properly instructed. While the instructions of the plaintiff are directed to two, which the court could have properly refused, still in view of the fact that the same principle is applied in the instruction of the defendant, there was no error in giving them.

We have examined the evidence upon the question of damages, which primarily was one for the jury, and we are not convinced by the argument of the defendant that the damages are grossly excessive. The judgment in this case is for \$12,000. The plaintiff, a boy four years of age, was injured in the manner described. The large bone of his right leg was fractured and notwithstanding treatment, there is deformity and shortening, and the evidence seems to indicate that certain nerves are impinged and destroyed and that there is paralysis of the extensor muscles of the leg, and there is also a degeneration of the nerves and muscles. The boy walks with a limp, due to the shortening of the limb, and the physical condition of the leg, according to the record, is permanent. This evidence fully warranted the verdict of the jury.

We are not prepared to hold that the appeal to this court was for the purpose of delay, and therefore will not entertain plaintiff's motion for statutory damages.

There being no reversible error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

to have examined the evidence upon the question of damages, which primarily was one for the jury, and we are not convinced by the argument of the defendant that the damages are grossly excessive. The judgment in this case is for \$12,000. The plaintiff, a boy four years of age, was injured in the manner described. The large bone of his right leg was fractured and notwithstanding treatment, there is deformity and shortening, and the evidence seems to indicate that certain nerves are injured and destroyed and that there is paralysis of the extensor muscles of the leg, and there is also a degeneration of the nerves and muscles. The boy walks with a limp, due to the shortening of the limb, and the physical condition of the leg, according to the record, is permanent. This evidence fully warranted the verdict of the jury.

It was not suggested to hold that the appeal to this court was for the purpose of delay, and therefore will not entitle plaintiff's motion for statutory damages. There being no reversible error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. HARRIS, J. CLERK.

34614

JOSEPH E. MENRATH and CARL H.
UPMEYER,

Defendants in Error.

vs.

SAMUEL J. RICHMAN, HARRY RICHMAN
and FRED J. RICHMAN,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

262 I.A. 639²

PRESIDING
MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a decree entered by the Superior court of Cook County which dismissed the original and cross-bills without costs.

The record discloses that complainants, as tenants, were occupying premises in Chicago and conducting a hotel therein under a written lease in which the defendants were the landlords; that complainants were in default under the lease in the payment of rent and other matters. The defendants were pressing for payment and on December 17, 1928, notified complainants in writing that they had elected to terminate complainants' right to occupy the premises without releasing them from liability to pay rent under the lease. On the next day defendants appeared at the hotel and sought to take possession and at the same time levied a distress warrant on the furnishings and fixtures in the hotel. At that time the complainant Menrath and certain of the defendants and their agents got into an altercation, one of the defendants' representatives drew a pistol and threatened to shoot Menrath in case he did not leave the premises, and he was forcibly ejected. A number of defendants' representatives registered at the hotel as guests and when the trouble arose they assisted the defendants in ejecting Menrath from the hotel.

A few days thereafter the complainants filed their bill, praying for an injunction to restrain the defendants from

JOHN E. HENNING and others
 Defendants

vs.
 The People of the State of New York

County of New York
 State of New York

2021.A.039

PRESIDING

THE JUDGE OF THE COURT

By this appeal the defendants seek to reverse a
 order entered by the Superior Court of Cook County which dismissed
 the original and cross-bills without leave.
 The record discloses that complainants, as plaintiffs,
 were occupying premises in Chicago and constructed a hotel therein
 under a license issued in which the defendants were the landlords;
 that defendants were in default under the lease in the payment
 of rent and other matters. The defendants were proceeding for pay-
 ment and on December 19, 1935, notified complainants in writing
 that they had agreed to terminate complainants' right to occupy
 the premises without releasing them from liability to pay rent
 under the license. On the next day defendants appeared at the
 hotel and sought to take possession and at the same time failed a
 distress warrant on the furniture and fixtures in the hotel.
 At that time the complainant HENNING and certain of the defendants
 and their agents got into an altercation, one of the defendants
 representatives drew a pistol and threatened to shoot HENNING if
 same he did not leave the premises, and he was forcibly ejected.
 A number of defendants' representatives registered at the hotel
 on nights and when the trouble arose they assisted the defend-
 ants in ejecting HENNING from the hotel.
 A few days thereafter the complainants filed their
 bill, praying for an injunction to restrain the defendants from

interfering with the complainants in the management and conduct of the hotel, and on motion of complainants an order was entered restraining the defendants as prayed. Some few days thereafter defendants, in compliance with the injunction, vacated the hotel and it was re-occupied by complainants. Defendants answered and filed their cross-bill praying for a mandatory injunction against the complainants and cross-defendants, requiring them to forthwith surrender up the possession of the premises to the defendants and cross-complainants and to restrain the cross-complainants from damaging the premises and committing malicious mischief.

The defendants' motion to dissolve the injunction restraining them from interfering with complainants' possession of the hotel and defendants' motion for a mandatory injunction were both referred to a master and later the entire cause was referred to the master to take the evidence and make up his report. Prior to the reference the cross-complainants were given leave to amend their bill in which they prayed that the complainants and cross-defendants be decreed to pay the amount found due on account of rent, etc., to the cross-complainants. The master heard the evidence and made up his report, dated April 19, 1929.

In his report the master stated that complainants contended that the defendants forcibly entered the premises with guns and that complainant Menrath was forced out of the premises at the point of a gun by George Palmer, acting on the part of defendants; but he made no finding whether the contention was sustained by the evidence. In fact he made no finding at all on the contention stated, except that he found defendants did not use any more force than was necessary to obtain possession of the premises, and he concluded that the preliminary injunction issued against the defendants should be dissolved and defendants restored to possession of the premises, and that the complainants and cross-defendants be

interfere with the commission in the management and conduct of the hotel, and on motion of complainants an order was entered restraining the defendant as prayed. Some two days thereafter defendant, in compliance with the injunction, vacated the hotel and it was re-occupied by complainants. Defendant answered and filed their cross-bill praying for a mandatory injunction against the complainants and cross-defendants, requiring them to terminate their possession of the premises of the defendant and to vacate the cross-complainants from occupying the premises and committing willful wrongs against.

The defendant's motion to dissolve the injunction restraining them from interfering with complainants' possession of the hotel and defendant's motion for a mandatory injunction were both referred to a master and later the entire cause was referred to the master to take the evidence and make up his report. Prior to the reference the cross-complainants were given leave to amend their bill in which they prayed that the complainants and cross-defendants be decreed to pay the amount found due on account of rent, etc., to the cross-complainants. The master heard the evidence and made up his report, dated April 12, 1935.

In his report the master stated that complainants had stated that the defendant lawfully entered the premises with guns and that complainant's weapons were found out of the premises at the point of a gun by Harry Palmer, acting on the part of defendant; but he made no finding whether the contention was sustained by the evidence. In fact he made no finding at all on the contention stated, except that he found defendant did not use any more force than was necessary to obtain possession of the premises, and he concluded that the preliminary injunction issued against the defendant should be dissolved and defendant referred to possession of the premises, and that the complainants and cross-defendants be

restrained as prayed in the cross-bill. The report was filed in court April 30, 1939, objections of both parties having been theretofore overruled. On the same day an order was entered by agreement of the parties, that the complainants surrender possession of the premises to the defendants by ten o'clock May 1, 1939. The record discloses and the chancellor finds that the order was carried out and defendants took possession of the hotel May 1, 1939. In the decree it was further found that the complainants were entitled to possession of the hotel and that the defendants, "their agents and servants, had threatened complainants and were by force and deception attempting to take possession of said premises and of the hotel business of said complainants contrary to the law;" that the temporary injunction restraining defendants was properly issued; that the defendants, prior to the time they filed their cross-bill, had instituted suit against the complainants to recover the rent which the defendants in the amendment to their cross-bill claimed to be due them; that by agreement on May 1, 1939, complainants surrendered the hotel to the defendants. Complainants' exceptions to the master's report were sustained and the motion of the defendants to dissolve the temporary injunction was denied as was defendants' motion for an injunction in accordance with the prayer of the cross-bill. It was further found in the decree that the defendants, in accordance with the order of April 30th, above mentioned, entered into and took possession of the hotel and continued in such possession without interference from the complainants. It was further found that the action at law of the defendants, by which they sought to recover the rents claimed to be due in the amendment to their bill, was still pending and undisposed of, and it was decreed that both bills be dismissed without costs.

From the foregoing it appears without dispute that sub-

remained as before in the cross-bill. The return was filed in
court April 30, 1930, objections not being taken having been there-
fore overruled. On the same day an order was entered by agreement
of the parties, that the complainant surrender possession of the
premises to the defendant by ten o'clock May 1, 1930. The return
admitted and the defendant filed that the order was carried out
and defendant took possession of the premises May 1, 1930. In the
order it was further found that the complainant was entitled to
possession of the hotel and that the defendant, "their agents and
servants, had threatened complainant and were by force and decep-
tion attempting to take possession of said premises and of the hotel
business of said complainant contrary to the law; that the tempo-
rary injunction restraining defendant was properly issued; that
the defendant, prior to the time they filed their cross-bill, had
instigated and aided against the complainant to recover the rent which
the defendant in the agreement to their cross-bill claimed to be
due them; that by agreement on May 1, 1930, defendant surrendered
the hotel to the complainant. Complainant's exceptions to the master's
report were sustained and the action of the defendant is reversed
the temporary injunction was denied as was defendant's motion for an
injunction in accordance with the report of the cross-bill. It was
further found in the return that the defendant, in accordance with
the order of April 30th, above mentioned, entered into and took
possession of the hotel and remained in such possession without
interference from the complainant. It was further found that the
action at law of the defendant, by which they sought to recover the
rent claimed to be due in the agreement to their bill, was still
pending and undischarged of, and it was decreed that both bills be
dismissed without costs. From the foregoing it appears without dispute that the

stantially the only controversy between the parties was the possession of the hotel. Complainants' bill was filed praying for a mandatory injunction to restrain the defendants, who had forcibly taken possession of the hotel, from interfering with complainants' possession of the hotel. The defendants answered and filed a cross-bill likewise praying for a mandatory injunction to put them in possession of the hotel, they having in the meantime vacated the hotel in accordance with the preliminary injunction. Afterwards defendants amended their cross-bill seeking payment of rent due and other matters. The cause was referred to the master, who heard the evidence and made up his report, finding in favor of the defendants and cross-complainants - that they were entitled to possession of the hotel and that the preliminary injunction obtained by the complainants be dissolved. A few days after this report was filed in court the parties agreed that the complainants would move out and the defendants take possession of the hotel, and an order by agreement was entered and the next day, May 1st, in accordance with the order, complainants surrendered possession of the hotel to the defendants. So that the substance of the controversy had been settled by agreement of the parties after the hearing before the master. Substantially nothing appears to have been done from May 1st, when defendants took possession of the hotel, until the decree was entered December 23, 1929, more than seven months after the defendants had possession of the hotel without interference on the part of the complainants; and under the facts we think the decree of the chancellor was warranted. The evidence in the record, much of which we have not adverted to, shows without doubt that the defendants forcibly and at the point of a pistol took possession of the hotel, and the decree finding that the preliminary injunction was warranted is in accordance with the

essentially the only controversy between the parties was the possession of the hotel. Complacencia, bill, was filed praying for a mandatory injunction to restrain the defendants, who had forcibly taken possession of the hotel, from interfering with complacencia's possession of the hotel. The defendants answered and filed a cross-motion of the hotel. The defendants prayed for a mandatory injunction to put them in possession of the hotel, they having in the meantime vacated the hotel in accordance with the preliminary injunction. Afterwards defendants amended their cross-bill seeking payment of rent and other matters. The same was referred to the master, who heard the evidence and made up his report, finding in favor of the defendants and cross-complainants - that they were entitled to possession of the hotel and that the preliminary injunction obtained by the complainants be dissolved. A few days after this report was filed in court the parties agreed that the complainants would move out and the defendants take possession of the hotel, and an order by agreement was entered and the next day, May 1st, in accordance with the order, complainants surrendered possession of the hotel to the defendants. So that the substance of the entire controversy had been settled by agreement of the parties after the hearing before the master. Substantially nothing appears to have been done from May 1st, when defendants took possession of the hotel, until the hearing was entered December 23, 1930, more than seven months after the defendants had possession of the hotel without interference on the part of the complainants; and under the facts we believe the decree of the chancellor was warranted. The evidence in the record, much of which we have not adverted to, shows without doubt that the defendants forcibly and at the point of a pistol took possession of the hotel, and the decree finding that the preliminary injunction was warranted is in accordance with the

evidence in the record. The merits of the controversy having been disposed of when the matter came before the chancellor, it was discretionary with the chancellor as to whether he should retain the defendants' cross-bill for the purpose of adjudicating defendants' claim for rent, suit having theretofore been brought by the defendants, which suit was then pending.

The master's fees were fixed and taxed as costs prior to the entry of the decree and most of them had been paid by the defendants, who complain that the court should have taxed the costs against the complainants or apportioned them. Under the facts in the record, substantially all of the master's fees having been paid by the defendants and the court having found that defendants were at fault in taking possession of the hotel forcibly, we think the defendants are not in any position to urge that the costs should have been apportioned.

Although the lease in the instant case provided that in case of default the landlord might take possession of the premises with or without process of law, using such force as might be necessary, yet we are of the opinion that the law does not warrant the landlord in taking forcible possession of the hotel at the point of a gun, as was done in the instant case.

A further point is made by the defendants that since the evidence shows that complainants had divested themselves of all interest in the hotel by transferring it to the corporation, they had no right to the possession of the premises. There is evidence to the effect that all interest in the premises had been transferred to the corporation formed to take over the hotel but defendants never consented to the assignment of the lease. We think the evidence is ~~insufficient~~ sufficient to warrant a finding that complainants had an interest in the premises. Menrath was the principal

...in the record. The matter of the controversy having been
disposed of when the matter came before the Chancellor, it was dis-
posed of with the Chancellor as to whether he should retain the
defendants' cross-bills for the purpose of adjusting accounts.
...for rent, and having therefore been brought by the de-
fendants, which suit was then pending.
...The master's fees were taxed and found on costs prior
to the entry of the decree and were of them then paid by the
defendants, who complain that the court should have taxed the costs
against the complainants or apportioned them. Under the facts in
the record, substantially all of the master's fees having been paid
by the defendants and the court having found that defendants were
at fault in taking possession of the hotel, surely, we think the
defendants are not in any position to urge that the costs should
have been apportioned.
...Although the issue in the instant case provided that in
case of default the landlord should take possession of the premises
with or without process of law, such was found as a matter of neces-
sary, yet we are of the opinion that the law does not require the
landlord in taking forcible possession of the hotel at the point of
a gun, as was done in the instant case.
...A further point is made by the defendants that since
the evidence shows that complainants had divided themselves off
all interest in the hotel by transferring it to the corporation,
they had no right to the possession of the premises. There is
evidence in the record that all interest in the premises had been
transferred to the corporation formed to take over the hotel and
defendants never succeeded to the ownership of the hotel. We
think the evidence is sufficient to warrant a finding that com-
plainants had no interest in the premises. Complainants were the legal

stockholder of the company and was in fact in charge of and running the hotel.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Matchett, JJ., concur.

34953

ALBIN O. HORN,
Appellee,

vs.

HOWARD D. SALINE, Doing Business
as Howard D. Saline Golding
Printing Machinery, Etc. Inc.,
Appellant.

677
APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

2621A.639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$1022.30 claimed to be due for money paid on account of the purchase price of a machine which he bought from the defendant but which had never been delivered. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of his claim, and the defendant appeals.

The record discloses that on January 2, 1929, the parties entered into a written contract whereby the plaintiff agreed to buy and the defendant to sell an automatic printing and punching machine, the purchase price of which was \$16,400. The contract provided that the machine was to be delivered "if possible" on or about five months after the date of the contract. It further provided that plaintiff was to deliver to the defendant his 33 promissory notes for the entire purchase price, and accordingly on the date of the contract plaintiff executed four promissory notes all payable to the defendant, two for \$500 each, one for \$700 and one for \$1,940, due 3, 6, 9 and 12 months respectively after date with interest at 6 per cent per annum. The 29 remaining notes were never executed.

The evidence shows that plaintiff paid the two notes for \$500 each about the dates when they became due, with interest thereon, the payments aggregating the amount for which plaintiff

ALVIN C. WOOD,
Appellee.

WILLIAM D. WALKER, Doing Business
as WALKER B. WALKER, Claiming
Patent Rights, Not. Inc.,
Appellant.

APPEAL FROM THE DISTRICT COURT

2021-A-633

1. That the appellant has failed to establish the validity of his claim.

Plaintiff brought an action against the defendant to recover \$1000.00 claimed to be due for money paid on account of the purchase price of a machine which he bought from the defendant but which had never been delivered. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of his claim, and the defendant appealed. The record discloses that on January 2, 1930, the

plaintiff entered into a written contract whereby the plaintiff agreed to buy and the defendant to sell an automatic printing and punching machine, the purchase price to be \$1000.00. The contract provided that the machine was to be delivered "if possible" on or about five months after the date of the contract. It was provided that plaintiff was to deliver to the defendant his 25 promissory notes for the entire purchase price, and accordingly on the date of the contract plaintiff executed four promissory notes all payable to the defendant, two for \$200 each, one for \$700 and one for \$1,000, due 3, 6, 9 and 12 months respectively after date. All interest at 6 per cent per annum. The 25 remaining notes were never executed.

The evidence shows that plaintiff paid the two notes for \$200 each about the dates when they became due, with interest thereon, the amounts aggregating the amount for which plaintiff

sues; that when the note for \$700 came due it was renewed at the request of the plaintiff and the time of its payment extended 3 months. The evidence further shows that the machine was to be made in Europe and that shortly after the execution of the contract in January the defendant went to Germany for the purpose of having the machine constructed by a concern in that country. Defendant returned in February and advised plaintiff that the machine was in process of construction. It further appears that later on, about July, the defendant again went to Germany and took the matter up with the persons there about speeding up the construction of the machine; that he stayed there about a month, when he was advised that it would take the German concern about ten months longer to construct the machine; that thereupon defendant went to France and gave an order for the construction of the machine to a concern there because it could be made there in a much shorter time than in Germany, and that sometime afterwards, in September, the defendant cancelled the German contract.

The evidence further shows that plaintiff was in communication with the defendant from time to time, inquiring as to when the machine would be completed, and about the latter part of September and again, sometime in October, defendant testified he notified plaintiff that the machine would be delivered in the first part of the year 1930. The evidence is further to the effect that on December 20, 1929, plaintiff called on defendant and again inquired as to the time when he might expect the machine, and a number of witnesses on behalf of the plaintiff testified that at that time the defendant stated that the machine would be delivered in January or the early part of February, 1930, and that plaintiff requested the defendant to write him confirming the statement. There appears in the record a letter written by the defendant to plaintiff, dated

...; that when the note for \$700 came due it was renewed at the request of the plaintiff and the time of its payment extended 3 months. The evidence further shows that the machine was to be made in Europe and that shortly after the execution of the contract in January the defendant went to Germany for the purpose of having the machine constructed by a concern in that country. The defendant returned in February and advised plaintiff that the machine was in process of construction. It further appears that later on, about July, the defendant again went to Germany and took the matter up with the persons there about speeding up the construction of the machine; that he stayed there about a month, when he was advised that it would take the German concern about ten months longer to construct the machine; that thereafter defendant went to France and gave an order for the construction of the machine to a concern there because it could be made there in a much shorter time than in Germany, and that sometime afterwards, in September, the defendant cancelled the German contract.

The evidence further shows that plaintiff was in communication with the defendant from time to time, insisting on its completion, and about the latter part of September, defendant testified he notified plaintiff that the machine would be delivered in the first part of the year 1930. The evidence is further to the effect that on December 2, 1929, plaintiff called on defendant and again insisted on its completion, when he might expect the machine, and a number of witnesses on behalf of the plaintiff testified that at that time the defendant stated that the machine would be delivered in January or the early part of February, 1930, and that plaintiff requested the defendant to write him confirming the statement. There appears in the record a letter written by the defendant to plaintiff, dated

December 26th, in which the defendant states that the machine would be delivered between the 15th of April and the first of May at the latest. Three days later, on December 23rd, the plaintiff again called on defendant and told him he was rescinding the contract and demanded the return of the money he had paid the defendant and the notes he had delivered to defendant. The demand was refused and December 28, 1929, plaintiff wrote the defendant formally rescinding the contract and demanding the return of his money and notes. The demand was refused and on January 30, 1930, the instant suit was begun.

Substantially the only dispute in the evidence is as to what was said between plaintiff and defendant December 26, 1929, the defendant testifying that at that time he told plaintiff the machine would be delivered the latter part of April or the first of May, 1930, while plaintiff and a number of his witnesses testified that defendant stated it would be delivered the latter part of January or the first part of February, 1930. Defendant testified that when he went to Germany immediately after the contract was made in January, 1929, he entered into an oral agreement with the German firm for the construction of the machine and that the concern immediately began its construction; that he returned to Europe July following and they were still working on the machine and at that time entered into a written confirmation of the oral contract. The written contract was introduced in evidence by the defendant and is in the record, but it is in the German language and was not translated. However, we note that it is dated August 16, 1929, which was about 8 months after plaintiff made the written contract with the defendant for the purchase of the machine. Moreover, the defendant further testified that the German company continued to work on the machine until September, 1929, when the defendant then cancelled the order, although he had theretofore, about July, gone

December 1933, in which the defendant stated that the machine would be delivered between the 1st of April and the 1st of May at the latest. Three days later, on December 23rd, the plaintiff again called on defendant and told him he was retaining the contract and demanded the return of the money he had paid the defendant and the notes he had delivered to defendant. The demand was refused and December 25, 1933, plaintiff wrote the defendant formally regarding the contract and demanding the return of his money and notes. The demand was refused and on January 25, 1934, the defendant

admitted that the only dispute in the evidence is as to what was said between plaintiff and defendant December 25, 1933. The defendant testified that at that time he told plaintiff the machine would be delivered the latter part of April or the first of May, 1934, while plaintiff had a number of witnesses testified that defendant said it would be delivered the latter part of January or the first part of February, 1934. Defendant testified that when he went to Germany immediately after the contract was made in January, 1933, he entered into an oral agreement with the German firm for the construction of the machine and that the contract was actually begun its construction; that he returned to Europe July 1933 and they were still working on the machine and at that time entered into a written confirmation of the oral contract. The written contract was introduced in evidence by the defendant and is in the record, but it is in the German language and was not translated. However, we note that it is dated August 18, 1933, which was about 3 months after plaintiff made the written contract with the defendant for the purchase of the machine. Moreover, the defendant further testified that the German company continued to work on the machine until September, 1933, when the defendant then cancelled the order, although he had theretofore, about July, 1933,

to France and given an order for the machine. No written contract or any other kind of contract between defendant and the French concern was offered in evidence.

We think, on defendant's own testimony, no judgment would be warranted except one for the plaintiff. The contract called for the delivery of the machine within five months from the date "if possible." This evidently contemplated that the machine would be delivered within a short time and, at most, after the expiration of five months. The five months would expire June 2, 1929. The instant case was not begun until January 30, 1930, and there is no substantial evidence in the record that the machine was anywhere near completed nor when it would be delivered. It seems rather strange that the defendant would enter into two contracts for the construction of the machine which he was selling for more than \$16,000 when, as he testified, he had but one order for the sale of the machine.

The defendant argues three propositions of law as to why the judgment should be reversed, but in view of the evidence in the case the propositions are entirely immaterial.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

to prove and given an order for the machine. He witness stated
at that time of contract between defendant and the witness
order was given in evidence.

We think, on defendant's own testimony, no testimony
would be warranted except one for the plaintiff. The contract called
for the delivery of the machine within five months from the date
"if possible." This evidently contemplated that the machine would
be delivered within a short time and, at most, after the expiration
of five months. The five months would expire June 2, 1936. The
last case was not begun until January 30, 1936, and there is
no substantial evidence in the record that the machine was any-
where near completed nor when it would be delivered. It seems
rather strange that the defendant would enter into two contracts
for the construction of the machine when he was waiting for more
than \$10,000 when, as he testified, he had had an order for the
sale of the machine.

The defendant argues three propositions of law as to
why the judgment should be reversed, but in view of the evidence
in the case the propositions are entirely immaterial.
The judgment of the Municipal Court of Chicago is

affirmed.

ATTORNEYS.

Attorneys, P. J. and Kuntz, J. J. counsel.

For the plaintiff: P. J. and Kuntz, J. J. counsel.
The machine was delivered, in fact, on June 2, 1936.
The machine was delivered, in fact, on June 2, 1936.

34954

HOWARD D. SALINS, Doing Business
as Howard D. Salins Golding
Printing Machinery, Not Inc.,
Appellee,

vs.

ALBIN C. HORN,
Appellant.

687
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

462-114.639⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On February 3, 1930, plaintiff caused judgment to be entered by confession in its favor and against defendant on a promissory note for \$731.50 made by the defendant and payable to the plaintiff. Afterwards, on motion of defendant, the judgment was opened up and he given leave to defend. The case was then heard in connection with Horn v. Salins, No. 34953, an opinion in which case is this date filed. The evidence is the same in both cases, both were tried by the same Judge and decided at the same time. In the instant case the court found against the plaintiff, judgment was entered on the finding and the plaintiff appeals.

From what we have said in the opinion in No. 34953, it is obvious that the judgment entered in this case is correct, and for the reasons stated in that opinion the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J. and McSurely, J., concur.

ALFRED D. GILLING, Being Defendant
vs
ALFRED D. GILLING, Being Plaintiff
Plaintiff's Exhibit, No. 10000
Exhibit

ALFRED D. GILLING
Plaintiff

10000 A. 10000

THE JUDGE'S DECISION IN THE CASE OF THE COURT.

On February 2, 1900, plaintiff caused judgment to be
entered by confession in its favor and against defendant on a
promissory note for \$750.00 made by the defendant and payable to
the plaintiff. Likewise, on motion of defendant, the judgment
was opened up and he given leave to defend. The case was then
heard in connection with case No. 10000, and when he came in to
which case is now being tried. The statement is the same as in
case, but was tried by the court and decided in the same
manner. In the instant case the court found against the plaintiff.
Judgment was entered on the finding and the plaintiff appeals.
From what we have said in the opinion in No. 10000,
it is obvious that the judgment entered in this case is correct,
and for the reasons stated in that opinion the judgment of the
Municipal court of Chicago is affirmed.

ALFRED D. GILLING

ALFRED D. GILLING, Plaintiff, vs. ALFRED D. GILLING, Defendant.

34976

EVA KARON SHUR, Inc.,
Appellee,

vs.

JACOB KATZ and MRS. JACOB
KATZ,
Appellants.

697
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

282 I.A. 639⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover \$129.50 claimed to be the balance due for merchandise purchased by Mrs. Katz. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of its claim. Judgment was entered on the finding and defendants appeal.

The two defendants were served with summons by the bailiff on May 28, 1930, and on June 5th their appearance was entered by counsel.

One of the grounds argued for reversal is that the abbreviation "Mrs. is not a name, therefore in this case there are two defendants named 'Jacob Katz.'" There is no merit in this contention. Jacob Katz and Mrs. Katz were both sued and the bailiff served both of them. Later they filed their appearance, one of the defendants being designated as in the suit, "Mrs. Jacob Katz." Both parties having been properly before the court, there is no merit in the contention and it is entirely frivolous.

A further point seems to be that the finding and judgment "are not sufficient because there is no direct finding by the court that the defendants sued herein are husband and wife, and that the whole account sued upon is for family necessities." There is evidence in the record that Mr. Katz took his wife into plaintiff's place of business and introduced her as his wife, and said

THE STATE OF TEXAS,
County of _____

vs.

JACOB KATE and MRS. JACOB
KATE,
Defendants.

IN SENATE
JANUARY 1930

262 I.A. 639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover \$125.00 claimed to be the balance due for merchandise purchased by Mrs. Kate. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of the claim. Judgment was entered on the finding and judgment of the court.

The two defendants were served with summons by the sheriff on May 28, 1929, and on June 28 their appearance was entered by counsel.

One of the grounds alleged for reversal is that the provision "Mrs. is not a name, therefore in this case there are two defendants named 'Jacob Kate.'" There is no merit in this contention. Jacob Kate and Mrs. Kate were both used and the bill filed both of them. Later they filed their appearance, one of the defendants being designated as in the suit, "Mrs. Jacob Kate." Both parties having been properly before the court, there is no merit in the contention and it is entirely irrelevant.

A further point seems to be that the finding and judgment "are not sufficient because there is no direct finding by the court that the defendants named Kate are husband and wife, and that the whole account was upon a family necessaries." There is evidence in the record that Mr. Kate took his wife into plaintiff's place of business and introduced her as his wife, and said

that his wife wanted to buy some wearing apparel. It is obvious that this contention is equally without merit.

The evidence shows that Mrs. Katz purchased merchandise from plaintiff and that some of it was purchased for Mrs. Silverman. The evidence is that Mr. and Mrs. Katz went to plaintiff's place of business and brought with them Mrs. Silverman and both were present when the purchase was made of the merchandise for Mrs. Silverman, the latter not having an account with the store. The testimony is: "Mr. Katz came in with his wife and Mrs. Silverman and Mrs. Silverman was introduced as Mrs. Katz's sister and she wanted to buy some merchandise for herself. And after she selected what she wanted Mr. Katz and Mrs. Katz both said the girl had her account with them and charge it to them. They both said that at the time. Q. Mr. and Mrs. Katz -- They were both present? A. Yes." It is clear that there is no merit in this appeal.

Something is also said about the insufficiency of the pleading, but we think the pleading was all that the law required. It informed the defendants of the nature of plaintiff's claim and it is obvious it gave defendants all the notice they required. They went to trial without any complaint that the statement of claim did not give them sufficient information. This is a case of the fourth class where a judgment will be affirmed if the evidence warrants the rendition of the judgment. Such is the case here.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, F. J., and McSurely, J., concur.

that his wife wanted to buy some wearing apparel. It is obvious
that this contention is equally without merit.
The evidence shows that Mrs. Kate purchased wearing-
apparel from plaintiff and that some of it was purchased for Mrs.
Silverman. The evidence is that Mr. and Mrs. Kate went to plaintiff's
place of business and brought with them Mrs. Silverman and
both were present when the purchase was made at the merchandise for
Mrs. Silverman, the latter not having an account with the store.
The testimony is that Mrs. Kate came in with his wife and Mrs. Silver-
man and Mrs. Silverman was introduced as Mrs. Kate's sister and she
wanted to buy some merchandise for herself. and after she selected
what she wanted Mr. Kate and Mrs. Kate both said the girl had not
account with them and charged it to them. They both said that at
the time. Mr. and Mrs. Kate -- they were both present. A. Yes.
It is clear that there is no merit in this story.
Something is also said about the inventory of the
planning, but we think the planning was all that the law requires.
It informed the defendant of the nature of plaintiff's claim and
it is obvious it gave defendant all the notice they required. They
went to trial without any complaint that the statement of claim did
not give them sufficient information. This is a case of the fourth
class where a judgment will be affirmed if the evidence warrants the
 rendition of the judgment. Such is the case here.
The judgment of the Appellate Court of Chicago is
affirmed.

APPROVED

Noted by J. J. and Maguire, J. J. consent.

35044

NICK KALATA and MARY KALATA,
Defendants in Error,

vs.

MERCHANTS AND MANUFACTURERS
SECURITIES COMPANY, a Corporation,
et al.,

Plaintiffs in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

262 I.A. 640

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Merchants and Manufacturers Securities Company, a corporation, (which will hereinafter be referred to as Securities Company) seeks to reverse a decree of the Circuit court of Cook county, by which it was perpetually enjoined from attempting to collect a note for \$490.

The record discloses that complainants were the owners of a piece of property known as 6421 South Artesian avenue, Chicago, and were solicited by a representative of the Standard Construction Company to repair and remodel the improvements on the property, and on June 10, 1928, complainants entered into a written document which is treated by both parties to this suit as being a contract, whereby the Standard Construction Company was to repair or remodel complainants' premises for a consideration of \$510, \$20 being the down-payment, and complainants were to give their note for the balance, \$490, when the work was completed. Three days afterwards, June 13th, the Securities Co. signed a document which is designated as "Acceptance," addressed to the Standard Construction Co., whereby the Securities Co. agreed to purchase the Kalata "contract and note offered to us on the real estate improvements for 6421 S. Artesian, Chicago, Ill." It is recited that the contract is signed by the Kalatas. July 3, 1928, the Standard Construction Co., having shortly prior to that time

WILLIAM H. HARRIS and HARRY HARRIS,
Plaintiffs in Error,

VERSUS
SECURITY AND MARSHALLS
INSURANCE COMPANY, a Corporation,
Defendant in Error.

1932 I.A. 010

IN JUSTICE'S COURT DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Marshalls and
Security Insurance Company, a corporation, (which will here-
inafter be referred to as Security Company) seeks to reverse a
verdict of the Circuit Court of Cook County, by which it was found
that it was liable to the plaintiff for a note for \$500.
The record discloses that complainant with the defendant
at a place at property known as 4441 North Western Avenue, Chi-
cago, and were solicited by a representative of the Standard Com-
pensation Company to repair and remodel the improvements on the
property, and on June 10, 1928, complainant entered into a writ-
ten agreement which is treated by both parties to this suit as being
a contract, whereby the Standard Compensation Company was to re-
pair or remodel complainant's premises for a consideration of \$250,
the balance of the down-payment, and complainant was to give credit
for the balance, \$750, when the work was completed. Three
days afterwards, June 13th, the Security Co. signed a document
which is designated as "Assignment," addressed to the Standard
Compensation Co., whereby the Security Co. agreed to purchase the
plaintiff's contract and note offered to us on the real estate in-
volvement for \$251.80, American, Chicago, Ill. It is testified
that the contract is signed by the defendant, July 2, 1928, the
Standard Compensation Co., having earlier given to that date

began work under the contract, procured the defendants to sign and deliver to the Construction Co. their promissory note, being the one involved in this appeal. The note is dated July 3, 1928, for \$490, payable to the order of the Construction Co. in 24 consecutive monthly installments of \$20.42 each, and it is stated that the note is given for the "balance due upon a contract for labor and materials furnished by the payee hereof for the improvement of the land *** No. 6421 S. Artesian avenue," Chicago, and it is further stated in the note that the makers acknowledge that the work has been satisfactorily completed by the payee (the contractor) and that the acceptance of the note shall not operate as a waiver of any mechanic's lien. Then follows an authority to confess judgment, etc. There is printed matter on the back of the note and it is endorsed without recourse by the Construction company. Part of the printed matter is: "For value received the undersigned has sold and hereby assigns *** unto the legal holder of this note all the right, title and interest of the undersigned (contractor) in and to all liens or claims for lien which the undersigned *** has or which may arise or accrue under the laws of the State of Illinois for labor and materials furnished by the undersigned (contractor) as set forth on the face of this note, together with full and complete power and authority to the legal holder of this note to enforce such lien or claims for lien in the same manner as if such proceedings were taken by and in the name of the undersigned (contractor.)"

"The undersigned (contractor) hereby warrants that all indebtedness incurred, materials purchased for or used and labor employed by the undersigned (contractor) for the improvement mentioned on the face of this note has been paid in full."

On July 11th the Construction company assigned the contract it had entered into with the complainants to the Securities Co., and at that time endorsed and delivered the note and contract

begin with under the contract, provided the defendant in this and
delivered to the defendant as their promissory note, being the
one involved in this appeal. The note is dated July 2, 1900, for
\$100, payable to the order of the defendant in 24 months
five percent interest of \$10.42 each, and it is stated that the
note is given for the "balance due upon a contract for labor and
materials furnished by the payee heretofore for the improvement of the
land of No. 2421 E. Jackson Avenue, Chicago, and it is further
stated in the note that the maker acknowledges that the work has
been satisfactorily completed by the payee (the contractor) and
that the acceptance of the note shall not operate as a waiver of
any mechanic's lien. When follows an authority to collect judgment,
etc. There is printed matter on the back of the note and it is an-
dorsed without recourse by the Construction Company. Part of the
printed matter is: "For value received the undersigned has sold and
hereby assigns to and unto the legal holder of this note all the right,
title and interest of the undersigned (contractor) in and to all
liens or claims for lien which the undersigned has or which may
arise or accrue under the laws of the State of Illinois for labor
and materials furnished by the undersigned (contractor) on and to the
on the face of this note, together with full and complete power and
authority to the legal holder of this note to enforce such lien or
claim for lien in the same manner as if such proceedings were taken
by and in the name of the undersigned (contractor)."
"The undersigned (contractor) hereby warrants that all
indebtedness incurred, materials furnished for or used and labor
employed by the undersigned (contractor) for the improvement men-
tioned on the face of this note has been paid in full."
On July 11th the Construction Company assigned the con-
tract to and entered into with the defendant to the defendant
Co., and it was then entered and delivered the note and contract

to the Securities Co. The assignment of the contract is printed on the back of the contract. It recites that in consideration of one dollar, etc., the Construction company assigns to the Securities Co. all interest in the contract and all money due or to become due thereunder and all liens or claims for liens which may arise or accrue to the contractor, the Construction Co., with full power of the Securities Co. to enforce such claimer liens. It also states that the Construction company warrants the signatures upon it as being genuine and that the Kalatas are the owners in fee of record of the property described in the contract and that the contract has been faithfully and fully performed by the Construction company in a good and workmanlike manner; "that all indebtedness incurred, materials purchased for or used and labor employed by the undersigned to complete said improvement, has been paid in full; that the said contract was completed on the 3rd of July, 1928, and \$490 remains unpaid.

Considerably more is printed on the back of the contract, and the evidence further shows that on the same day, July 11th, the defendant Securities Co. issued its four checks aggregating \$401.63, one of them running to the Construction company for \$71. These checks were given in accordance with the directions of the Construction company, being the consideration given by the Securities Co. for the note involved here. Shortly afterwards subcontractors who had furnished labor and materials made claims that they had not been paid for the work done and materials furnished; these claims aggregated \$398.86 and they were proved before the master in the instant case, and allowed in the decree as a lien on the premises in question. The aggregate of these claims was deducted from the \$490 due and unpaid by the complainants, leaving a balance of \$91.14, for which sum the Securities Co. was given a lien.

to the Securities Co. The assignment of the contract is stated on the back of the contract. It recites that in consideration of the dollar, the Construction Company assigns to the Securities Co. all interest in the contract and all money due or to become due thereunder and all claims or claims for money which may arise or accrue to the contractor, the Construction Co., with full power of the Securities Co. to enforce such claims thereon. It also states that the Construction Company warrants the signature upon it as being genuine and that the balance of the contract in the contract is the property described in the contract and that the contract has been lawfully and fully performed by the Construction Company in a good and workmanlike manner; that all indebtedness incurred, materials furnished or used and labor employed by the contractor to complete said improvement, has been paid in full; that the said contract was completed on the 2nd of July, 1924, and that the same remains unpaid.

Considerably more is stated on the back of the contract, and the evidence further shows that on the same day, July 11th, the defendant Securities Co. issued its own check payable to the Construction Company for \$100,000. One of them running in the Construction Company for \$75. These checks were given in accordance with the provisions of the Construction Company, being the consideration given by the Securities Co. for the note involved here. Shortly afterwards the contractor who had furnished labor and materials made claim that they had not been paid for the work done and materials furnished; these claims aggregated \$300.00 and they were proved before the master in the instant case, and allowed in the decree as a lien on the premises in question. The aggregate of these claims was \$400.00. The balance of \$100.00 was not paid by the contractor, leaving a balance of \$300.00, for which the Securities Co. was given a lien.

The amount was tendered and refused and it was paid to the clerk of the court.

The contention of the Securities Co. is that it is a bona fide holder of the note, and therefore the complainants have no defense to the note. The master and the chancellor both found against this contention and we are also of the opinion that the Securities Co. was not a bona fide holder of the note in due course, but that it must be charged with notice of the facts that the note was given in payment of work to be done on complainants' property by the Construction company, and that work had been done and materials furnished which had not been paid for by the contractor.

The evidence shows that the blank contract and the assignment of it were prepared by the Securities Co., which at that time was doing considerable business with the Construction company. All of the documents show that the note was given to pay for the improvement of complainants' premises. This is shown by a number of statements concerning a mechanic's lien on the property in question in case the note was not paid.

All of the evidence shows that the Securities Co. was to furnish the money to the Construction company so that the work could be done and paid for. The Kalatas were not paying cash for the work but were giving their note to the Construction company, which would not be due for some time. Obviously the men who did the work on the job would be paid as the work progressed and before any money was received from the Kalatas. This money was to be furnished by the Securities Co. The same is true with reference to materials furnished. The Securities Co. knew that unless the men who furnished the material and performed the work on the job were paid, the Kalatas would receive no consideration for the note. Furthermore, that this was the understanding of the Securities Co. is shown by the testimony of the witness Zolla. He testified that

The amount was \$100.00 and it was paid in the year of 1912.

The condition of the Security Co. is that it is a
bank like holder of the note, and therefore the complainant have
no defense to the note. The master and the complainant both turned
against this condition and we are also of the opinion that the
Security Co. was not a bank like holder of the note in due course,
but that it must be charged with notice of the facts that the note
was given in payment of work to be done on complainant's property
by the Construction company, and that work had been done and was
certainly furnished which had not been paid for by the contractor.
The evidence shows that the bank contract and the
assignment of it were prepared by the Security Co., which is that
the was a sale of real estate business with the Construction company.
All of the documents show that the note was given to pay for the
payment of complainant's expenses. This is shown by a number
of documents concerning a mortgage's lien on the property in ques-
tion in case the note was not paid.
All of the evidence shows that the Security Co. was
to furnish the money to the Construction company so that the work
could be done and paid for. The witnesses were not saying much for
the work but were giving their note to the Construction company,
which would not be due for some time. Obviously the man who did
the work on the job would be paid as the work progressed and before
any money was received from the witness. This money was to be fur-
nished by the Security Co. The same is true with reference to
materials furnished. The Security Co. knew that unless the man
who furnished the material and performed the work on the job were
paid, the witness would receive no consideration for the note.
Furthermore, that this was the understanding of the Security Co.
is shown by the testimony of the witness Baker. He testified that

the \$401.63 which the Securities Co. paid out at the time they received the note on July 11th, was in payment for work done on the Kalata contract; and we think it apparent, from the amount still remaining due to the sub-contractors, that the Securities Co. was deceived by the Construction company because apparently none of the \$401.63 went to pay for the work done on the Kalata property.

We think it clear that the Securities Co. was apprized of all the facts and is not a bona fide holder of the note within the meaning of the Negotiable Instrument law.

Upon a consideration of all the evidence in the record we think it clear that the Securities Co. was not a bona fide holder in due course and that the decree enjoining it was correct and it is affirmed.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McGuirely, J., concur.

the \$401.43 which the Security Co. paid out at the time they received the note on July 11th, was in payment for work done on the Kalala contract; and we think it reasonable, from the amount still remaining due to the sub-contractors, that the Security Co. was deceived by the Government company because apparently none of the \$401.43 went to pay for the work done on the Kalala property.

We think it clear that the Security Co. was deceived by all the facts and is not a bona fide holder of the note within the meaning of the Negotiable Instrument Law.

Upon a consideration of all the evidence in the case and we think it clear that the Security Co. was not a bona fide holder in due course and that the defense enjoining it was correct and is allowed.

The decree of the Circuit Court of Cook County is affirmed.

ATTORNEYS.

Witness my hand and seal of office at Chicago, Illinois, this 10th day of June, 1908.

Notary Public for Cook County, Illinois.

My commission expires the 10th day of June, 1910.

Notary Public for Cook County, Illinois.

My commission expires the 10th day of June, 1910.

Notary Public for Cook County, Illinois.

Notary Public for Cook County, Illinois.

Notary Public for Cook County, Illinois.

Notary Public for Cook County, Illinois.

35103

SOFIA SNELLMAN,
Appellant.

vs.

EVALD SNELLMAN,
Appellee.

717
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2621.A. 640²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$509.25 claimed to be for moneys advanced by plaintiff to the defendant and for board and lodging furnished defendant and his wife and child for about 25 weeks at \$14 a week. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$41, apparently being the amount of two items claimed by plaintiff. Plaintiff, being dissatisfied, prosecutes this appeal.

The record discloses that plaintiff's husband is the uncle of the defendant, and in 1923 plaintiff advanced money to the defendant to pay for the transportation of the defendant and his family from Finland to Chicago, which plaintiff admits has been paid. Plaintiff's evidence also was to the effect that upon defendant and his family arriving in Chicago they lived with plaintiff at her home from July 6, 1923, to December 16, 1923, and that it was agreed by the parties that the defendant would pay \$14 a week.

There is other evidence tending to show that plaintiff had advanced money to the defendant in buying a baby buggy and a suit of clothes, these two items aggregating \$41, for which amount the court entered judgment in plaintiff's favor. Substantially the only item in dispute was the \$14 a week for the board and lodging of defendant and his family.

Plaintiff's testimony was to the effect that there was

[illegible]

04341938

Plaintiff brought suit against the defendant to recover \$200.25 claimed to be for money advanced by plaintiff to the defendant and for board and lodging furnished defendant and his wife and child for about 25 weeks at \$14 a week. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$41, apparently being the amount of the loan advanced by plaintiff. Plaintiff's being dissatisfied,

that it was agreed by the parties that the defendant would pay plaintiff at her home from July 6, 1935, to December 10, 1935, the defendant and his family arriving in Chicago they lived with defendant's relatives also was to the effect that upon his family from Chicago, which plaintiff admits has been paid. Plaintiff's evidence also was to the effect that upon the defendant to pay for the transportation of the defendant and family of the defendant, and in 1935 plaintiff advanced money to the record discloses that plaintiff's husband is the

There is other evidence tending to show that Plaintiff had advanced money to the defendant in buying a baby buggy and a suit of clothes, these two items aggregating \$41. For which amount the court entered judgment in Plaintiff's favor. Substantially if only item in dispute was the \$14 a week for the board and lodging of defendant and his family.

an express agreement that the defendant would pay this amount, while on the other hand, evidence on behalf of the defendant was to the effect that there was no agreement between the parties; that nothing was said about payment and that the defendant's wife worked for plaintiff doing laundry work; that plaintiff at that time was doing laundry work in her home for certain hotels in Chicago and that although there was no agreement that defendant would pay plaintiff for board and lodging, yet the defendant's wife did the laundry work so that defendant would not be under obligation to pay for board and lodging.

Plaintiff has filed what is designated as an abstract of record in this court, but has failed to abstract any of the evidence given on the trial; yet counsel for plaintiff in his brief contends that the finding and judgment of the court in favor of the plaintiff for \$41 is against the manifest weight of the evidence. The rules of this court require the party bringing a case here to furnish an abstract of the record, including the evidence, so that the court can understand the contentions made. That not having been done here, obviously the point is not before us, and the judgment will be affirmed for failure to abstract any of the evidence in the case.

As above stated, however, we have examined the evidence in the record and are of the opinion that we would not be warranted in disturbing the finding and judgment of the court on the ground that the finding was against the manifest weight of the evidence. It will be noted that the claim here made for board and lodging was from July to December, 1923, more than five years before suit was brought. This element the court undoubtedly took into consideration in deciding the case.

For the reasons stated the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

an express agreement that the defendant would pay this amount,
while on the other hand, evidence on behalf of the defendant was to
the effect that there was no agreement between the parties; that
nothing was said about payment and that the defendant's wife warned
the plaintiff being laundry work; that plaintiff at that time was
doing laundry work in her room for certain hotels in Chicago and
that although there was no agreement that defendant would pay
plaintiff for board and lodging, yet the defendant's wife did the
laundry work so that defendant would not be under obligation to
pay for board and lodging.
Plaintiff has filed what is designated as an affidavit
of record in this court, but has failed to submit any of the
evidence given on the trial; yet counsel for plaintiff in his
brief contends that the finding and judgment of the court in favor
of the plaintiff for \$41 is against the manifest weight of the
evidence. The rule of this court requires the jury to bring a
case here to furnish an abstract of the record, including the evi-
dence, so that the court can understand the contentions made. That
not having been done here, obviously the point is not before us,
and the judgment will be affirmed for failure to abstract any of
the evidence in the case.
As above stated, however, we have examined the evidence
in the record and are of the opinion that we would not be warranted
in disturbing the finding and judgment of the court on the ground
that the finding was against the manifest weight of the evidence.
It will be noted that the claim here made for board and lodging
was from July to December, 1921, more than five years before suit
was brought. This amount the court undoubtedly took into consid-
eration in reaching the case.
For the reasons stated the judgment of the Municipal Court
at Chicago is affirmed.

35118

GEORGE GIBBONS, Doing Business as
GIBBONS LUMBER & MATERIAL CO.,
Appellee,

vs.

EDDIE JONES,
Appellant.

72 A
APPEAL FROM COUNTY COURT
OF COOK COUNTY.

2521A. 340³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action before a justice of the peace of Cook county to recover \$500 claimed to be due him for goods sold and delivered to defendant. There was a trial before a justice of the peace, and a finding and judgment in plaintiff's favor for the amount of his claim. The defendant appealed to the County court of Cook county, taking his appeal before the justice of the peace by there filing his bond and paying the necessary costs.

The transcript of the record was filed in the office of the clerk of the County court of Cook county on October 27, 1930. Four days later, October 31st, an order was entered by the County court, on motion of the defendant, directing the justice of the peace to recall an execution which had been immediately issued out of his court and directing the constable who had levied an automobile under the execution, to return the automobile to the defendant. The order recites that notice was given by the defendant and that counsel for the parties appeared before the County court on the hearing of the motion. Afterwards, on February 6th, the defendant filed a petition in the County court setting up the entry of the order above mentioned and that the constable had refused to turn back the automobile which he had taken under the execution. The prayer of the petition was that a rule be entered upon the justice and the constable, to show cause why they should

UNKNOWN ALIBION, Being business as
 ALIBION LUMBER MATERIAL CO.,
 Appellee.

APPEAL FROM COUNTY COURT
 OF COOK COUNTY.

362 A.A. 640

Appellant.

AL. JAMES O'BRIEN, Plaintiff in Error vs. THE STATE.

Plaintiff brought an action before a Justice of the

peace of Cook county to recover \$200 claimed to be due him for
 grain sold and delivered to defendant. There was a trial before a
 Justice of the peace, and a finding and judgment in plaintiff's
 favor for the amount of his claim. The defendant appealed to the
 County court of Cook county, taking his appeal before the Justice
 of the peace by there filing his bond and paying the necessary

The transcript of the record was filed in the office
 of the clerk of the County court of Cook county on October 27,
 1930. Four days later, October 31st, an order was entered by the
 County court, on motion of the defendant, directing the Justice
 of the peace to recall an execution which had been immediately
 issued out of his court and directing the constable who had having
 an automobile under the execution, to return the automobile to the
 defendant. The order recited that notice was given by the defendant
 and that counsel for the parties appeared before the County
 court on the hearing of the motion. Afterwards, on February 6th,
 the defendant filed a petition in the County court stating up the
 entry of the order above mentioned and that the constable had
 failed to turn back the automobile when he had taken under the
 execution. The prayer of the petition was that a rule be issued
 upon the Justice and the constable, to show cause why they should

not be held to be in contempt of court for failure to comply with the order. November 13th there was filed by plaintiff in the office of the clerk of the County court a notice to the defendant, signed by the attorney for the plaintiff, notifying the defendant that the plaintiff would file a notice with the clerk of the County court to place the cause upon the short cause calendar, and there is an affidavit that the notice is served upon counsel for the defendant.

January 13, 1931, the case came on for a trial before the court and a jury, and after hearing the evidence and argument of counsel the jury returned a verdict in favor of plaintiff for \$500. Thereupon the defendant made a motion for a new trial which was continued to January 14th. January 23rd there appears in the record a written motion filed by counsel for the defendant, contending that the court had no jurisdiction to hear the cause because the plaintiff had failed to file his written appearance, and on January 23rd an order was entered overruling the defendant's motion for a new trial, judgment was entered on the verdict and the defendant appeals.

March 3, 1931, an order was entered reciting that the parties appeared by their attorneys, plaintiff made a motion for leave to file his written appearance and for leave to pay the appearance fee, and the motion was overruled and denied.

In this court the defendant contends that the failure of the plaintiff to file his written appearance in the County court deprived that court of jurisdiction to try that cause. We think it obvious that there is no merit in this contention. While the statute requires the filing of an appearance and the payment of a fee of \$5.00, yet the appearance of the plaintiff was entered without the filing of a written appearance. Plaintiff had filed an affidavit

not be held to be in contempt of court for failure to comply with the order. November 1920 there was filed by plaintiff in the office of the clerk of the County court a notice to the defendant signed by the attorney for the plaintiff, notifying the defendant that the plaintiff would file a notice with the clerk of the County court to place the cause upon the next court calendar, and there is an affidavit that the notice is served upon counsel for the defendant.

January 18, 1921, the case came on for a trial before the court and a jury, and after hearing the evidence and argument of counsel the jury returned a verdict in favor of plaintiff for \$100. Thereupon the defendant made a motion for a new trial which was granted on January 19th. January 20th there appears in the record a written motion filed by counsel for the defendant, containing that the court had no jurisdiction to hear the cause because the plaintiff had failed to file his written agreement, and on January 22nd an order was entered overruling the defendant's motion for a new trial. Judgment was entered for the plaintiff and the defendant appealed.

of the Court March 2, 1921, an order was entered reciting that the parties appeared by their attorneys, plaintiff made a motion for leave to file his written agreement and for leave to pay the expenses, and the motion was overruled and denied. In this court the defendant contends that the failure of the plaintiff to file his written agreement in the County court deprived that court of jurisdiction to try that cause. We think it obvious that there is no merit in this contention. While the statute requires the filing of an agreement and the payment of a fee of \$5.00, yet the appearance of one plaintiff was entered without the filing of a written agreement. Plaintiff had filed an affidavit

with the clerk of the court and had the cause placed on the short cause calendar, and he appeared with opposing counsel on a number of occasions in court when orders were entered and the case tried. Each of these occasions was the entry of appearance by the plaintiff and it was entirely unnecessary for plaintiff to file a separate written document stating that he thereby entered his appearance. There is no merit in any of the defendant's contentions.

On the other hand, plaintiff in his brief argues that the trial court was without jurisdiction in ordering the constable who had taken the automobile under the execution to return it to defendant. We think it equally obvious that this point is not before us. Plaintiff has assigned no cross-errors, so the matter is in no way involved here.

The judgment of the County court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Katchett, P. J., and McSurely, J., concur.

with the clerk of the court and had the same signed on the short
cross reference, and he appeared with opposing counsel on a number
of occasions in court when orders were entered and the case tried.
Each of these occasions was the result of messages by the clerk
first and it was entirely unnecessary for counsel to file a
motion without counsel stating that he desired to appear at the
proceedings. There is no merit in any of the defendant's contentions.

On the other hand, counsel is at all times aware that
the trial court was at least justified in ordering the examination
who had taken the automobile under the examination to return it to
defendant. He thinks it equally evident that this party is not
before the trial court and assigned an agent, as the matter
is in no way involved here.

The defendant of the county court of Cook County is

attested.

Witness my hand.

Respectfully, J. J. and Secretary, J. J. counsel.

The court of the county of Cook, Illinois, do hereby certify that the
above is a true and correct copy of the original as the same appears
from the records of the court.

35121

E. J. MORGAN,
Appellee,

vs.

CHICAGO BODY & EQUIPMENT COMPANY,
a Corporation,
Appellant.

737
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 640⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for \$149.80, entered in favor of plaintiff upon the finding of the court at the conclusion of all the evidence.

August 19, 1930, plaintiff brought an action against the defendant to recover \$384.67 which he claimed was due him under a written contract entered into between the parties on January 13, 1930, the claim being that plaintiff was entitled under the contract to a salary of \$60 a week for the two weeks ending August 16, 1930, and \$264.67 for commissions on sales made by plaintiff for defendant. Defendant filed an affidavit of merits denying that there was any written contract between the parties and set up that plaintiff was employed by the defendant and had a drawing account of \$60 a week, against which was to be charged commissions on sales made by plaintiff, and averring that there was due defendant from plaintiff \$847.63. Defendant filed its set-off, claiming this amount, being the excess of \$60 a week over plaintiff's commissions.

Plaintiff's theory of the case was that on January 13, 1930, he entered into a written contract with the defendant corporation, whereby he was employed for a term of one year at \$60 a week, payable weekly, and three percent on certain sales made by him, payable monthly.

Defendant's theory of the case was that there was no written contract entered into between the parties, but that plaintiff f

E. J. LINDSEY,
Attorney

vs.

THE CHICAGO
CITY & COUNTY
A Corporation
Attorney

CHICAGO
CITY & COUNTY
A Corporation

3212 A. 640

IN THE COURT OF THE DISTRICT OF COLUMBIA

By this appeal the defendant seeks to reverse a judgment for \$142.50, entered in favor of plaintiff upon the finding of the court at the conclusion of all the evidence.

August 10, 1930, plaintiff brought an action against the defendant to recover \$284.97 which he claimed was due him under a written contract entered into between the parties on January 15, 1930, the claim being that plaintiff was entitled under the contract to a salary of \$80 a week for the two weeks ending August 10, 1930, and \$284.97 for commissions on sales made by plaintiff for defendant.

Defendant filed an affidavit of merits denying that there was any written contract between the parties and set up that plaintiff was employed by the defendant and had a drawing account of \$80 a week, against which was to be charged commissions on sales made by plaintiff, and averring that there was no defendant from plaintiff.

Defendant filed its set-off, claiming this amount, being the excess of \$80 a week over plaintiff's commissions.

Plaintiff's theory of the case was that on January 15, 1930, he entered into a written contract with the defendant corporation, whereby he was employed for a term of one year at \$80 a week, payable weekly, and three percent on certain sales made by him.

Defendant's theory of the case was that there was no written contract entered into between the parties, but that plaintiff

was employed under an oral agreement by the defendant, as its manager, at a salary of \$60 a week; that on April 1st, the business of the company not having been successful, plaintiff was relieved from his position as manager of the defendant company, and was thereafter employed as a salesman with a drawing account of \$60 a week, which was to be charged against a commission of five percent on sales made by plaintiff; that plaintiff continued to work for defendant until August 1st, when he was discharged, and after charging the commissions against the \$60 a week, there was a balance owing to defendant from plaintiff of \$347.63; that the \$60 a week drawing account was more than the commissions earned by the plaintiff. The court allowed plaintiff \$29.80 for commissions, which he had earned prior to April 1st, and disallowed any commissions after that date. He also allowed plaintiff a salary of \$60 a week for the two weeks of August, making \$120, or a total allowance of \$149.80, and disallowed defendant's set-off.

Plaintiff offered in evidence a written document signed by himself and the president of the company, which is the basis of his suit, and by which he was employed for a period of one year ending December 31, 1930. This document, on its face, states that the hiring is "subject, however, to consultation with Mr. J. E. McCoy and myself." J. E. McCoy was the principal stockholder and in reality controlled the defendant corporation. The minutes of the corporation showed that Ernest E. Boyer was elected president and that McCoy was elected secretary and treasurer. At the same meeting the minutes showed that the president was authorized to employ persons on behalf of the defendant, to fix their salary and wages, "subject to the approval of John E. McCoy."

Plaintiff contends that his contract with the defendant being signed by Boyer, the president, was binding and valid. The

was employed under an oral agreement by the defendant, as its manager, at a salary of \$500 a week; that on April 1st, the business of the company not having been successful, plaintiff was relieved from his position as manager of the defendant company, and was thereafter employed as a salesman with a drawing account of \$500 a week, which was to be charged against a commission of five percent on sales made by plaintiff; that plaintiff continued to work for defendant until August 1st, when he was discharged, and after changing the commissions against the \$500 a week, there was a balance owing to defendant from plaintiff of \$327.43; that the \$500 a week drawing account was more than the commissions earned by the plaintiff. The court allowed plaintiff \$250.00 for commissions, which he had earned prior to April 1st, and disallowed any commission after that date. He also alleged plaintiff a salary of \$500 a week for the two weeks of August, making \$1000, or a total allowance of \$1250.00, and disallowed defendant's set-off.

Plaintiff offered in evidence a written document signed by himself and the president of the company, which is the basis of his suit, and by which he was engaged for a period of one year ending December 31, 1930. This document, on its face, states that the hiring is "subject, however, to consultation with Mr. E. H. McCoy and myself." E. H. McCoy was the principal stockholder and in reality controlled the defendant corporation. The minutes of the corporation showed that August 1st, 1930, was elected president and that McCoy was elected secretary and treasurer. At the same meeting the minutes showed that the president was authorized to employ persons on behalf of the defendant, to fix their salary and wages, "subject to the approval of John E. McCoy."

Plaintiff contends that his contract with the defendant, being signed by J. E. McCoy, the president, was binding and valid. The

evidence also shows that McCoy knew nothing of this written agreement until the instant suit was brought, and we think it clear, as shown by the minutes of the meeting of the Board of Directors, that Boyer could not enter into the contract on behalf of the defendant without the approval of McCoy. Bloom v. Vahon, 341 Ill. 200.

Plaintiff testified that McCoy discharged him on August 1st, and this being true, it is obvious that plaintiff could not thereafter sue for salary - that any claim he might have would be for damages. Doherty v. Schipper & Block, 250 Ill. 128. But since we have held that the alleged written contract was invalid, plaintiff was subject to be discharged at any time, and therefore he was entitled to neither damages nor salary after his discharge. This being a case of the fourth class in the Municipal court, since the case was tried on its merits, we are not interested in the pleadings because the case is to be determined from the evidence. Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311; McClunn v. Gillespie, 227 Ill. App. 400; Bruner v. Grand Trunk Western Ry. Co., 319 Ill. 421.

We are also of the opinion that defendant was not entitled to recover on its set-off because there was no agreement between the parties that plaintiff would repay defendant any part of the \$60 a week drawing account in case his commissions did not reach this amount. Felsenthal Bros. & Co. v. Gradwohl, 217 Ill. App. 170; Nelson v. American Business Bureau, 241 Ill. App. 432; Eagle v. Hoffman, 258 Ill. App. 234.

Under the evidence in this case we think the court was warranted in finding that plaintiff had earned commissions of \$29.80 from the time he was employed until April 1, 1930. The judgment of the Municipal court will therefore be reversed with a finding of fact, and judgment will be entered in this court in favor of

plaintiff and against the defendant for \$29.80. Each party will be required to pay his or its own court costs.

JUDGMENT REVERSED WITH A FINDING OF FACT
AND JUDGMENT ENTERED IN THIS COURT.

Matchett, P. J., and McSurely, J., concur.

35121

FINDING OF FACT.

We find as a fact that the purported written contract entered into between plaintiff and the defendant by Ernest Boyer, its president, was not a binding obligation because Boyer exceeded his authority.

plaintiff and against the defendant for \$25.00. Such party will

be required to pay his or her own costs.

THE COURT HEREBY FINDS A VERDICT FOR THE
 DEFENDANT AGAINST THE PLAINTIFF.

7

Witness, D. L. and Plaintiff, J. J. witness.

That party (name)

and the party (name) and the party (name)

Witness (name)

That the plaintiff

and the defendant (name) and the defendant (name)

Witness (name) to find as a fact that the plaintiff (name) and the

entered into between plaintiff and the defendant by (name) party.

the plaintiff, was not a (name) party because (name) entered

his authority.

Witness (name)

7

8

Witness (name)

Witness (name)

Witness (name) and the defendant (name) and the defendant (name)

Witness (name) and the defendant (name) and the defendant (name)

Witness (name) and the defendant (name) and the defendant (name)

Witness (name) and the defendant (name) and the defendant (name)

35122

C. B. VAN ZEE,
Appellee,

vs.

CHICAGO BODY & EQUIPMENT COMPANY,
a Corporation,
Appellant.

74
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 641

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$60 claimed to be due him as salary for the week ending August 16, 1930, under a written contract entered into between him and the defendant, dated January 15, 1930. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that on January 15, 1930, plaintiff entered into a written contract with the defendant, whereby plaintiff was to act as salesman for the defendant in certain territory in Chicago, for which he was to receive a commission of five per cent on all bodies and automobiles sold by plaintiff for the defendant, and ten per cent "on all other accessories now listed by the Company." The contract further provided that plaintiff was to have a drawing account of \$60 every week, "to be charged against commissions and you may draw the difference between your advances and accumulated commissions at the end of each month, providing such accounts show a difference due you on the books of the Company. However, final settlement must be taken into consideration when extra accounts are drawn during the months of November and December. This employment shall continue until the 31st day of December, 1930."

About the time of the making of the contract plaintiff entered upon the discharge of his duties and so continued until April 1, 1930, when John E. McCoy, who in reality controlled the

C. E. VAN NEE,
 Plaintiff,
 vs.
 CHICAGO BODY & EQUIPMENT COMPANY,
 a Corporation.
 Defendant.

APPEAL FROM JUDGMENT
 OF CHICAGO
 262 I.A. 641

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$60 claimed to be due him as salary for the year ending August 16, 1930, under a written contract entered into between him and the defendant, dated January 16, 1930. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that on January 16, 1930, plaintiff entered into a written contract with the defendant, whereby plaintiff was to act as salesman for the defendant in certain territory in Chicago, for which he was to receive a commission of five per cent on all bodies and automobiles sold by plaintiff for the defendant, and ten per cent "on all other accessories now listed by the company." The contract further provided that plaintiff was to have a drawing account of \$60 every week, "to be charged against commissions and you may draw the difference between your advance and accumulated commissions at the end of each month, providing such accounts show a difference due you on the books of the company. However, final settlement must be taken into consideration when such accounts are drawn during the months of November and December. This employment shall continue until the 31st day of December, 1930."

About the time of the making of the contract plaintiff entered upon the discharge of his duties and so continued until April 1, 1930, when John M. McCoy, who in reality controlled the

company, had a talk with plaintiff whereby it was agreed that plaintiff was to change his work from that of salesman for the defendant to that of general manager. At that time plaintiff testified, it was orally agreed that he was to be thereafter paid \$60 a week as a straight salary and that he was to receive no commissions; that thereupon he began to work as manager and continued until about August 8th, when he was discharged by McCoy; that he did not do any work the week ending August 8th, but received his pay of \$60 for that week. The defendant called E. W. Boyer, who signed the contract on behalf of the defendant, as president of the company. He testified that about the first of August he had a talk with plaintiff and the latter told him he had been discharged; that the witness replied his hands were tied and that he could do nothing. And further, "He told me about August 1st that he was fired. I told him that I could not do anything about it; that I ^{he} knew/had a contract for a year."

In deciding the case the court said that in view of the testimony of Boyer, who was defendant's witness and who testified that plaintiff had a contract for a year, he would find for the plaintiff for \$60, apparently on the theory that the defendant was bound by the testimony of its own witness.

In view of all the evidence in the record, we think this conclusion was erroneous. It is obvious that Boyer had in mind the written contract he signed in behalf of the defendant on January 15, 1930, but this written contract, all the evidence shows, was abrogated by an oral agreement entered into by plaintiff and defendant through McCoy on April 1st. Beginning on that date plaintiff was employed by defendant at a salary of \$60 a week and there is no evidence that his employment was for the balance of the year. Plaintiff being employed by the week, might be discharged at any time, and apparently could have no claim in case

company, had a talk with plaintiff whereby it was agreed that plaintiff was to change his work from that of salesman for the defendant to that of general manager. At that time plaintiff testified, it was orally agreed that he was to be therefor paid \$50 a week as a general salary and that he was to receive no commission; that thereupon he began to work as manager and continued until about August 15th, when he was discharged by Hoyer; that he did not do any work the week ending August 22nd, but received his pay of \$50 for that week. The defendant called E. W. Hoyer, who signed the contract on behalf of the defendant, as president of the company. He testified that about the first of August he had a talk with plaintiff and the latter told him he had been discharged; that the witness replied his hands were tied and that he could do nothing. And further, "He told me about August 1st that he was fired. I told him that I could not do anything about it; that I had a contract for a year."

In deciding the case the court said that in view of the testimony of Hoyer, who was defendant's witness and who testified that plaintiff had a contract for a year, he would find for the plaintiff for \$50, apparently on the theory that the defendant was bound by the testimony of its own witness.

In view of all the evidence in the record, we think this conclusion was erroneous. It is obvious that Hoyer had in mind the written contract he signed in behalf of the defendant on January 18, 1935, but this written contract, all the evidence shows, was superseded by an oral agreement entered into by plaintiff and defendant through Hoyer on April 1st. Beginning on that date plaintiff was employed by defendant at a salary of \$50 a week and there is no evidence that his employment was for the balance of the year. Plaintiff being employed by the week, might be discharged at any time, and apparently could have no claim in case

he was given a week's notice, and his own testimony shows that during the last week ending August 8th he did no work for the company but was paid the \$60.

The judgment of the Municipal court of Chicago is reversed, with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF
FACT.

Matchett, P. J., and McSurely, J., concur.

35122

FINDING OF FACT.

We find as a fact that plaintiff did not have a contract with the defendant for that part of the calendar year beginning April 1st; that on that date the parties entered into an oral agreement whereby either party could terminate the contract at the end of any week.

he was given a woman's notice, and his only business was to
during the last week ending August 31, 1912, and for the
company had not paid the bill.

The judgment of the Municipal Court of Chicago is
reversed, with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF
FACT.

REVEREND, P. J., and REVEREND, J., concur.

REVEREND, P. J., and REVEREND, J., concur.

It is held by a 7-4 vote that the defendant is not liable
contract with the defendant for the part of the calendar
year beginning April 1st, 1912, and on that date the parties
entered into an oral agreement whereby the defendant would
terminate the contract at the end of the year.

THE COURT
AND THE JURY

35155

VALERIE MORRIS,
Appellee,

vs.

CLAUDE W. MORRIS,
Appellant.

757
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

262 I.A. 641²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to reverse an order entered by the Circuit court of Cook county whereby a writ of attachment was ordered to issue directed to the sheriff, commanding that he produce the defendant, Claude W. Morris, "in this court forthwith to show cause, if any he has, why he should not be punished for contempt of court in neglecting and refusing to comply with the said orders thereof."

The record discloses that on June 24, 1918, a decree of divorce was entered by the Circuit court of Cook county in favor of complainant Valerie Morris and against the defendant Claude W. Morris. By the decree it was ordered that complainant have the custody of the minor child of the parties, and it was further adjudged and decreed that the defendant pay alimony of \$2,000 per annum in monthly instalments of \$166.66 until the further order of the court, and that defendant also pay \$200 solicitors' fees.

On December 16, 1930, pursuant to notice, complainant filed her verified petition wherein she set up inter alia that the defendant was behind in the payment of alimony in the sum of \$1266.60 that defendant was in receipt of a regular salary, the exact amount of which was unknown to petitioner; that defendant owned real estate in Cook county, Illinois; that he had an interest ^a in certain business concern, and the petitioner further alleged upon information and belief, that defendant was beneficially interested in other

CLARENCE W. MORRIS,
 Plaintiff,
 vs.
 VALERIE MORRIS,
 Defendant.

ALL HAIL FROM CIRCUIT COURT
 OF COOK COUNTY.

SEC. I. A. 641

MR. JUSTICE O'CONNOR DELIVERED HIS OPINION OF THE COURT.

By this writ of error the defendant seeks to reverse an order entered by the Circuit Court of Cook County whereby a writ of attachment was ordered to issue directed to the sheriff, commanding that he produce the defendant, Valerius W. Morris, in this court forthwith to show cause, if any he has, why he should not be punished for contempt of court in neglecting and refusing to comply with the said order thereof.

The record discloses that on June 24, 1915, a decree of divorce was entered by the Circuit Court of Cook County in favor of complainant Valerius Morris and against the defendant Clarence W. Morris. By the decree it was ordered that complainant have the custody of the minor child of the parties, and it was further ordered and decreed that the defendant pay alimony of \$5.00 per annum in monthly installments of \$500.00 until the further order of the court, and that defendant also pay \$500 collection fees.

On December 15, 1915, pursuant to notice, complainant filed her verified petition wherein she set up again that the defendant was delinquent in the payment of alimony in the sum of \$1500.00 that defendant was in possession of a regular salary, the exact amount of which was unknown to complainant; that defendant owed her a case in Cook County, Illinois; that he had no interest in certain business interests, and the petition further alleged that defendant was habitually intoxicated in former times and habits, that defendant was habitually intoxicated in former

real estate in Cook county, the title to which stood in the name of other parties unknown to the petitioner. The prayer was that defendant answer the petition and that a rule be entered requiring him to show cause why he should not be held in contempt of court and punished for failure to pay the alimony, and there was a further prayer for solicitors' fees.

On the same date, December 16, 1930, an order was entered that the defendant "make full and true answer within 5 days to the petition" and the matter was set for hearing on January 2nd following. December 29th the defendant filed a general and special demurrer to the petition, and on January 2, 1931, an order was entered, on motion of solicitors for complainant, overruling the demurrer and ordering the defendant to answer the petition within ten days. And it was further ordered that the hearing on the petition and answer and on the rule to show cause be set for hearing January 16th. On January 16th the court entered an order which recited that the matter came on for hearing upon the petition praying that a rule be entered on the defendant to show cause why he should not be punished by the court for failure to pay the alimony as decreed and that the defendant was ruled to answer the petition; that he filed his demurrer which was overruled; that he was again ruled to answer the petition and that he had not done so. The court found that the defendant was in arrears in the payment of alimony in the sum of \$1166.60 and found that the defendant had neglected and refused to pay the same, and it was further ordered that a writ of attachment issue directed to the sheriff to produce the defendant to show cause, if any, why he should not be punished for contempt of court in his failure to pay the alimony.

January 28th an order was entered setting aside the order of January 16th on the ground that there had been an error

trial estate in Cook County, the title to which stood in the name of other parties unknown to the petitioner. The prayer was that defendant answer the petition and that a rule be entered requiring him to show cause why he should not be held in contempt of court and punished for failure to pay the alimony, and there was a prayer for solicitors' fees.

On the same date, December 15, 1930, an order was entered that the defendant "make trial and give answer within 5 days to the petition" and the matter was set for hearing on January 14, 1931. December 23, 1930 the defendant filed a general and special answer to the petition, and on January 2, 1931, an order was entered, on motion of solicitors for defendant, overruling the answer and ordering the defendant to answer the petition within ten days. And it was further ordered that the hearing on the petition and answer and on the rule to show cause be set for hearing

January 14, 1931. On January 14, 1931 the court entered an order which recited that the matter came on for hearing upon the petition praying that a rule be entered on the defendant to show cause why he should not be punished by the court for failure to pay the alimony as ordered and that the defendant was asked to answer the petition; that he filed his answer which was overruled; that he was again asked to answer the petition and that he had not done so. The court found

that the defendant was in arrears in the payment of alimony in the sum of \$150.00 and found that the defendant had neglected and refused to pay the same, and it was further ordered that a writ of attachment issue directed to the sheriff to produce the defendant to show cause, it was further ordered that he should not be punished for contempt of court in the failure to pay the alimony.

January 23, 1931 an order was entered setting aside the order of January 14, 1931 on the ground that there had been an error

in notifying the defendant, and on the same date, January 28th, the court entered an order in which it is recited that the matter came on for hearing upon the petition and the rule on the defendant to show cause why he should not be punished for contempt of court for failure to pay back alimony, and the order further recites the other proceedings had, as heretofore mentioned, including the overruling of defendant's demurrer and that plaintiff elected to stand by his demurrer. The court found "from the allegations of said petition and proof made in open court that the defendant was in arrears in the payment of alimony in the sum of \$1166.60." As above stated, it was ordered that a writ of attachment issue with directions to the sheriff to produce the defendant forthwith and that he show cause why he should not be punished for failure to pay alimony. An appeal was prayed and allowed from this order.

The brief and argument of defendant consists of but one page. No authorities are cited because, it is said, none was necessary. As stated by defendant's counsel, "The petition sought the discovery of assets when there had been no execution returned 'not found' and if the defendant did not wish to disclose on such a 'fishing expedition' his various assets, he is entitled to the protection of the law in that connection." And continuing: "when the relation of husband and wife has been terminated by a decree of divorce, no new obligation of the wife not specifically mentioned in the decree of divorce can be saddled on the husband. During the marriage relation the wife's solicitor's fees are regarded as a necessary expense which the husband must bear. There is no such presumption after divorce. It is, of course, no answer to these contentions to point out (as appellee may point out) that the order finally entered did not bind the defendant to pay

in notifying the defendant, and on the same date, January 25th, 1914, the court entered an order in which it is recited that the motion came on for hearing upon the petition and the rule on the defendant and as now seems why he should not be punished for contempt of court for failure to pay back alimony, and the order further recites that other proceedings had, no arrears were mentioned, indicating the overlooking of defendant's demand and that plaintiff elected to stand by his demand. The court found "From the admission of said petition and proof made in open court that the defendant was in arrears in the payment of alimony in the sum of \$115.00." As above noted, it was ordered that a writ of sequestration issue with directions to the sheriff to produce the defendant forthwith and that he show cause why he should not be punished for failure to pay alimony. An appeal was prayed and allowed from this order.

The writ and return of defendant consists of two pages. No objection was filed because, it is said, none was necessary. As stated by defendant's counsel, "The petition recites the discovery of assets when there had been no execution returned 'not found' and if the defendant did not wish to disclose on such a 'filing expedition' his various assets, he is entitled to the protection of the law in that connection." And continuing: "When the relation of husband and wife has been terminated by a decree of divorce, no new collection of the wife's unpaid alimony is allowed in the future of divorce can be sought on the husband. During the marriage relation the wife's collection is then regarded as a necessary expense which the husband must bear. There is no such presumption after divorce. It is, of course, a matter to these intentions to point out (as appellee may point out) that the court finally entered did not bind the defendant to pay

solicitor's fees, and did not punish him for failure to grant discovery of his assets. The demurrer is general and special in form, and the only way that defendant could take advantage of these points to his full protection, is by standing by his demurrer." And it is argued that the demurrer should have been sustained. Obviously this argument is of no assistance to this court. The court having decreed the payment of alimony by defendant, it obviously had power to enforce its decree, and to do this intelligently it was necessary to find out what property or income the defendant had and this the court could compel him to disclose on the witness stand.

On the other hand, counsel for the complainant contends that the order appealed from should be affirmed, but we are clearly of the opinion that the order entered is not an appealable order and therefore the appeal must be dismissed. The proper procedure to enforce the payment of alimony where it appears that failure to make the payment is without just cause, which has been determined by a hearing, is to find the defendant to be guilty of contempt of court, directing a writ of attachment be issued against him and that he be fined or imprisoned or both in the discretion of the court. Blake v. The People, 80 Ill. 11; Altmejd v. Altmejd, 223 Ill. App. 302; Kuebler v. Kuebler, 204 Ill. App. 259; Barclay v. Barclay, 184 Ill. 471; Shaffner v. Shaffner, 212 Ill. 492.

In the instant case it was ordered that a writ of attachment issue, directed to the sheriff, that he produce the defendant forthwith and that the defendant then show cause, if he could, why he should not be punished for contempt in failing to pay the back alimony. If the defendant was taken into custody under the writ, pursuant to the order, and produced by the sheriff in open court, he might be discharged upon the hearing. The defendant

and said this the court could compel him to disclose on the witness stand. It was necessary to find out what property or income the defendant owned had power to enforce the decree, and so to this intelligently court having decreed the payment of alimony by defendant, it obviously this argument is of no assistance to this court. The and it is argued that the defendant should have been enjoined. The points to his self protection, is by standing by his defendant. "I am, and the only way that defendant could take advantage of this discovery of his assets. The defendant is general and special in collector's fees, and did not punish him for failure to comply

On the other hand, counsel for the respondent contends
that the order appealed from should be affirmed, but we are clearly
of the opinion that the order entered is not an appealable order
and therefore the appeal must be dismissed. The proper procedure
to enforce the payment of alimony where it appears that failure to
make the payments is without just cause, which has been determined
by a hearing, is to find the defendant to be guilty of contempt of
court, directing a writ of attachment be issued against him and
that he be fined or imprisoned or both in the discretion of the
court.

HARRIS v. HARRIS, 308 Ill. App. 3d 671, 198 Ill.
App. 3d 671; 198 Ill. App. 3d 671; 198 Ill. App. 3d 671;
198 Ill. App. 3d 671; 198 Ill. App. 3d 671;

...in the instant case it was ordered that a writ of habeas corpus issue, directed to the sheriff, that he produce the defendant and testify and that the defendant then move, if he wishes, why he should not be awarded the sentence in failing to pay the cash alimony. If the defendant was taken into custody under the writ, pursuant to the order, and produced by the sheriff in open court, he might be discharged upon the hearing. The defendant

having been found to be in contempt of court, sentence should then have been imposed. Obviously the order is not final and the appeal will therefore be dismissed.

APPEAL DISMISSED.

Matchett, P. J., and McSurely, J., concur.

having been found to be in conformity with the conditions specified herein
have been imposed. (Specially the order is not final and the agent
will therefore be allowed).

Yours faithfully,

Respectfully, J. J. [unclear]

35178

THOMAS R. FINLEY,
Appellee,

vs.

CARLOS AMES, ARCHIBALD J. CAREY
and EDWARD J. DENEMARK, as Civil
Service Commissioners of the City of Chicago,
Appellants.

76 17
APPEAL FROM
SUPERIOR COURT
OF COOK
COUNTY.

262 I.A. 341³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants, the Civil Service Commissioners of Chicago, seek to reverse a judgment entered in the Superior court of Cook county overruling their motion to quash the writ of certiorari and quashing the record of the Civil Service Commission.

September 27, 1929, Thomas R. Finley filed his petition in the Superior court of Cook county for a writ of certiorari to the Civil Service Commissioners to certify the proceedings had before the Commissioners whereby he was ordered discharged as a patrolman of the City of Chicago after charges were filed against him and a hearing had. The return of the Commissioners to the writ showed that on September 29, 1927, charges were preferred against Finley by the Commissioner of Police. The charges are specifically set out in detail and the return further shows that on October 6, 1927, Finley was served with a written notice by the secretary of the Civil Service Commission, notifying him that charges had been filed against him before the Commission and that the Commission had ordered that a hearing be had on the 13th of October, 1927, at ten o'clock in the forenoon in room 612 City Hall, Chicago. Receipt of a copy of the notice and charges was made by Finley on October 6, 1927.

The record discloses that the Civil Service Commission on October 13, 1927, proceeded to hear the testimony of

CHAS. A. HENRY,
Appellant.

CARLOS A. HENRY, ARRESTED, CARRY
and HENRY J. HENRY, as CIVIL
Service Commissioners of the City of Chicago,
Appellees.

202 I.A. 641

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants, the Civil Service Com-
missioners of Chicago, seek to reverse a judgment entered in the
Superior court of Cook county overruling their motion to quash
the writ of certiorari and granting the record of the Civil Ser-
vice Commission.

September 27, 1937, Thomas H. Wiley filed his peti-
tion in the Superior court of Cook county for a writ of certiorari
to the Civil Service Commission to set aside the proceedings had
before the Commission whereby he was ordered discharged as a
policeman of the City of Chicago after charges were filed against
him and a hearing had. The return of the Commission to the
writ showed that on September 28, 1937, charges were preferred
against Wiley by the Commissioner of Police. The charges are
specifically set out in detail and the return further shows that
on October 6, 1937, Wiley was served with a written notice by the
Secretary of the Civil Service Commission, notifying him that
charges had been filed against him before the Commission and that
the Commission had ordered that a hearing be had on the 13th of
October, 1937, at ten o'clock in the forenoon in room 613 City
Hall, Chicago. Receipt of a copy of the notice and charges was
made by Wiley on October 6, 1937.

The record discloses that the Civil Service Commis-
sion on October 13, 1937, proceeded to hear the testimony of

witnesses concerning the charges made against Finley. The charges and specifications are then set forth verbatim and the Commission finds on October 6, 1927, five days prior to the investigation, that due notice was served upon Finley by delivering to him personally a copy of the notice and charges; that at the hearing Finley appeared in person and was represented by counsel who participated in the examination of witnesses who were sworn and testified. The Commission found that it had jurisdiction of the subject matter and of Finley and that upon a consideration of the evidence found him guilty of violation of rules and regulations of the police department, of conduct unbecoming a police officer, of negligence of duty and violation of the criminal law, the details of which are set forth in the record. This decision was rendered October 13, 1927, and it was ordered by the Commission that Finley be discharged from the position of patrolman.

In this court Finley contends that the judgment of the trial Judge should be affirmed because no proper notice was served upon him notifying him of the proceedings before the Civil Service Commission, and, as stated by his counsel, "No affidavit or deposition was made that charges were served and notice of the time, date and place of hearing, as required by the civil service law and by Section 12" of that law. Continuing, counsel says that "For the same reason the Civil Service Commission were without jurisdiction to order the discharge of plaintiff because they failed to carry out the letter and spirit of the civil service law. Section 12, page 562 of Smith-Hurd Illinois Revised Statutes, as well as the rules and regulations of the civil service commission require five days notice prior to hearing and proper return showing that five days notice had been given and received. The record as returned herein oppose our contention in that behalf."

...the charges made against Finley. The charges and specifications are then set forth verbatim and the Commission finds on October 3, 1937, five days prior to the investigation, that due notice was served upon Finley by delivering to him personally a copy of the notice and charges; that at the hearing Finley appeared in person and was represented by counsel who participated in the examination of witnesses who were sworn and testified. The Commission found that it had jurisdiction of the subject matter and of Finley and that upon a consideration of the evidence found him guilty of violation of rules and regulations of the police department, of conduct unbecoming a police officer, of negligence of duty and violation of the criminal law, the details of which are not set forth in the record. This decision was rendered October 12, 1937, and it was ordered by the Commission that Finley be discharged from the position of policeman.

In this court Finley contends that the judgment of the trial judge should be affirmed because no proper notice was served upon him notifying him of the proceedings before the Civil Service Commission, and, as stated by his counsel, "an affidavit of deposition was made that charges were served and notice of the time, date and place of hearing, as required by the civil service law and by Section 18 of that law. Continuing, counsel says that 'for the same reason the Civil Service Commission were without jurisdiction to enter the discharge of plaintiff because they failed to serve out the notice and writ of the civil service law. Section 18, page 555 of Smith-Hurd Illinois Revised Statutes, as well as the rules and regulations of the civil service commission require five days notice prior to hearing and proper return showing that five days notice had been given and received. The record as returned herein shows our contention in that

If by the foregoing it is meant to contend that five days notice was not given Finley prior to the hearing before the Civil Service Commissioners, it is contrary to the record. The record shows that a written notice, together with a copy of the charges, was personally handed to Finley on October 6th, notifying him of the charges and that there would be a hearing on the charges on October 13th at ten o'clock in the forenoon at room 612 City Hall. Finley receipted for this in person. He appeared before the Commission on the hearing in person and by counsel; they participated in the hearing. It is clear, therefore, that the contention is entirely without merit.

Counsel for Finley further says that the learned trial Judge reviewed the record and the evidence in the case and examined the plaintiff. No evidence should have been taken on the hearing before the court. The case should have been determined upon the record as certified by the Civil Service Commission. Carroll v. Houston, 341 Ill. 531. In the Carroll case the proper proceedings before a Civil Service Commission, where a police officer is charged with some dereliction of duty, is pointed out; and upon a consideration of the record in the instant case we are clear that the method followed by the Commissioners was in accordance with the law as announced in the Carroll case. Moreover, Finley was barred by laches. He was discharged October 13, 1927, and did not file his petition herein until September 27, 1929. (Carroll case, supra.)

The judgment of the Superior court of Cook county is reversed and the cause remanded with directions to quash the writ.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

It is by the foregoing it is meant to contend that five days notice was not given timely notice to the hearing before the Civil Service Commission, it is contrary to the record. The record shows that a written notice, together with a copy of the charges, was personally handed to Wiley on October 22nd, notifying him of the charges and that there would be a hearing on the charges on October 27th at ten o'clock in the forenoon at room 612 City Hall. Wiley requested for this in person. He appeared before the Commission on the hearing in person and by counsel; they participated in the hearing. It is clear, therefore, that the contention is entirely without merit.

General Lee Wiley further says that the learned trial judge reviewed the record and the evidence in the case and examining the plaintiff. He witnesses should have been taken on the hearing before the court. The case should have been determined upon the record as certified by the Civil Service Commission. Reaffirmed, 241 Ill. 222. In the Gentry case the proper proceedings before a Civil Service Commission, where a police officer is charged with some dereliction of duty, is pointed out; and when a complaint of the second in the instant case we are clear that the method followed by the Commission was in accordance with the law as announced in the Gentry case. Moreover, Wiley was served by Reaffirmed. He was discharged October 12, 1927, and did not file his petition

Reaffirmed until September 27, 1927. (Reaffirmed case, 241 Ill. 222.)

The judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to award the writ.

REVEREND AND HONORABLE JUDGES

Respectfully, J. L. ...

34788

PEOPLE OF STATE OF ILLINOIS
ex rel. Leo H. Laws, Director
of Trade and Commerce of the
State of Illinois, et al.,
Complainants,

vs.

MARQUETTE NATIONAL FIRE INSURANCE
COMPANY, a Corporation, et al.,
Defendants.

On Appeal of H. U. BAILEY, as
Liquidator of the Marquette
National Fire Insurance Company,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

262 I.A. 641'

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Marquette National Fire Insurance Company was a stock company organized under the laws of Illinois to engage in the business of writing fire insurance in 22 states. March 30, 1927, its directors adopted a resolution requesting H. U. Bailey, Director of the Department of Trade and Commerce of the State of Illinois, to take action necessary to liquidate its affairs for the benefit of its creditors and stockholders. The request was by direction referred to the Attorney General of this State who on April 15, 1927, filed a petition in the Superior court of Cook county praying for the liquidation of the business of the company, and on the same day a rule was entered requiring the company to show cause why the prayer of the petition should not be granted. April 28, 1927, Rufus M. Potts filed his appearance as solicitor for the company. On the next day after a hearing an order was entered directing liquidation, appointing H. U. Bailey liquidator, and authorizing him to employ counsel and other assistance. On the same day the appearance of Edward J. Hennessy as solicitor for the liquidator was entered.

The answer of the Marquette National Fire Insurance

company was filed September 20, 1927, and it admitted the allegations of the petition. An amendment to the petition was filed November 21st and alleged the insolvency of the company and that its further transaction of business would be dangerous to the creditors and stockholders. An amended answer which was filed also admitted the allegations of the petition. On the same day a further order was entered continuing H. U. Bailey as liquidator and directing that he reduce the assets to possession, continue the employment of Edward J. Hennessy as counsel, employ additional counsel "in connection with the defense, collection and liquidation of the assets of the said company," bring suits either at law or in equity as might be necessary, and "incur and pay all reasonable charges, fees and expenses." That order required all claims to be filed on or before February 1, 1928, directed the publication of notice thereof and referred the cause to a master to take the evidence as to the claims.

Pursuant to these orders H. U. Bailey proceeded to liquidate the affairs of the company and to that end employed assistants, including H. J. Bailey, his brother, as special deputy liquidator. February 15, 1929, Leo H. Lowe, as Director of Trade and Commerce, by the Attorney General suggested the resignation of H. U. Bailey as Director of Trade and Commerce on or about January 14, 1929, the appointment and qualification of Lowe to succeed him, and the substitution of Lowe as liquidator.

March 5, 1929, on petition of H. U. Bailey an order was entered permitting him to file his final report and account instant and requiring holders of policies, creditors, claimants and all parties in interest to file objections thereto on or before April 5, 1929. The report was filed and contained a complete itemized statement of receipts and disbursements from the date of

company was filed September 20, 1937, and it advised the assign-
 ment of the petition. An amendment to the petition was filed
 November 12th and alleged the insolvency of the company and that
 its further prosecution of business would be dangerous to the
 creditors and shareholders. An amended answer which was filed
 also admitted the allegations of the petition. On the same day a
 further order was entered continuing N. U. Bailey as liquidator and
 directing that he reduce the assets to possession, continue the man-
 agement of Edward J. Hannon as counsel, employ additional counsel
 "in connection with the defense, collection and liquidation of the
 assets of the said company," bring with him either of law or in equity
 as might be necessary, and "incure and pay all reasonable charges,
 fees and expenses." That order required all claims to be filed on
 or before February 1, 1938, directed the liquidation of assets thereof
 and referred the cause to a master to take the evidence as to the
 claims.

Thereafter to those orders N. U. Bailey proceeded to
 liquidate the affairs of the company and to that end employed
 assistants, including N. E. Bailey, his brother, as special deputy
 liquidator. February 16, 1938, Lee H. Lowe, as Director of Trade
 and Commerce, by the Attorney General suggested the resignation of
 N. U. Bailey as Director of Trade and Commerce on or about January
 14, 1938, the appointment and qualification of Lowe to succeed him,
 and the resignation of Lowe as liquidator.

March 1, 1938, an petition of N. U. Bailey as liquidator
 was entered continuing him as liquidator and appointing
 assistants and retaining holders of policies, creditors, claimants and
 all parties in interest to file objections thereto on or before
 April 1, 1938. The report was filed and contained a complete
 itemized statement of receipts and disbursements from the date of

H. U. Bailey's appointment to January 31, 1939.

Objections were filed by certain claimants, evidence was heard by the chancellor and the final report was approved with certain exceptions: (1) The compensation paid to H. J. Bailey for his services as deputy liquidator in the sum of \$16,200 was reduced to \$12,600; (2) the item of \$1,000 paid by the liquidator to Rufus M. Potts for counsel fees in services rendered to the Insurance company in connection with the proceedings was disallowed; (3) the sum of \$17,500 paid on account of counsel fees to Edward J. Hennessy and his request for further compensation to the amount of \$5,000 were disallowed.

The decree of the court with reference to the claims of Rufus M. Potts and Edward J. Hennessy was based upon the theory that under the statute applicable the liquidator was wholly without authority to employ counsel or to incur liability for solicitor's fees, it being the duty of the Attorney General of the State of Illinois to furnish such services. The reduction of \$3,600 in the compensation of H. J. Bailey was upon the theory that the compensation as allowed by the liquidator was excessive. The liquidator has appealed, and the errors assigned and argued require a construction of "An Act in relation to delinquent insurance companies, associations and societies," approved June 26, 1925, in force July 1, 1925 (Smith Hurd's Ill. Rev. Stats. 1929, chap. 73, sec. 495, et seq.)

It is first contended that the court should approve the payment of compensation to the special deputy liquidator as provided in the account, and that the court erred in finding that the same was excessive to the amount of \$3600. It is urged that there is no conflict in the evidence in this respect and that the findings of the chancellor are therefore not entitled to the special weight which otherwise would be given to the same by a court of

U. S. Bailey's deposition as January 21, 1930.

Objections were filed by certain claimants, witnesses

as heard by the commission and the final report was approved with

certain exceptions: (1) The compensation paid to E. J. Bailey for

his services as deputy legislator in the year of 1929, 1930 was reduced

to \$12,500; (2) the item of \$1,000 paid by the legislator to E. J.

for counsel fees in services rendered to the insurance

company in connection with the proceedings was disallowed; (3) the

sum of \$17,500 paid on account of counsel fees to Edward J. Kennedy

and his request for further compensation to the amount of \$2,500

was disallowed.

The decree of the court with reference to the claim

of E. J. Bailey and Edward J. Kennedy was based upon the theory

that under the statute applicable the legislator was wholly without

authority to employ counsel or to incur liability for legislator's

fees, it being the duty of the Attorney General of the State of

Illinois to furnish such services. The valuation of \$2,500 in the

compensation of E. J. Bailey was upon the theory that the compensation

was allowed by the legislator was excessive. The legislator had

acted, and the errors assigned and argued require a reconsideration

of the law in relation to delinquent insurance companies, legisla-

tors and legislator, approved June 26, 1929, in terms July 1,

1929 (Smith v. State, Ill. Rep. 1929, chap. 75, sec. 493, et seq.)

It is first contended that the court should approve

the payment of compensation to the special deputy legislator as pro-

vided in the account, and that the court erred in finding that the

sum was excessive to the amount of \$12,500. It is urged that there

is no conflict in the evidence in this respect and that the leg-

islate of the commission and therefore not entitled to the special

right which otherwise would be given to him by a court of

review. It has been so held in several well considered cases which are cited. Shackleford v. Elliott, 209 Ill. 333; Raylin v. C. A. & De K. R. R. Co., 297 Ill. 130; Clohesov v. Spencer, 134 Ill. App. 137, affirmed 231 Ill. 353.

With the above rule in mind we have examined the evidence upon this question, but we are unconvinced that the liquidator was wronged in this respect. It is true that the services of the special liquidator seem to have been upon the whole faithfully performed and that expert witnesses in response to formal inquiries as to their opinions placed the value of these services at from \$20,000 to \$25,000, while the amount allowed by the chancellor was only \$12,600. However, in matters of this kind the formal evidence of experts is not at all controlling. This case seems to be one of the particular class wherein, contrary to the usual rule, the court may take into consideration its personal knowledge of the nature and character of the services rendered in determining the value thereof. It may be added that trial courts do not often err in the direction of allowing less compensation than services of this kind are reasonably worth. The material facts bearing on this point, however, would seem to be as follows:

H. J. Bailey was appointed special deputy liquidator April 29, 1927. He rendered services in that capacity for a period of 21 months. He is a brother of H. U. Bailey, the liquidator. At the time of his appointment he was without special experience in the business of insurance, with the exception that March 7, 1927, he had been appointed to a similar position for the Lincoln Casualty Company. He had worked in a newspaper office for 18 years and thereafter was a court reporter in Bureau county, Illinois, for about 20 years. During the last two years, however,

review. It has been to help in various ways connected with
which are cited. W. J. Kelley, Jr., Chicago, Ill.
U. S. A. No. 1, 1917, Vol. 11, No. 1, Chicago, Ill.
111. App. 1917, Vol. 11, No. 1.

With the above rule in mind we have examined the evidence
concerning this question, but we are unconvinced that the figure
of \$200,000 was wronged in this respect. It is true that the services
of the special investigator seem to have been upon the whole fairly
fully performed and that expert witnesses in response to formal
inquiries as to their opinions placed the value of these services
at from \$20,000 to \$25,000, while the amount allowed by the government
was only \$15,000. However, in matters of this kind the
formal evidence of experts is not at all controlling. This case
seems to be one of the particular class wherein, contrary to the
usual rule, the court may take into consideration the personal
knowledge of the nature and character of the services rendered
in determining the value thereof. It may be added that the
court is not often in the position of allowing less compensation
than services of this kind are reasonably worth. The
evidential facts bearing on this point, however, would seem to be
as follows:

W. J. Kelley was appointed special deputy investigator
April 30, 1917. He rendered services in that capacity for a period
of 22 months. He is a brother of W. V. Kelley, the investigator. At
the time of his appointment he was almost equally divided in
the business of insurance, with the exception that between 7, 1917,
he had been appointed to a similar position for the Lincoln
Casualty Company. He had worked in a newspaper office for 15
years and had written was a court reporter in various courts,
Illinois, for about 10 years. During the last two years, however,

he worked at court reporting only about thirty days each year. For five months during the first part of his service as deputy liquidator he paid his own necessary traveling and hotel expenses. He was assisted in the work of liquidating by a large force of clerks, examiners, appraisers, etc. In particular he had the assistance of Mr. Bartsch and Mr. Wessels, who were experienced in the insurance business, and he admits that without their assistance he could not have carried on the work. Their compensation was \$395 a month.

The assets of the insolvent company were estimated to be about \$500,000; claims foreign and domestic amounted to approximately \$1,500,000. During the period of the service of H. J. Bailey there was collected for the insolvent the gross amount of \$363,495.91, and from this amount there was disbursed \$133,730.73, of which \$101,355.12 was for expenses of the administration of the estate. During June and July, 1927, at the expense of the estate, the deputy liquidator made a trip to Zurich, Switzerland, to settle foreign claims. There has been allowed \$8,200 for similar services rendered by him as deputy collector for the Lincoln Casualty Company.

In the items of expenses for this insolvent appear fees paid to examiners, appraisers, etc., a number of whom it seems were employees already on the payroll of the state from which they received compensation, but the evidence tends to show that the services for which these persons received compensation from the estate of this insolvent were actually performed. As already stated, we do not regard ourselves as bound by the opinions of experts, however competent, upon questions of this kind, and after a consideration of the whole evidence have arrived at the conclusion that the amount allowed by the trial court for the services of the deputy liquidator is not illiberal, unfair or

he worked as a night porter only about thirty days each year. For five months during the first year of his service as deputy legislator he had his own personal traveling and hotel expenses. He was assisted in the work of legislating by a large force of clerks, amanuenses, apprentices, etc. In particular he had the assistance of Mr. Harbach and Mr. Wessels, who were experienced in the insurance business, and he admits that without their assistance he could not have carried on his work. Their compensation was \$250 a month.

The assets of the insolvent company were estimated to be about \$500,000; claims foreign and domestic amounted to approximately \$1,500,000. During the period of his service at N. J.

salary there was collected for the insolvent the gross amount of \$150,400.91, and from this amount there was disbursed \$150,750.73, of which \$101,383.12 was for expenses of the administration of the estate. During June and July, 1927, at the expense of the estate, the deputy legislator made a trip to Berlin, Germany, to secure certain claims. There has been allowed \$5,500 for similar services rendered by him as deputy legislator for the insolvent company. In the item of expenses for this insolvent company

there paid to examiners, apprentices, etc., a number of whom it seems were employees already on the payroll of the estate from which they received compensation, and the allowance made to them for the services for which those persons received compensation from the estate of this insolvent were actually returned. As already stated, we do not regard ourselves as bound by the opinion of experts, however competent, upon questions of this kind, and after a consideration of the whole evidence have arrived at the conclusion that the amount allowed by the trial court for the services of the deputy legislator is not excessive, either as

unjust.

The question of first importance, however, concerns the disallowance of solicitors' fees. Edward J. Hennessy was employed by the liquidator under an order of court, and he performed the usual and necessary legal services required by the liquidator in the settlement of the estate. The evidence also discloses that Hennessy was employed only after a request made to the Attorney General of the State that such services should be performed by his office, which the Attorney General refused to do upon the ground that he was not legally obligated so to do.

The liquidator contends that the objectors are es-
 topped ^{and} by law precluded from raising any objection to the payment of solicitors' fees for the liquidator. This contention is based first upon evidence tending to show that in July, 1927, the objector J. D. Monroe knew that Hennessy was the attorney for the liquidator. August 5, 1927, the attorney for Monroe wrote Hennessy:

"I have had correspondence with regard to this claim with Mr. H. U. Bailey, the Director of Trade and Commerce of this State. Under date of July 27th he wrote me that you were attorney for the Receiver. I would like to know what is to be done as to the matter of filing claim.

"This is the case of a fire loss in California in the amount of \$4,000, for which the Marquette gave drafts to Mr. Monroe about a year ago. "

The contention that the objector, Pioneer Fire Insurance company of America, had notice, is based upon the testimony of its solicitor to the effect that he knew Hennessy prior to the appointment of the liquidator in this case and that on April 29, 1927, he "knew that Mr. Hennessy had been authorized by the Court to act as Mr. Bailey's counsel." The solicitor, however, further testified that he had been retained shortly after the report of the liquidator was filed March 5, 1929; that he did not have any conversation with any officers of the company he represented in

Witness.

The question of their importance, however, concerns the effectiveness of solicitors' fees. Edward J. Kennedy was employed by the liquidator under an order of court, and he performed the usual and necessary legal services required by the liquidator in the settlement of the estate. The evidence also discloses that Kennedy was employed only after a request made to the Attorney General at the date that such services should be rendered by his office, which the Attorney General refused to do. Upon the ground that he was not legally obligated to do so. The liquidator contends that the objection to the properly fees presented from raising any objection to the payment of solicitors' fees for the liquidator. This contention is based first upon evidence tending to show that in July, 1937, the Attorney J. E. Kennedy knew that Kennedy was the attorney for the liquidator. August 2, 1937, the attorney for Kennedy wrote:

"I have had correspondence with regard to this claim with Mr. J. E. Kennedy, the Director of Trade and Commerce of this State. Under date of July 28th he wrote me that you were the attorney for the Receiver. I would like to know what is to be done as to the matter of filing claim. This is the case of a life loss in California in the amount of \$10,000, for which the California State Guaranty Co. has made a payment."

The contention that the objection, Edward J. Kennedy made on behalf of America, had notice, is based upon the testimony of its solicitor to the effect that he knew Kennedy prior to the appointment of the liquidator in this case and that on April 29, 1937, he knew that Mr. Kennedy had been authorized by the Court to act as Mr. Bailey's counsel. The solicitor, however, further testified that he had been retained shortly after the report of the liquidator was filed March 2, 1936; that he did not have any conversation with any officer of the company as represented in

regard to the Marquette National Fire Insurance Co. prior to March 5, 1929, but that he applied to the Director at Princeton for claim blanks for his client in November or December, 1928. It is not claimed that the objector Leonard had any knowledge of the facts with reference to the entry of the orders directing the employment of Hennessey. The attorneys for the objectors, as a matter of fact, were not named in the notices given of the filing of the first and second reports of the liquidator, and there was no service of these notices had upon them or any one of them or upon the objectors represented by them either at the time of the filing of the first report or at the time of the filing of the second report. When on March 5, 1929, leave was granted the liquidator to file his final report and account, the order provided that notice of the same should be served upon at least thirty of the largest creditors who were not represented in court. Thereupon notice was served upon the counsel for the objectors, and upon the service of such notice these objections were filed. The letter of the solicitor for Montes, it is true, discloses that he knew Hennessey was acting as solicitor but it does not disclose whether he had knowledge that Hennessey was not in fact acting for the office of the Attorney General. Knowledge of the solicitor for the Pioneer Fire Insurance Co. would not be notice to that company prior to the time he was employed to represent it, and, as already stated, it is not claimed that Leonard had notice.

We cannot overlook the fact that the burden of proving facts showing an estoppel is on the liquidator, and this evidence, we think, comes far short of disclosing facts out of which an estoppel would arise. But there is another and conclusive reason why the defense of estoppel cannot be successfully interposed. If the employment of Hennessey was illegal and contrary to the public

report to the committee and the committee, prior to the
 5, 1935, but that he applied to the committee at Washington for a
 check for his claim in November or December, 1935. It is not
 claimed that the officer in question had any conversation with the
 with reference to the matter at that time. The committee
 of November. The attorney for the officer, as a matter of fact,
 were not named in the notice given at the filing of the claim and
 second reports of the liquidator, and there was no service on those
 notices and upon them or any one of them on the officer rep-
 resented by them either at the time of the filing of the claim or
 sent or at the time of the filing of the second report. When on
 March 5, 1935, James was granted the liquidator to file his final
 report and account, the order provided that notice of the same
 should be served upon at least thirty of the largest creditors who
 were not represented in court. That order was served upon the
 counsel for the officer, and upon the service of such notice
 these objections were filed. The letter of the collector for
 Kenton, it is true, disclosed that he knew Ramsey was acting as
 liquidator but it does not disclose whether he had knowledge that
 Ramsey was not in fact acting for the office of the Attorney
 General. Knowledge of the collector for the Pioneer Life Insurance
 Co. would not be notice to that company prior to the time he was
 employed to represent it, and, as already stated, it is not claimed
 that Ramsey had notice.
 We cannot overlook the fact that the burden of proving
 facts tending to establish is on the liquidator, and this evidence,
 we feel, comes far short of disclosing facts and of which an
 inference would arise. But there is another and more serious reason
 why the failure of attorney cannot be satisfactorily explained. It
 the employment of Ramsey was illegal and contrary to the public

policy of the State as expressed in its statutes, then a court of equity may not lend its aid to support an illegal and prohibited act by the interposition of an estoppel. There is an abundant authority to this effect. (County of Cook v. City of Chicago, 158 Ill. 524; Steele v. Ruprecht, 147 Ill. App. 646.) This last named case seems to us to settle conclusively this question against the contention of the liquidator. The chancellor held the employment was illegal and denied the right to compensation on that theory, and the solution of the question of whether he erred in so holding requires a construction of the statute applicable.

The voluminous briefs disclose a wealth of authority from this and other jurisdictions has been submitted where questions supposed to be analogous have been decided by the courts. It seems to be conceded by the parties that the business of insurance is affected by a public interest; that the state may in the exercise of its police powers subject the business to reasonable regulations; that acting upon that principle regulatory statutes have been enacted and the business of insurance subjected to the oversight of the superintendent of insurance, and that his office has become a department of the state government. By the enactment of the Civil Administrative Code of Illinois March 17, 1917, there was created as a part of the state government a Department of Trade and Commerce which was empowered "to exercise the rights, powers and duties vested by law in the insurance superintendent, his officers and employees."

Clearly, therefore, the question here to be settled must be determined by an examination of the statutes. By the strict rules of the common law the assets of a defunct corporation went to the state (Life Assoc. of America v. Nassett, 102 Ill. 315.) and the right to have the same distributed to creditors and stockholders appears to be exclusively a matter of statutory legislation.

policy of the State as expressed in its statutes, then a court of equity may not find it aid to support an alleged and prohibited act by the intervention of an estoppel. There is an abundant authority to this effect. (See 188 Ill. 224; People v. Farmers, 187 Ill. App. 440.) This last named case seems to us to settle conclusively this question against the contention of the liquidator. The chancellor held the complaint was illegal and denied the right to compensation on that theory, and the solution of the question of whether he erred in so holding requires a consideration of the statute applicable.

The voluminous briefs disclose a wealth of authority from this and other jurisdictions has been submitted which appears to be undisputed and has been decided by the courts. It seems to be conceded by the parties that the business of insurance is affected by a public interest; that the state may in the exercise of its police power subject the business to reasonable regulations; that acting upon that principle regulatory statutes have been enacted and the business of insurance subjected to the oversight of the Department of Insurance, and that this office has become a department of the state government. By the enactment of the Civil Administrative Code of Illinois March 17, 1917, there was created as a part of the state government a Department of Public Safety and Commerce which was empowered "to exercise the rights, powers and duties vested by law in the Insurance Superintendent, his officers and employees."

Clearly, therefore, the question here to be settled must be determined by an examination of the statute. By the strict rules of the common law the assets of a defunct corporation vest in the state (188 Ill. 224; People v. Farmers, 187 Ill. App. 440.) and the right to have the same distributed to creditors and stockholders appears to be exclusively a matter of statutory legislation.

The liquidator contends and the objecters deny that the authority to employ counsel is granted by sections 8 and 11 of the Insurance Company Liquidation Act. This act was adopted by the legislature of Illinois from a similar act previously enacted by the State of New York. Consol. Laws of N. Y. 1909, chap. 30, sec. 63, subd. 1-12. Section 8 of the Illinois act corresponds to section 6 of the New York act. For the purpose of comparison we place them side by side. Section 8 of the Illinois act provides:

"For the purposes of this Act, the director shall have power to appoint, under his hand and official seal, one or more special deputies as his agent or agents, and to employ such clerks and assistants as may by him be deemed necessary, and delegate to each of such persons such powers to assist him as he may consider wise. The compensation of such special deputies, clerks and assistants and all expenses of taking possession of and conducting the business of liquidating any such company, shall be fixed by the director, subject to the approval of the court, and shall, on certificate of the director, be paid out of the funds or assets of such company."

Section 6 of the New York act provides:

"For the purposes of this section, the superintendent shall have power to appoint, under his hand and official seal, one or more special deputy superintendents of insurance, as his agent and agents, and to employ such counsel, clerks and assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The compensation of such special deputy superintendent, counsel, clerks and assistants, and all expenses of taking possession of and conducting the business of liquidating any such corporation shall be fixed by the superintendent, subject to the approval of the court, and shall, on certificate of the superintendent, be paid out of the funds or assets of such corporation."

The objecters say that the omission of the word "counsel" from the Illinois act indicates the legislative intention that the Director of Trade and Commerce shall not have the power to employ counsel. The contention is based on the well known rule of construction that where certain things or matters are enumerated, then the things or matters excluded in the enumeration must be considered as expressly forbidden. Illustrating the rule are cited Gaddis v. Richland County, 92 Ill. 119, where the mode by which the power granted to a city should be exercised was expressly prescribed

The legislative committee and the advisory body shall
The authority to employ counsel is granted by section 5 and 11 of
the Insurance Company Legislation Act. This act was adopted by the
Legislature of Illinois from a similar act previously enacted by
the State of New York. Section 5 of the Illinois act corresponds to sec-
tion 4 of the New York act. The purpose of the legislation is to
provide for the same.

"In the purposes of this act, the director shall have power
to employ, under his hand and official seal, one or more special
agents as his agents or assistants, and to employ such agents and
assistants as may be deemed necessary, and delegate to
each of them power to assist him as he may deem
proper. The compensation of such special agents, clerks
and assistants and all expenses of taking possession of and
conducting the business of liquidating any such company, shall
be paid by the corporation, subject to the approval of the board
of directors, and shall, on certificate of the director, be paid out of the
assets of such company."

Section 6 of the New York act provides:

"For the purposes of this section, the superintendent shall
have power to employ, under his hand and official seal, one or
more special agents or assistants of insurance, on his agents
and agents, and to employ such agents, clerks and assistants
as may be deemed necessary, and give each of them power
to assist him as he may deem proper. The
compensation of such special agents, clerks and assistants, and all
expenses of taking possession of and conducting the business of
liquidating any such company, shall be paid by the corporation,
subject to the approval of the board of directors, and shall, on certificate of the superintendent,
be paid out of the funds or assets of such corporation."

The object of the act is to provide for the collection of the assets
of companies from the Illinois and Indiana the legislative intention
that the Director of Trade and Commerce shall not have the power to
employ counsel. The intention is based on the well known rule of
construction that where certain things or matters are enumerated,
then the things or matters excluded in the enumeration must be
understood as expressly forbidden. Illustrating the rule are cited
Harris v. United States, 111. 119, where the note by which the
power granted to a city should be exercised was expressly prescribed

and was held to exclude all other modes; City of Cairo v. Brass, 101 Ill. 475, where the enumeration of powers granted to a city was held to necessarily exclude the inference that any other powers were granted; Warner v. Armstrong, 214 Ill. App. 168, where the inclusion of specific powers in a statute was held to exclude all others; and Iselin v. United States, 275 U. S. 245, where the court said, "To supply omissions transcends the judicial function."

The liquidator replies that the rule invoked is predicated upon the premise that the specific and general provisions must relate to the same subject; that section 8 of the statute relates to the power of the director as liquidator to appoint deputies, clerks, assistants, etc., while section 11 of the same act has to do entirely with the powers and practice of the court; that the cases relied ^{on} are distinguishable in this respect. The liquidator further contends that under its general chancery powers granted under section 11, the court had the power to allow solicitor's fees to the liquidator or to the receiver appointed by it. Here again, however, the objectors invoke the rule of construction that where in the same statute there is a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former one, the particular enactment must be operative and the general enactment must be construed only to apply to cases within the general language which are not within the provisions of the particular enactment. They cite Dodge v. City of Chicago, 201 Ill. 68, and Mandtoffski v. Chicago Traction Co., 274 Ill. 282, which seem to so hold. The objectors therefore say that applying that rule it cannot be held that section 11 grants power to employ counsel, and section 8 must be construed as expressly forbidding such employment. In other words, they contend that section 11 grants only powers such as are consonant with section 8.

and was held to contain all such matters; United States v. ...
of 111, 117, where the constitutionality of the act was
was held to be necessarily implied in the language that the act
was granted; United States v. ... 111, 117, where the
language of the act is a statute was held to contain all
statutes; and United States v. ... 111, 117, where the court
said, "To supply omissions transcends the judicial function."

The legislator requires that the law should be pre-
sented with the provision that the specific and general provisions
must relate to the same subject; that section 2 of the statute
relates to the power of the director as legislator to appoint depu-
ties, clerks, assistants, etc., while section 1 of the same act
is to regulate the power and practice of the court; and the
general provisions are distinguishable in this respect. The legislator
further contends that under the general emergency power granted
under section 1, the court has the power to alter section 2.
There is the legislator in the two cases mentioned in 111, 117.
Again, however, the distinction between the two is not so clear as
there is in the same statute there is a particular enactment and also
a general one, which in its most comprehensive sense would include
that is embraced in the former one, the particular enactment must
be operative and the general enactment must be construed only to
apply to cases within the general language which are not within the
particular of the particular enactment. They also United States v. ...
United States v. ... 111, 117, and United States v. ... 111, 117.
111, 117, which seem to be held. The objectors therefore say that
section 1 of the act is not to be held that section 2 grants power
to employ clerks, and section 2 must be construed as expressly
prohibiting such employment. In other words, they contend that sec-
tion 1 grants only power to the court as an enactment and section 2

As against this the liquidator contends that neither the rule nor the cases are applicable because in those cases the different sections considered related to only one and the same subject, while here one subject is considered in section 8 and another and different subject is considered in section 11; and he therefore says that the rule above stated is one only of interpretation and that where it appears from the context that the general words are not limited, the rule will not be applied. He cites Minch v. Russell, 136 Ill. 22; Gillock v. The People, 171 Ill. 307; Gage v. Cameron, 212 Ill. 146; McReynolds v. The People, 230 Ill. 623; Mertens v. Southern Coal Co., 235 Ill. 540; 25 R.C.L., sec. 240, p. 999; 36 Cyc. 1121-1122; which seem to so hold. He also invokes section 1 of chapter 131 of the Illinois Revised Statutes (Cahill's Ill. Rev. Stats. 1929, chap. 131, sec. 1, par.1) which, referring to construction of statutes, provides:

"All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the Legislature may be fully carried out."

Against this the objectors say that the powers granted by section 11 are not general chancery powers; that the proceeding provided for by the statute remains a special statutory proceeding; and cite as applicable the cases of Smith v. Johnson, 321 Ill., 134, and Wilson v. Smart, 324 Ill. 276, which hold that section 6 of the Diverce act, while it confers chancery powers, limits the same to the actual jurisdiction conferred by the Diverce act, and that such limitation controls any exercise by the chancery court in such cases of general equity powers. We think this view correctly interprets these cases, and the rule is not unlike that declared in Therens v. Therens, 267 Ill. 592, where in a proceeding by an administratrix to sell real estate to pay debts, it was held that the same was not inherently a chancery proceeding, but that it was a special proceeding

in which the powers of the court were limited. Hannah v. Meinschausen, 299 Ill. 525, and Farmers State Bank & Trust Co. v. Rayborn, 238 Ill. App. 542, are other cases which announce the same rule. On the authority of these cases it was held that the statute here does not confer the general jurisdiction of a court of chancery, and hence no power to allow solicitor's fees can be derived therefrom in the absence of an express authority. It is further contended by the objectors that even if it is conceded that general chancery powers are conferred, the contention could not prevail for the reason that in this state courts having such general chancery powers may not allow solicitor's fees to be taxed as costs. Metropolitan Life Ins. Co. v. Kinsley, 269 Ill. 529; Benson v. Benson, 293 Ill. 456; Benza v. New Era Assog., 323 Ill. 296, and Alex v. Lowe, 230 Ill. App. 548, are cited to this point. However, Metropolitan Life Ins. Co. v. Kinsley, by the opinion filed therein, is declared plainly distinguishable from Heffron v. Rice, 149 Ill. 216, and McAnrow v. Martin, 183 Ill. 46, where a court of equity was specifically held to have power even in the absence of statutory authority to allow receiver fees to a receiver appointed by the court. Indeed, that principle, we think, must be regarded as well settled by these decisions.

We seen, finally then, to come to the question of whether a liquidator appointed under a statute similar to this which we now consider may be regarded as an officer of the court and deriving his power and authority from him. The parties have cited a large number of cases holding (as claimed) under similar facts that the receiver or liquidator was an officer of the court, deriving his authority from the court rather than from the statute. The liquidator cites Assets Realization Co. v. DeFreese, 225 Ill. 508, where the proceeding was for a liquidation of a corporation organized

In which the power of the court was limited. United States v. ...

United States v. ...

United States v. ...

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statute here does not confer the general jurisdiction of a court of

competency, and hence no power to allow solicitor's fees can be de-

rived therefrom in the absence of an express authority. It is fur-

ther contended by the appellants that even if it is conceded that

general competency powers are conferred, the conclusion cannot be pro-

ved for the reason that in such cases courts having such general

competency powers may not allow solicitor's fees to be taxed as costs.

United States v. ...

United States v. ...

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The first of these cases is United States v. ...

above the proceedings was for a liquidation of a corporation organized

under the Homestead Loan Associations act, and the auditor of State had taken possession. The court there held that the power of the auditor was necessarily subject to the control of the courts. The liquidator also cites State v. Falkenhainer, 309 Mo. 381, 274 S.W. 722, where under a Missouri statute quite similar to that which we are here required to interpret, it was held that the insurance superintendent was in effect the receiver of the court and under its control; Evans v. Illinois Surety Co., 298 Ill. 101, and also at 319 Ill. 105, where it was held that the court exercised equity jurisdiction in the appointment of a receiver for an insolvent surety company.

On the contrary, the objectors rely on Scalzo v. Commercial Trust & Savings Bank, 239 Ill. App. 330, where in a proceeding under the Banking Liquidation act, the court said that under section 11 of that act the auditor of the state might appoint a receiver "to take charge of the affairs of the bank without the order of any court and wind up its affairs, obtaining orders of court for certain specific purposes." The objectors also cite United States v. Weitzel, 246 U. S. 533, 62 Law Ed. 872; Ex Parte Chetwood, 165 U. S. 443, 41 Law Ed. 782, where a receiver under a statute concerning national banks was appointed by the comptroller of the currency, and the court said that he was not the officer of the court. Balf v. Rundle, 163 U. S. 222, is also cited, disclosing that contrary to the courts of the state of Missouri, the United States court held that the superintendent of insurance of that state, while acting as liquidator, was not in any sense an officer of the court. A similar proceeding was considered and a similar ruling given after review of the authorities in Krauthoff v. Kansas City Joint Stock Land Bank, 23 Fed. (2nd) 71. The United States court said as to the superintendent of insurance of the state of Missouri that he derived his authority "not from the

under the Homestead Loan Association act, and the auditor of state had taken possession. The court there held that the power of the auditor was necessarily subject to the control of the courts. The auditor also cited Smith v. Commonwealth, 200 Pa. 221, 274 A. 2d 722, where under a Homestead statute quite similar to that which we are now required to interpret, it was held that the insurance corporation was in effect the trustee of the state and under its control; Smith v. Commonwealth, 200 Pa. 221, 274 A. 2d 722, at 210 Pa. 221, 274 A. 2d 722, where it was held that the court retained jurisdiction in the appointment of a receiver for an insurance company to pay.

On the contrary, the opposite view is taken in Commonwealth v. Smith, 200 Pa. 221, 274 A. 2d 722, where in a proceeding under the Banking Regulation act, the court said that under section 11 of that act the auditor of the state might appoint a receiver "in case of the failure of the bank without the order of the court and with up the auditor, obtaining orders of court for certain specific purposes." The opposite view also cited United States v. Smith, 200 Pa. 221, 274 A. 2d 722, where a receiver under a Homestead act was appointed by the auditor without the order of the court, and the court held that he was not the auditor of the state, and the court held that he was not the auditor of the state. Smith v. Commonwealth, 200 Pa. 221, 274 A. 2d 722, is also cited, also stating that contrary to the holding of the state of Missouri, the United States court held that the superintendent of insurance of that state, while acting as liquidator, was not in any sense an officer of the court. A similar proceeding was considered and a similar view given after review of the authorities in Smith v. Commonwealth, 200 Pa. 221, 274 A. 2d 722, where it was held that the state of Missouri had derived his authority from the state of Missouri.

decree of the court but from the state." Attention is also called to Farrell v. Stoddard, 1 Fed. (2nd.) 802, where the Federal court for the Northern district of New York construed the act from which the Illinois statute was taken and held after a review of all the authorities that during liquidation of an insurance company under that act, its property was not in the custody of the court and that the Federal court under rules of comity was not precluded from entertaining suits with reference thereto by the fact that the same was in the possession of the liquidator. That case cites as authority Allen v. United States, 285 Fed. 678; Commonwealth v. Commissioner of Banks, 240 Mass. 244, 133 N.E.625.

Both the parties here rely on In re Casualty Co. of America, 243 N. Y. 443, 155 N. E. 735, where the same sections of the New York act which we are here called upon to construe were considered. In that case it appears the insurance superintendent liquidator employed counsel, who rendered a bill for a balance of \$8,500 claimed to be due for services. He had received payment to the amount of \$1500, the total bill charged being \$10,000. The bill was rejected by the superintendent liquidator as excessive, and he fixed the balance due to the attorney at \$2,000. The nisi prius court (that is, the Supreme court of New York) held that the services were worth \$8,000 and ordered payment on that basis. The Appellate division sustained the view of the superintendent and reversed the order, saying:

"The only power conferred by the statute upon the court is to approve, or disapprove because excessive, the compensation fixed by the superintendent of insurance. The court is given no power of fixation, and hence, even though the court may consider the compensation fixed by the superintendent too low, it must approve the same. Only in the event the compensation fixed by the superintendent is excessive may the court disapprove the same." (In re Casualty Co. of America, 216 N.Y.S. 255.)

The Court of Appeals sustained the trial court and reversed the

Appellate division. The opinion points out that the superintendent did not have arbitrary powers; that rules and regulations which he might adopt were "subject to the approval of the court." The court said:

"The power of the court to liquidate this claim and direct its payment from the assets does not depend upon the power of approval reserved by subdivision 6 where the amount has been fixed by the liquidator through agreement with the creditor or with the creditor's consent. The power is incidental to the supervision and direction of the court of liquidation (sec. 63, subd. 3). By the settled practice of the Court of Chancery, one who supplies services upon the winding up of a business at the hands of a receiver may apply to the court by summary petition for the allowance of his claim and for payment upon allowance. (High on Receivers, sec. 254-b; 19 Abb. N. C. 371 at seq., note.) We cannot doubt that a like jurisdiction, and one equally summary, exists today as an incident to the judicial supervision of the liquidation of an insurance company by the statutory liquidator. There was some suggestion in the court below that the claimant's remedy, if any, was a remedy by action, and not by motion or petition. The boon of prompt and economical administration would be needlessly sacrificed if this suggestion were accepted. The power to supervise and direct the time and method of liquidation is a power to determine the extent and validity of claims arising in the course of liquidation and growing out of its necessities."

This decision if followed to its logical conclusion would seem to compel us to hold that general chancery powers (at least, to the full extent necessary to a proper liquidation of the business of the particular company involved) is granted by the statute. Unlike the cases cited where authority is conferred upon a court of limited jurisdiction, we cannot disregard the fact that the legislature here saw fit to confer the power granted (whatever it was) upon a court of general and superior jurisdiction with full chancery powers. When, however, we return from the excursion which the voluminous briefs filed in this cause have required us to undertake, we come again to the simple question, What was the intention of the legislature in the enactment of the particular statute which we are called upon to interpret? The act in question

was approved June 26, 1925 (see Laws of Illinois, 54th General Assembly, 1925, p. 446.) It became a law July 1st of the same year. It recognizes the office of the Director of Trade and Commerce, to whom had been transferred all the powers of the insurance superintendent by the act of March 17, 1917, known as "The Civil Administrative Code of Illinois." As already stated, it is copied almost verbatim from a similar law of the State of New York, which was adopted by that state in 1909. The enactment of the law seems to have come about through the suggestion of the then Governor Hughes of New York, who in his annual message to the legislature of that state recommended that authority should be given to the superintendent of insurance to conduct the liquidation of insolvent insurance companies in a manner similar to that which had been authorized in the case of banking institutions. He said:

"Serious delays and enormous wastes connected with receiverships both of banking and insurance corporations has directed attention to the advisability of providing suitable means for economical and speedy liquidation through the agency of the respective state departments. Last year the Banking Law was amended so that it provided for the liquidation of banking corporations by a businesslike method and the wisdom of the provision has already been demonstrated by experience. Similar exigencies arise in connection with insurance corporations, and should be dealt with in a similar way." (See re Casualty Co. of America, 216 N. Y. S. 256.)

We may assume that the purpose of adopting the act in this state was the same. The case, of course, is not authority to the proposition that the liquidator had the power under the Illinois act to hire attorneys and solicitors. The fact that with the New York statute before it the legislature twice deleted therefrom the authority to pay expenses of counsel, easily distinguishes this case from that one and precludes any holding that the New York case is controlling here, however instructive it may be upon the general principles involved.

Another and important respect in which the cases are

was approved June 25, 1925 (see laws of Illinois, 1925, Chapter Assembly, 1925, p. 446.) It became a law July 1st of the same year. It transferred the office of the Director of Trade and Commerce, to whom had been transferred all the powers of the insurance department by the act of March 17, 1917, known as "The Civil Administrative Code of Illinois." As already stated, it is copied almost verbatim from a similar law of the State of New York, which was adopted by that State in 1909. The enactment of the law seems to have come about through the suggestion of the then Governor Hughes of New York, who in his annual message to the Legislature of that State recommended that authority should be given to the Superintendent of Insurance to conduct the regulation of insurance business companies in a manner similar to that which had been authorized in the case of banking institutions. He said:

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We may assume that the purpose of adopting the act in this State was the same. The case, of course, is not entirely to the proposition that the Legislature had the power under the Illinois act to give attorneys and solicitors. The fact that with the New York statute before it the Legislature voted deleted therefrom the authority to pay expenses of counsel, easily distinguishes this case from that one and precludes any holding that the New York case is controlling here, however instructive it may be upon the general principles involved.

Another and important respect in which the cases differ

distinguished from In Re Casualty Company of America, is that so far as the briefs disclose, it does not appear that in the State of New York the office of attorney general carries with it the powers or that its occupant is required by law to perform the duties which devolve upon the attorney general of this commonwealth under the laws of this state. No such official as the attorney general is mentioned in the New York act. He is the only attorney expressly mentioned in the Illinois act, and the act proceeds to place upon him explicit and express duties as a public officer. By article 1, section 8 of the Constitution of 1870 the office of attorney general is made a part of the executive department of the state. This is the same department of which the director of trade and commerce is a part. Moreover, the duties and powers of the attorney general of the commonwealth, before the enactment of the Liquidation law of 1925, had been defined in a notable opinion filed in the Supreme court of this state, the direct effect of which was to challenge the power of the legislature in respect to appropriations. The importance of the decision and of the subject matter to which it related was so great that we may safely assume that it was present in the mind of the legislature at the time of the enactment of the Liquidation act. Moreover, the decision and the act indicate when read together that for the time being at least the judicial, executive and legislative departments of the state saw eye to eye and co-operated to a common end for the public weal. The case is Fergus v. Russel, 270 Ill. 304, in which an opinion was filed November 6, 1918.

In that case it appeared that a bill was brought by Fergus against the state treasurer and other public officials of the state to enjoin certain alleged illegal appropriations therefore assumed to have been made by the legislature. A decree

distinguished from the general office of the
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 of New York the office of attorney general carries with it the
 power of that its execution is regulated by law to perform the
 duties which devolve upon the attorney general of this common-
 wealth under the laws of this state. He cannot officiate as the
 attorney general in the New York act. He is the
 only attorney expressly mentioned in the Illinois act, and the
 act proceeds to place upon him explicit and express duties as a
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 1870 the office of attorney general is made a part of the execu-
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 270 Ill. 304, in which an opinion was filed November 4, 1915.
 In that case it appeared that a bill was brought by
 the state to enforce certain alleged illegal appropriations there-
 before seemed to have been made by the legislature. A decision

was entered in Sangamon county finding certain items to be valid and others to be invalid. On appeal cross-errors were assigned by complainants and some of the items challenged concerned an appropriation for an attorney and three examiners for the superintendent of insurance. The appropriation was: "For legal services, \$4000 per annum; for expenses of prosecutions of violations of the insurance laws, \$15,000 per annum." The appropriation also included \$2000 for traveling expenses of attorneys, court costs in prosecutions of violations of the insurance laws. The insurance superintendent appeared to support these items and was permitted to file a separate brief. The opinion of the Supreme court reviews the development of the law of this state on the subject of insurance from 1869, when it was not distinguished from the law applicable to corporations for pecuniary profit until the amended act of 1899 (see Laws of 1899, p. 256), by which, as the court pointed out, the General Assembly attempted to strip the attorney general of all of his powers and duties with reference to insurance and to transfer the same to the superintendent of insurance. After citing section 1 of article 5 of the Constitution of 1870, the opinion states that the document conferred no express powers upon the attorney general and prescribed no express duties except such as might be prescribed by law; that the office of attorney general was known to the common law; that under the common law he had well known and well defined powers, and that it was incumbent upon him to perform well known and clearly prescribed duties. The opinion also states:

"It is sufficient for the purposes of the discussion of the point here involved to state that at common law the Attorney General was the law officer of the crown and its chief representative in the courts. (Rex v. Austen, 9 Price 12; Attorney General v. Brown, 1 Swanst. 294; Rex v. Wilkes, 4 Burr. 2570; Wilkes v. Rex, 4 Brown's P. C. 360; 1 Tomlin's Law Dict. 129; 25 Law Quarterly Rev. 400.)"

After reviewing the cases and stating that the insurance

superintendent relied upon North American Ins. Co. v. Yates, 214

Ill. 272, the court said:

"When by the act of 1893 the General Assembly attempted to strip the Attorney General of all his powers and duties in reference to insurance matters, it was effective only to the extent of such added powers and duties as had been conferred and imposed by the legislature and did not affect those which were inherent in his office. As was held in the Yates case, the Insurance Superintendent now has the right to institute prosecutions and maintain any suit or proceeding that could theretofore have been prosecuted in the name of the Attorney General. It does not follow, however, that he may employ other counsel than the Attorney General or secure other legal advice than his in the prosecution of such proceedings. Such proceedings may be prosecuted in the name of the Insurance Superintendent, but he must look to and depend upon the Attorney General for all legal services.

* * * * *

"It is true there were other representatives of the crown in the courts at common law, but they were all subordinate to the Attorney General. By our constitution we created this office by the common law designation of Attorney General and thus impressed it with all its common law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our constitution the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers and of all boards, commissions and departments of the State government, and it is his duty to conduct the law business of the State, both in and out of the courts."

The opinion then goes on to state that the appropriation of \$15,000 for expenses of prosecutions of violations of the insurance laws was not necessarily for the purpose of paying salaries or fees of attorneys for legal services but might be for the purpose of conducting investigations; that the use of any part of the same for the purpose of performing legal services would not be proper, and that the auditor should refuse to issue a warrant and the state treasurer to pay the same for any such purpose.

It would therefore appear that in eliminating the provision of the New York law as to the employment and payment of counsel and in naming the attorney general of the state as the law officer to conduct proceedings in court when necessary, the legislature sought to conform with this decision of the Supreme court.

Representative told upon [illegible] [illegible] [illegible]

III. 275, the court said:

"When by the act of 1883 the General Assembly attempted to strip the Attorney General of all his powers and duties in relation to the execution of the laws, it was effective only to the extent of such stated powers and duties as had been conferred and imposed by the Legislature and did not affect those which were inherent in his office. As was said in the *Wells* case, the Legislature has no right to take away from the Attorney General the powers and duties which are essential to the execution of the laws. It does not follow, however, that he may enjoy other powers than those which are conferred upon him by the Legislature. Such proceedings may be taken in the name of the Executive Department, but he must look to and depend upon the Attorney General for all legal services."

"It is true there were other representatives of the Executive in the courts of common law, but they were all subordinate to the Attorney General. By our constitution we created this office by the common law tradition of Attorney General and then provided it with all the common law powers and duties. As the office of Attorney General is the only office of common law which is now created by our constitution and the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. This exception, only, he is the sole official adviser of the Executive officers and of all boards, commissions and departments of the State Government, and it is his duty to conduct the business of the State, both in and out of the courts."

The opinion then goes on to state that the representation of the Executive in the courts of common law is not necessary for the purpose of paying salaries or fees of attorneys for legal services but might be for the purpose of conducting investigations; that the use of any part of the same for the purpose of performing legal services would not be proper, and that the Auditor should refuse to issue a warrant and the State Treasurer to pay the same for any such purpose. It would therefore appear that in eliminating the provision of the New York law as to the payment and payment of counsel and in giving the Attorney General of the State as the law officer to conduct proceedings in court when necessary, the Legislature sought to conform with this decision of the Supreme Court.

Another significant fact which compels the same conclusion is to be found in the subsequent legislation amending and in substance repealing the act of 1925. This legislation is entitled, "An act in relation to delinquent insurance companies, associations and societies," and states that the title was amended by an act approved May 20, 1929, (see Laws of Illinois, 1929, p. 527; Smith-Hurd's Ill. Rev. Stats. 1929, chap. 73, sec. 495, p.1731.) Section 7 of the amended act eliminates the provision by which the director of trade and commerce must be appointed as liquidator and substitutes a receiver appointed by the court. Section 8 as amended gives this receiver power to employ attorneys and solicitors, thus substituting for liquidation by the executive department of the government the old system which it had been intended to supersede. Much of the phraseology of the act is retained but the substance has been eliminated.

Considering the language of the act of 1925 as we must interpret the same by the rules of construction, considering the evident purpose for which the statute was enacted, considering the powers and duties of the attorney general of this state as defined in the Constitution and as interpreted in the Fergus case, and in view of the language of the amended act, we may not entertain a doubt that it was the intention of the legislature as expressed in the act of 1925 that the attorney general alone should perform all legal services in connection with the liquidation of insurance companies under the act, and that the liquidator was without power to employ and the court under that act without jurisdiction to authorize the employment of any other attorney or solicitor, and that any such employment of any other would be contrary to the public policy of the state as expressed in that act.

It has been suggested that the duties of the attorney

general are limited to cases in which the state has "a real interest," and we are cited to a number of cases where the question to be decided concerns the jurisdiction of the Supreme as distinguished from the Appellate courts of the state, where it was held that the real interest of the state meant a financial interest.

People v. Continental Ben. Assoc., 280 Ill. 113, is one of a number of cases relied on. That decision concerns only the respective jurisdictions of the Supreme and Appellate courts of the state and interprets statutes prescribing the practice in that regard. That decision followed a long line of cases dealing with the same subject, beginning with Hodge v. The People, 96 Ill. 423, and has been followed in the yet later case of The People v. Mitchell, 317 Ill. 439. It has no bearing whatever on the matters decided in the Fergus case. It is suggested that the state is by article 4, section 20 of the Constitution forbidden to pay, assume or become responsible for the debts or liabilities of, "or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual," and that if the statute is construed as requiring the attorney general and officer of the state to perform these legal services, it would then be void as violating this provision of the Constitution. We can hardly regard this contention as seriously made. If there is anything to it, the Supreme court of the state is the tribunal to which the matter should be presented. We hold the contention without merit (1) because the business of insurance, as has been often held, is affected by a public interest; and (2) because as will be disclosed by a reading of the Life Assoc. of America v. Fassett case, the assets of a defunct corporation, in the absence of a statute providing otherwise, in fact belong to the state.

What we have already said disposes of the item of

\$1000 paid by the liquidator to Rufus M. Potts for legal services. For the same reasons the decree disallowing this item must be sustained. If the court and the liquidator were without power or right to employ Hennessy in the administration of the estate, much less were they without power or authority to employ Potts to represent the insolvent corporation. In support of the contention that this item should have been allowed, the rule is invoked that a court of equity has inherent power to direct and pay as a preferred claim reasonable compensation to counsel employed by a corporation to defend the corporate existence in insolvency proceedings; and Standish v. Musgrove, 223 Ill. 500, The People v. Commercial Alliance Life Ins. Co., 148 N. Y. 563, 42 N. E. 1044, and Goodyear Tire & Rubber Co. v. United Motor Car & Supply Co., 89 N. J. Eq., 108, 103 Atl. 471, are cited. There is no doubt of the existence of such a rule in cases where insolvent estates are administered by a receiver appointed by a court of unlimited equity jurisdiction. However, in this case Potts did not resist the appointment of the liquidator, but on the contrary entered an appearance and consented thereto. Moreover, as we have already held, the proceeding was statutory, and the statute did not authorize the payment of such expenses.

For the reasons we have indicated the decree of the trial court is affirmed.

AFFIRMED.

O'Connor, J., dissents.

McSurely, J., concurs.

I agree with the decision of the court as announced in the majority opinion except as to what is said concerning the fees paid to the solicitor for the liquidator. There is nothing in the law that makes the payment of the solicitor's fees out of the funds illegal. And under all the facts which are undisputed in the record, it is in my opinion contrary to justice and fair dealing to say that the solicitor should not be paid for his services, which are admitted to have been necessary and his charges reasonable, in view of the fact that his appointment as solicitor for the liquidator was expressly authorized by an order of court. And from time to time reports were made to the court showing the work done by the solicitor and the payments made to him, on account of services rendered, out of the funds derived from the property being administered by the liquidator.

The record discloses that April 15, 1927, the proceeding for liquidating the Marquette Insurance Company was instituted in the Superior court of Cook county. April 28, 1927, the defendant Insurance company filed its appearance, and April 29, 1927, an order was entered by the court providing, inter alia, for the appointment of a liquidator of the Insurance company, authorizing the liquidator ^{any} to employ counsel to take steps that might be necessary to liquidate the Insurance company, and on the same day the appearance of Edward J. Hennessy was entered as solicitor for the liquidator. Thereupon the solicitor commenced the performance of his duties on behalf of the liquidator and continued throughout the proceeding for about two years, and "that 149 3-4 days constituted the total time expended (by the solicitor) in performing such legal services *** and the legal services rendered *** were necessary in the ad-

MR. JUSTICE GORDON EXAMINING.

4475

1907

I agree with the decision of the court as announced in the majority opinion except as to what is said concerning the fee paid to the solicitor for the liquidator. There is nothing in the law that makes the payment of the solicitor's fee out of the assets illegal. And under all the facts which are undisputed in the case, it is in my opinion contrary to justice and fair dealing to say that the solicitor should not be paid for his services, which are admitted to have been necessary and his charges reasonable, in view of the fact that his appointment as solicitor for the liquidator was expressly authorized by an order of court. And then also in these reports were made to the court showing the work done by the solicitor and the payments made to him, on account of services rendered, out of the funds derived from the property being administered by the liquidator.

The record discloses that April 18, 1927, the proceeding for liquidating the Harrogate Insurance Company was instituted in the Superior Court of Cook County. April 20, 1927, the defendant insurance company filed its appearance, and April 25, 1927, an order was entered by the court providing, inter alia, for the appointment of a liquidator of the insurance company, authorizing the liquidator to employ counsel or ^{any} agents that might be necessary to liquidate the insurance company, and on the same day the appearance of Edward J. Hennerty was entered as solicitor for the liquidator. Thereupon the liquidator commenced the performance of his duties on behalf of the liquidator and continued throughout the proceeding for about two years, and that 140 2-4 days constituted the total time expended (by the solicitor) in performing such legal services and the legal services rendered were necessary in the ab-

ministration of the estate of said Marquette National Fire Insurance company."

The Attorney General testified that after he filed the petition praying for the liquidation of the Insurance company he advised the liquidator that his services as Attorney General were substantially completed and that it was no part of his duties to perform the legal services necessary to reduce the assets of the Insurance company to possession. Thereupon the liquidator employed Edward J. Hennessy to represent him and to perform the necessary services. The Attorney General further testified that no appropriation had been requested by him and none had been made to his office by the legislature that could be used in payment of such services as were rendered the liquidator by the solicitor.

November 21, 1927, an order or decree was entered approving and confirming the order entered April 29, 1927, directing the liquidator to take possession of the assets of the Insurance company, and it further decreed that the liquidator continue to liquidate the assets and affairs of the company and "that said liquidator is authorized and shall continue the employment of Edward J. Hennessy as his counsel *** as heretofore ordered by this court." It was further ordered that all claims be filed with the liquidator on or before February 1st, 1928. The liquidator was directed to give public notice by publishing once a week for four consecutive weeks in a newspaper of general circulation, published in Chicago, of the time and place within which claims should be filed, and that any person failing to file such claims should be thereafter barred. It was further ordered that the cause be referred to a master in chancery to take the evidence on the allowance or disallowance of the claims.

In September, 1927, the liquidator paid his solicitor

administration of the estate of said deceased National Fire Insurance

company.

The Attorney General testified that after he filed his

petition praying for the liquidation of the Insurance company he

advised the liquidator that his services as Attorney General were

substantially completed and that it was no part of his duties to

perform the legal services necessary to reduce the assets of the

Insurance company to possession. Thereupon the liquidator assigned

Edward J. Kennedy to represent him and to perform the necessary

services. The Attorney General further testified that no report in

the had been rendered by him and none had been made to his office

by the liquidator that would be used in payment of such services

as were rendered the liquidator by the solicitor.

On November 21, 1927, an order of decree was entered ap-

proving and confirming the order entered April 29, 1927, directing

the liquidator to take possession of the assets of the Insurance

company, and it further directed that the liquidator continue to

liquidate the assets and affairs of the company and that said

liquidator be authorized and shall continue the employment of

Edward J. Kennedy as his counsel and as solicitor entered by this

court. It was further ordered that all claims be filed with the

liquidator on or before February 1st, 1928. The liquidator was di-

rected to give public notice by publishing once a week for four con-

secutive weeks in a newspaper of general circulation, published in

the city of the time and place wherein which claims should be filed,

and that any person failing to file such claims should be deemed to

waive. It was further ordered that the report be rendered to a com-

mittee in conformity to the evidence on the evidence on the

affidavit of the claimant.

In September, 1927, the liquidator paid his solicitor

\$5,000 on account and in December \$2500 more, and on September 28, 1928, the liquidator filed his first report showing his acts and doings from the time of his appointment in April, 1927, to February 29, 1928, which showed the two payments made by him to the solicitor as above stated. An order was entered June 15, 1928, allowing the filing of the first report and it was further ordered that all parties, creditors, claimants, etc., file their objections to the report on or before July 2, 1928. No objections were filed. November 15, 1928, upon notice to certain solicitors, the liquidator filed his second report covering his acts and doings from the time of his first report to October 1, 1928, and an order was entered giving leave to file the report; and further, that all creditors, etc., file any objections they might have on or before December 15, 1928. No objections were filed to this report. This report expressly showed that Hennessy was performing services as counsel for the liquidator and that the liquidator had disbursed for attorney's fees \$3819.15; that he had paid on account of services rendered by Hennessy \$7,500.

March 15, 1929, the liquidator filed his final report and account, which showed the payment to Hennessy of the \$7,500 and a further payment of \$10,000 made to him November 17, 1928. To this report there was an itemized statement attached, showing in detail legal services rendered by Hennessy, and praying that he be authorized to pay such further allowance to Hennessy as the solicitor's services were reasonably worth.

To this final report three claimants and creditors, namely, Pioneer Fire Insurance Co., Frank B. Leonard, the appellees, and J. D. Monroe filed objections contending that the payments to Hennessy as solicitor were illegal and void. One of the objections of the Pioneer Fire Insurance Company was that

the objections of the Illinois Fire Insurance Company was that
 payments to Kennedy as collector were illegal and void, and of
 course, the Illinois Fire Insurance Co., which is a party to the
 suit, is entitled to have its claimant and creditors.
 To this final report three claimants and creditors,
 as the collector's services were reasonably worth.
 that he be authorized to pay such further advances to Kennedy
 working in detail legal services rendered by Kennedy, and giving
 1932. To this report there was an attached statement attached,
 \$7,500 and a further payment of \$10,000 made to him November 17,
 part and account, which showed the payment to Kennedy of the
 March 12, 1932, the collector filed his final re-
 vices rendered by Kennedy \$7,500.
 The attorney's fees \$2,000.10 that he had paid on account of ser-
 vices for the collector and that the collector had disbursed
 report expressly showed that Kennedy was performing services as
 December 12, 1932. No objections were filed to this report. This
 collector, etc., this any objections they might have on or before
 was entered giving leave to file the report; and further, that all
 from the time of his first report to October 1, 1932, and an order
 collector filed his second report covering his case and things
 filed. November 12, 1932, upon notice to certain collectors, the
 claims to the report on or before July 2, 1932. No objections were
 sent all parties, creditors, claimants, etc., this final report
 allowing the filing of the final report and it was further ordered
 collector as above stated. An order was entered June 10, 1932,
 July 20, 1932, which showed the two payments made by him to the
 delays from the time of his appointment in April, 1932, to before
 1932, the collector filed his first report showing his case and

"the orders entered on April 29, 1927, wherein the liquidator was authorized 'to employ counsel,' and the order of November 21, 1927, wherein it was ordered, adjudged and decreed ****'that said liquidator is authorized and shall continue the employment of Edward J. Hennessy as his counsel' *** were entered without proper authority of law, the court so entering the orders being without jurisdiction to enter the same."

The objection of Leonard to the final report touching the matter now under consideration was that "attorney's or solicitor's fees for the receiver are not allowable in law."

The objection filed by Monroe to the allowance of solicitor's fees was that "the said liquidator has employed attorneys and legal counsel other than the Attorney General of the State which is prohibited by law" and that the amount paid by the liquidator was excessive.

Counsel for the liquidator in their brief contend that the objectors are "estopped and by laches precluded from raising any objection to counsel fees as compensation to the solicitor for the Liquidator."

The evidence shows that the objector Monroe in July, 1927, through his solicitor, had actual notice that Hennessy was acting as the solicitor for the liquidator, and that the solicitor for the Pioneer Insurance Company testified that on April 29, 1927, he knew Hennessy had been authorized by the court to act as counsel for the liquidator. It will be noticed that none of the three objectors, in the objections filed by them respectively, made any contention that they were without knowledge of the fact that Hennessy had been appointed and was acting as solicitor for the liquidator.

In view of the undisputed facts in this case, that

"The order entered on April 20, 1937, wherein the liquidator was authorized to employ counsel," and the order of November 21, 1937, wherein it was ordered, subject to and subject to the order of the liquidator in authorized and shall continue the employment of Edward J. Kennedy as his counsel, "were entered without proper authority of law, the court in entering the orders being without jurisdiction to enter the same."

The objection of counsel to the final report submitting the matter was upon consideration was that "attorney's or solicitor's fees for the receiver are not allowable in law."

The objection filed by counsel to the allowance of solicitor's fees was that "the said liquidator has employed attorneys and legal counsel other than the Attorney General of the State which is prohibited by law" and that the amount paid by the liquidator was excessive.

Counsel for the liquidator in their brief contend that the orders are "entered and by law are not subject to any objection to counsel fees as compensation to the solicitor for the liquidator."

The evidence shows that the objection was made in July, 1937, through his solicitor, and actual notice that Kennedy was acting as the solicitor for the liquidator, and that the solicitor for the Pioneer Insurance Company testified that on April 20, 1937, he knew Kennedy had been authorized by the court to act as counsel for the liquidator. It will be noticed that none of the three objections, in the objections filed by them respectively, made any contention that they were without knowledge of the fact that Kennedy had been appointed and was acting as solicitor for the liquidator.

In view of the undisputed facts in this case, that

since there was no violation of any law in the payment of any solicitor's fees to Hennessey, and since his appointment was a matter of record and the acts and doings of the liquidator in the several reports filed by him disclosed that he was paying the solicitor out of the funds of the Insurance company, and since there is no contention that the three objectors were without notice of these facts, and since the various orders of court were entered as above mentioned, I am of opinion that in equity and good conscience the objectors ought to be held estopped from now contending that the solicitor ought not to be paid. Bothman v. Lindstrom, 221 Ill. App. 262. The liquidator and his solicitor ought to be protected in what they did by the orders of court. Bothman v. Lindstrom, supra; Beardon v. Youngquist, 189 Ill. App. 3.

The case of Russel v. Fergus, 270 Ill. 304, chiefly relied upon by the objectors, in my opinion is not in point. In that case a taxpayer filed a bill against the state treasurer to restrain payment of \$4,000 which had been appropriated for legal services and expenses for attorneys in prosecutions of violations of the insurance laws. It was held that it was the duty of the attorney general, the chief law officer of the State, to prosecute such violations and the appropriation not having been made to his office, it was illegal. That case held that taxpayers' money could not be used for legal services, except by the Attorney General. In the instant case the taxpayers' moneys are in no way involved. The State is not interested in the funds derived from the assets of the Marquette Insurance Company being liquidated.

For the reasons stated, I think the decree was wrong in regard to the payment by the liquidator of fees to his solicitor.

since there was no violation of any law in the payment of any of
Lindner's fees to Ramsey, and since his appointment was a matter
of record and the note and holding of the legislator in the several
reports filed by him disclosed that he was paying the collector
out of the funds of the insurance company, and since there is no
contention that the three collectors were without notice of these
facts, and since the various orders of court were entered as above
mentioned, I am of opinion that in equity and good conscience the
collectors ought to be held estopped from now contending that the
collector ought not to be paid. Raymond v. Lindner, 111 Ill.
App. 228. The legislator and his collector ought to be protected
in what they did by the orders of court. Raymond v. Lindner,
111 Ill. App. 228. The case of Raymond v. Ramsey, 111 Ill. App. 228, chiefly
relied upon by the collectors, in my opinion is not in point. In
that case a taxpayer filed a bill against the state treasurer to
testain payment of \$1,000 which had been appropriated for legal
services and expenses for attorneys in prosecutions of violations
of the insurance laws. It was held that it was the duty of the
attorney general, the chief law officer of the state, to prosecute
such violations and the appropriation not having been made to his
office, it was illegal. That case held that taxpayers' money could
not be used for legal services, except by the Attorney General.
In the instant case the taxpayers' money are in no way involved.
The State is not interested in the funds derived from the assets of
the insurance company being liquidated.
For the reasons stated, I think the decree was wrong
in regard to the payment by the legislator of fees to his collector.

34818

WILSON & SCOTT COMPANY,
a Corporation,

Appellant,

vs.

MEDICAL & DENTAL BUILDING
CORPORATION, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2621A. 642

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for defendant and against plaintiff for costs entered upon the finding of the court.

Plaintiff's statement of claim in several paragraphs alleged a demand for a balance said to be due on account of goods and merchandise sold and delivered in some instances for agreed prices and in others for reasonable amounts under certain contracts made between plaintiff and defendant. The first transaction alleged took place April 19, 1927, and the last November 8, 1927. The item mentioned in the second paragraph was withdrawn upon the trial, having in the meantime been paid. This item amounted to \$188.89, leaving a balance due as claimed of \$1022.06.

The goods and merchandise in question consisted of furniture and other materials necessary for the furnishing of two rooms in a building in which defendant corporation was interested, although it did not hold title thereto.

The defense set up was that defendant did not order, contract for, purchase, or promise to purchase the goods described nor authorize any person so to do. The affidavit of merits, however, does not deny the allegations as to the delivery of the goods or the price thereof, and therefore under the rules of the Municipal court, these facts being alleged in plaintiff's pleading and not denied in the affidavit of merits, must be considered as admitted.

1. The first of these is the fact that the

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1437

RESEARCH, DESIGN & ANALYSIS
HISTORICAL & POLITICAL
SCIENCE

513 A. 1333

THIRDIAN ENTIRELY DISCREPANT, SEE
 1948-1950 TO 1951-1952 AND 1953-1954

...and against plaintiff for costs entered upon the finding of the court.

[illegible]

Two rooms in a building in which telephone exchanges are located, although it did not hold this property.

... The balance not so was paid for material and not other, ...
... purchased for, purchased, or provided to purchase the goods described ...
... not authorized and return to be ... The amount of return, how-
... does not show the disposition as to the delivery of the goods ...
... of the same material, and therefore under the terms of the contract ...
... court, these facts being alleged in plaintiff's complaint and not ...
... which in the affidavit of merits, must be considered as admitted.

Cooper v. Anderson, 246 Ill. App. 1.

The controlling question in the case is raised by plaintiff's contention that the finding and judgment is manifestly against the weight of the evidence. Indeed, there is little, if any, conflict in the evidence upon any material fact in issue. The goods in question were contracted for, upon the several occasions averred in the statement of claim, by Clark & Trainor, the purported agents of defendant corporation. Plaintiff seems to have tried the case on the theory that Clark & Trainor were duly authorized agents, and defendant presented its defense upon the theory that they were not duly authorized. A. R. Clark, an employee of Clark & Trainor, who was in charge of the building to which the goods were delivered, testified to the fact of the agency, but defendant contends (citing Maxey v. Heckethorn, 44 Ill. 437; Whiteside v. Margarell, 51 Ill. 507; Proctor v. Tows, 115 Ill. 138; Mullanphy Savings Bank v. Schett, 135 Ill. 686; Hummell v. Freshwater, 203 Ill. App. 77) that the agency could not be proved by the agent.

Defendant misunderstands these cases, which rightly hold that an agency cannot be proved by proof of a mere statement of the alleged agent to that effect when the fact of agency is in issue. Such proof would be mere hearsay and should be excluded upon that ground, but the fact of agency can be proved by the alleged agent when called as a witness just the same as by any other witness. See Mechem on Agency, vol. 1, 2nd ed., sec. 291, p. 211, and the authorities from the different jurisdictions which are cited. The author says:

"If it is deemed essential to prove the authority by the agent himself, he must be called as a witness; his testimony both as to the fact, and as to the nature and extent, of his authority, where it rests in parol, being as competent as that of any other witness. The rule upon this subject has been

George T. Anderson, 225 111. App. 1.

The controlling question in the case is raised by

plaintiff's contention that the finding and judgment is manifestly

against the weight of the evidence. Indeed, there is little, if

any, conflict in the evidence upon any material fact in issue.

The goods in question were contracted for, upon the several occa-

sions averred in the statement of claim, by Clark & Tinsley, the

purported agents of defendant corporation. Plaintiff seems to

have tried the case on the theory that Clark & Tinsley were duly

authorized agents, and defendant presented its defense upon the

theory that they were not duly authorized. A. B. Clark, an em-

ployee of Clark & Tinsley, who was in charge of the building to

which the goods were delivered, testified to the fact of the

agency, but defendant contended (citing Barney v. Goodwin, 11

111. 457; Whitaker v. Bennett, 111. 507; Frederick v. Jones, 112

111. 155; Whitman v. Smith, 112 111. 555; Hammer

v. Thompson, 203 111. App. 77) that the agency could not be

proved by the agent.

Defendant misapprehends these cases, which rightly

hold that an agency cannot be proved by proof of a mere statement

of the alleged agent to that effect when the fact of agency is in

issue. Such proof would be mere hearsay and should be excluded.

Upon that ground, but the fact of agency can be proved by the al-

leged agent when called as a witness that the same can be proved by any other

witness. See Johnson on Agency, vol. 1, 2d ed., sec. 291, p. 211.

and the authorities from the different jurisdictions which are cited.

The author says:

"It is is deemed essential to prove the authority of the agent himself, he must be called as a witness; his testimony goes as to the fact, and as to the nature and extent of his authority, where it exists in part, being as competent as that of any other witness. The rule upon this subject has been

stated by a learned Judge as follows: 'It is competent to prove a parol agency and its nature and scope by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally, to prove any parol authority of any kind by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent for the purpose of binding his principal by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who, it is claimed, had attained such authority.'

See also *Meyer v. Iowa Mutual Liability Ins. Co.*, 240 Ill. App. 431.

The record here shows practically without conflict that defendant corporation was organized under the laws of the state of Illinois as a building corporation for the purpose of erecting and maintaining a building in the city of Chicago; that the organization of the defendant corporation was brought about by another organization known as the Medical & Dental Arts Club; that this Club was the beneficial owner of the Medical & Dental Arts Building, which it caused to be erected; that a written contract of agency for the management of the building through Clark & Trainor as agents was entered into by said agents and the Medical & Dental Arts Club; that the Chicago Title & Trust Co. held the legal title to the building for the Club; that the defendant corporation was organized by the same persons interested in the Club with the idea that through the sale of its stock the building might be financed; that the two organizations were identical as to officers, and that Clark & Trainor, defendant and the Arts Club seem to have supposed that Clark & Trainor were the agents for the building corporation as well as for the Club; that Clark & Trainor made the contract with plaintiff for the goods and merchandise sold by plaintiff to defendant; that Clark & Trainor reported the purchase of the same to the board of directors of the building corporation, which approved the purchase; that defendant started a bank account against which Clark & Trainor were given authority to draw checks and that

[illegible]

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[illegible]

that defendant corporation was organized under the laws of the State of Illinois as a building corporation for the purpose of erecting and maintaining a building in the city of Chicago; that the organization of the defendant corporation was brought about by means of a contract known as the Medical & Dental Arts Club; that this Club was the beneficial owner of the Medical & Dental Arts Building, which is known to be erected; that a written contract of agency for the management of the building through Clark & Traylor was entered into by said agents and the Medical & Dental Arts Club; that the Chicago Title & Trust Co. held the legal title to the building for the Club; that the defendant corporation was organized by the same persons interested in the Club with the idea that through the sale of its stock the building might be financed; that the two organizations were identical as to officers, and that Clark & Traylor, defendant and the Arts Club seem to have supposed that Clark & Traylor were the agents for the building corporation as well as for the Club; that Clark & Traylor made the contract with plaintiff for the goods and merchandise sold by plaintiff to defendant; that Clark & Traylor reported the purchase of the same to the board of directors of the building corporation, which approved the purchase; that defendant signed a bank account against which Clark & Traylor were given authority to draw checks and that

they, as agents for defendant, did draw several checks against the bank account and deliver them to plaintiff in part payment of the purchase price of the goods sold, and that all this was done with the knowledge, consent and approval of the officers and the board of directors of the defendant corporation. It is true that the evidence shows that Clark & Trainor were the agents of the Medical & Dental Arts Club; that the written contract creating the agency was with the Club alone, and that the defendant corporation was not a party thereto; but it also appears, as we have already set forth, that Clark & Trainor were in fact by parol authorized to act as agents for the building corporation; that they were authorized to carry out these particular transactions and that the same were ratified, approved and confirmed by the officers and board of directors of defendant. The agency for the Club was not at all inconsistent with the agency for the building corporation.

On the undisputed evidence under the pleadings, plaintiff is entitled to recover from defendant the sum of \$1022.06, and the judgment for defendant will be reversed with a finding of facts and judgment here for plaintiff and against defendant for that amount.

REVERSED WITH A FINDING OF FACTS AND
JUDGMENT HERE FOR PLAINTIFF.

O'Connor and McSurely, JJ., concur.

they, as agents for defendant, had been receiving certain amounts of the
bank account and deliver them to plaintiff in part payment of the
purchase price of the house sold, and that all this was done with
the knowledge, consent and approval of the officers and the board
of directors of the defendant corporation. It is also stated that
evidence shows that Clark & Trainor were the agents of the Medical
& Dental Arts Club; that the witness conspired with the agency
was with the Club alone, and that the defendant corporation was not
a party thereto; but it also appears, as we have already said, that
that Clark & Trainor were in fact by parol authorized to act as
agents for the building corporation; that they were authorized to
carry out these particular transactions and that the same were
ratified, approved and confirmed by the officers and board of di-
rectors of defendant. The agency for the Club was not at all in-
consistent with the agency for the building corporation.
On the undisputed evidence under the findings,
plaintiff is entitled to recover from defendant the sum of
\$1022.00, and the judgment for defendant will be reversed with a
finding of facts and judgment here for plaintiff and against de-
fendant for that amount.

REVEREND WITH A VIEWING OF FACTS AND
JUDGMENT BEING FOR PLAINTIFF.

Defendant and Plaintiff, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Defendant and Plaintiff, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

34818

FINDING OF FACTS.

We find as facts that there is a balance due from the defendant corporation to plaintiff on account of the transactions set forth in the statement of claim to the amount of \$1022.06; that the different purchases of goods from plaintiff by defendant were transacted by defendant through Clark & Trainer, who were its agents duly authorized in that regard; that their acts and doings in this respect were ratified, approved and confirmed by the board of directors and officers of the defendant corporation, and the judgment should be entered in this court in favor of plaintiff and against defendant for the balance due amounting to the sum of \$1022.06.

PLAINT IN EQUITY
IN FAVOR OF THE DEFENDANT

That as there is a balance due from the
defendant corporation to plaintiff on account of the transactions
set forth in the statement of claim to the amount of \$1000.00;
that the different purchases of goods from plaintiff by defendant
were transacted by defendant through Clark & Evans, who were its
agents duly authorized in that regard; that their acts and omissions
in this respect were ratified, approved and confirmed by the
board of directors and officers of the defendant corporation, and
the judgment should be entered in this court in favor of plaintiff
and against defendant for the balance due amounting to the sum of

\$1000.00.

VERDICT OF THE JURY

That the balance due is

\$1000.00.

PLAINT IS GRANTED

\$1000.00, and costs

TRADING IN GOODS AND SERVICES

Plaintiff for that sum

34969

THE AULT & WIDORG COMPANY,
a Corporation,
Appellee,

vs.

AMERICAN BREAD WRAPPER COMPANY,
a Corporation,
Appellant.

797
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 642²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$7200 entered upon the verdict of a jury, which was for the sum of \$5911.10 "plus interest at 5%." The claim was for the purchase price of certain inks sold and delivered. The defense presented was by way of off-set for damages alleged to have been sustained by defendant for failure of plaintiff in preceding transactions to deliver inks of the quality warranted or inks fitted to the purpose for which they were to be used, of which plaintiff was aware at the time of the transactions. Defendant claimed damages of \$17,041.77.

The statement of claim was filed March 3, 1927. The affidavit of merits was filed April 6, 1927, and an amended statement of claim in off-set was filed June 4, 1930. April 1, 1930, defendant filed a written motion to dismiss the suit supported by an affidavit to the effect that the plaintiff was an Ohio corporation; that it had been dissolved and all its assets sold to another corporation; that June 8, 1928, plaintiff caused to be filed in the office of the Secretary of State of Ohio a certificate to that effect; and that November 28, 1928, a certificate of withdrawal of the plaintiff from the state of Illinois, where it was licensed to do business, was filed with the Secretary of State of Illinois. The motion was denied.

It is urged that the judgment should be reversed on

THE A&L TRADING COMPANY,
a Corporation,
Appellee,
vs.
AMERICAN TRADING COMPANY,
a Corporation,
Appellant.

IN SENATE
OF ILLINOIS

1932

MR. JUSTICE
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$7500 entered upon the verdict of a jury, which was for the sum of \$2011.10 "plus interest at 6%." The claim was for the purchase price of certain items sold and delivered. The defense presented was by way of offset for damages alleged to have been sustained by defendant for failure of plaintiff in preceding transactions to deliver some of the goods purchased or items fitted to the purpose for which they were to be used, of which plaintiff was aware at the time of the transactions. Defendant claimed damages at \$17,001.77.

The statement of claim was filed March 2, 1927. The affidavit of merits was filed April 5, 1927, and an amended statement of claim in offset was filed June 4, 1930. April 1, 1930, defendant filed a written motion to dismiss the suit supported by an affidavit to the effect that the plaintiff was an Ohio corporation; that it had been dissolved and all its assets sold to another corporation; that June 2, 1928, plaintiff caused to be filed in the office of the Secretary of State of Ohio a certificate to that effect; and that November 25, 1928, a certificate of withdrawal of the plaintiff from the state of Illinois, was filed and licensed to do business, was filed with the Secretary of State of Illinois. The motion was denied.

It is urged that the judgment should be reversed on

three grounds: (1) the judgment is against the manifest weight of the evidence; (2) the court erred in denying the motion of defendant to dismiss; and (3) interest should not have been allowed.

It is urged that the motion to dismiss should have been granted because of the common law rule that all actions by or against a corporation abate upon its dissolution; that the laws of Ohio were not put in evidence, and that in Illinois, in the absence of such evidence as to the laws of another state, the presumption is that the common law prevails even when it has been changed by statute in this state. Woodbury v. U. S. Casualty Co., 284 Ill. 227, is cited to this point. The reply is that by sections 48a and 48b (Smith-Hurd's Ill. Rev. Stats., chap. 51) the courts of this state are now required to take judicial notice of all laws of a public nature enacted in any state or territory of the United States. We are referred to section 11964 of the Statutes of Ohio (Page's Ann. Ohio General Code, vol. 2, title 4, div. 7, chap. 2) which specifically provides that no action shall abate by reason of the dissolution of a corporation.

Defendant also urges that the statute which requires this court to take judicial notice of the Ohio statute was enacted after the beginning of this suit, and that it should not be held to be retroactive or applicable to this cause for that reason. The general rule is that laws which affect only procedural rights may be applied retroactively, while those which affect substantial rights may not be so applied. There can be no vested rights in mere procedure. (G. A. W. L. R. Co. v. Gutarie, 192 Ill. 579.) Indeed, defendant can not maintain his off-set at law under rules which he now asks be applied. (Duncan Lumber Co. v. Leonard Lumber Co., 332 Ill., 104.) Moreover, the question has been squarely passed on and decided contrary to defendant's contention by this court in Capital State Savings Bank v. Larson, 283 Ill. App. 479,

three grounds: (1) the judgment is against the manifest weight of
the evidence; (2) the court erred in denying the motion of dis-
missal; and (3) interest should have been allowed.
It is urged that the motion to dismiss should have
been granted because of the common law rule that all actions by or
against a corporation abate upon its dissolution; that the law of
Ohio was not put in evidence, and that in Illinois, in the ab-
sence of such evidence as to the law of another state, the pre-
sumption is that the common law prevails even when it has been
changed by statute in that state. [Section 1-101, Ill. Civ. Code, 1907, is cited to this point. The reply is that by section
42a and 42b (Anti-Trust Act, Rev. Stat., Chap. 41) the courts
of this state are now required to take judicial notice of all laws
of a public nature enacted in any state or territory of the United
States. We are referred to section 1100 of the Revised Statutes
(Page's Ann. Ohio General Code, vol. 2, title 4, div. 2, Chap. 17)
which specifically provides that no action shall abate by reason of
the dissolution of a corporation.
Respondent also urges that the statute which requires
this court to take judicial notice of the laws of this state was enacted
after the beginning of this suit, and that it should not be held to
be retrospective or applicable to this cause for that reason. This
ground also is not law which would necessitate reversal of
the judgment retroactively, while there is no vested right in
rights may not be so applied. There can be no vested right in
mere procedure. (Ill. Civ. Code, 1907, sec. 1-101.)
Indeed, respondent has not maintained his offer of law under which
this law can be applied. [Section 1-101, Ill. Civ. Code, 1907, is
cited in United States Supreme Court v. Johnson, 269 U.S. 129.]

and American Tank & Installation Co. v. Wurlitzer Co., 284 Ill. App. 514.

The controlling question in the case appears to be whether the verdict is manifestly against the weight of the evidence, as defendant contends it is. Defendant was in the business of printing bread wrappers, and plaintiff knew this and knew that the inks sold were to be used for that purpose. Irrespective of any express agreement, there would be an implied warranty by the vendor that the inks were to be suitable for that purpose. There was further evidence of an express warranty that the inks were to be ground solely in linseed oil and in driers not soluble in wax; that the inks were used by defendant in the manufacture of bread wrappers for a large number of customers, and that the wrappers did not give satisfaction because the ink had not dried. There was no evidence offered by defendant, however, tending to prove damages to the full amount alleged in the statement of claim in off-set. The testimony offered tended to show damages of not more than \$1637.24.

The controlling issue of fact in the case is whether the inks were of the kind and quality ordered. The president of the defendant corporation gave testimony to the effect that when his customers complained about the bread wrappers he "for his own satisfaction" preserved some samples of the ink purchased. He says he took one can from the ink which had proved satisfactory and another from that which had proved unsatisfactory and put them behind his desk without letting anyone else know about it, and that these cans had not been opened until they were submitted to a chemist. He further testified after refreshing his memory that the wrapping paper manufactured from the alleged defective ink was made between November 5, 1925, and January 25, 1926. Upon cross-examination he testified that he could not say whether he received either bucket

and another fact is that the ink was not used in the case.

111.

The controlling question in the case appears to be

whether the verdict is manifestly against the weight of the evi-

dence, as defendant contends it is. Defendant was in the posi-

tion of printing broad wrappers, and plaintiff knew this and knew

that the ink sold was to be used for that purpose. It is not

of any express agreement, there would be an implied warranty by the

vender that the ink was to be suitable for that purpose. There

was further evidence of an express warranty that the ink was to

be fit and solely fit for use in the business in which it was

used. The ink was used by defendant in the manufacture of broad

wrappers for a large number of customers, and that the wrappers did

not give satisfaction because the ink had not dried. There was no

evidence offered by defendant, however, tending to prove damages to

the full amount alleged in the statement of claim in this case. The

testimony offered tended to show damages of not more than \$100.00.

The controlling issue of fact in the case is whether

the ink was of the kind and quality ordered. The president of

the defendant corporation gave testimony to the effect that when

his customers complained about the broad wrappers he "for his own

satisfaction" ordered some samples of the ink returned. He says

at that time and place the ink was of the kind and quality ordered and

another time that which had proved unsatisfactory and put them

back on his desk without telling anyone else how about it, and that

these same ink had been ordered which were admitted to a sample.

As further testified after plaintiff's attorney had been

advised that the ink was not satisfactory, the ink was made between

December 1, 1933, and January 22, 1934. Upon cross-examination he

of ink in evidence before December 1, 1925. When asked to look at the label on one of the buckets of ink and tell the date printed on it, he replied, "December 3d or 5th, I can't see any more." He was then asked if the year was 1925, and he said "Yes." The following colloquy then took place:

Q. Now, I will ask you to look at the date on this other bucket and tell me the date on that. A. December 14th.

Q. So you got both of these buckets of ink in your place of business after the 1st of December, 1925, didn't you?

A. Now do we know what those stamps mean? They might be put on there in October or November, or maybe in January. Who is responsible for those stamps? I couldn't tell when I received them, but the stamps don't prove anything that they are correct."

The witness also said he did not pay any attention to the date on the can at the time he took the cans into his office.

Credible and uncontradicted proof was offered by plaintiff to the effect that all labels on ink going out of plaintiff's plant contained the date on which it was made. This cross-examination therefore threw a doubt upon the reliability of the testimony of defendant's expert who, after a chemical analysis testified that the chemical content of the ink did not conform to the requirements of the contract. There was also evidence for plaintiff tending to show that the wrapping paper had been waxed too soon after printing. Plaintiff offered further evidence of chemical experts whose testimony, contradicting that of the expert produced by defendant, tends to show that the inks conformed in every respect to the contract. Manifestly in this condition of the record the question was for the jury, and we ought not to overrule the verdict of the jury and the judgment of the court, who saw and heard the witnesses testify and therefore had advantages over us in determining the question of their veracity.

The original statement of claim shows a demand for \$5964.25 with interest thereon at 5% per annum from March 30, 1926, to the date of judgment, and the affidavit of defendant's claim in

of ink in evidence before December 1, 1935. When asked to look at the label on one of the barrels of ink and tell the date printed on it, he replied, "December 24 or 25th, I can't see any more." He was then asked if the year was 1935, and he said "Yes". The

following colloquy then took place:

"Q. Now, I will ask you to look at the date on this other barrel and tell me the date on that. A. December 14th. Q. Do you not both of these barrels of ink in your place of business after the last of December, 1935, didn't you? A. Now is we know what these stamps mean? They might be put on there in October or November, or maybe in January. Who is responsible for these stamps? I couldn't tell when I received them, but the stamps don't prove anything that they are correct."

The witness also said he did not pay any attention to the date on the can at the time he took the same into office. Scientific and unscientific proof was offered by

plaintiff to the effect that all labels on ink going out of plaintiff's plant contained the date on which it was made. This expert examination therefore threw a doubt upon the reliability of the testimony of defendant's expert who, after a chemical analysis testified that the chemical content of the ink did not conform to the requirements of the contract. There was also evidence for plaintiff's finding it more than probable that the ink was not as represented after plaintiff's expert offered further evidence of chemical experts whose testimony, contradicting that of the expert presented by defendant, tends to show that the ink contained in every barrel to the contract. Relatively in this condition of the record the question was for the jury, and we cannot say to exclude the verdict of the jury and the judgment of the court, who saw and heard the witnesses testify, and therefore had advantage over us in determining the question of their veracity.

The original statement of claim shows a demand for \$100.00 with interest thereon at 5% per annum from March 30, 1935, to the date of judgment, and the affidavit of defendant's claim is

set-off was to the effect that \$17,041.77 was due to defendant. Defendant contends that the court erred in its instruction to the jury upon the question of interest. The court instructed the jury that if they should find in favor of defendant they should take into consideration the fact that there was an admitted amount due and owing plaintiff; and further:

"Whether or not they (plaintiff) are entitled to interest on that it is for you to decide. I just give you that little bit of instruction so that you will not be misled by any statement that I have made to you or you thought I made to you."

As already stated, interest was allowed by the jury and included in the judgment. Plaintiff insists that interest should have been allowed on the authority of Luetgert v. Volker, 153 Ill. 365, and Sachs v. Friedman Bros. & Lipaky Co., 209 Ill. App. 427.

The allowance of interest in cases of this character is controlled by section 2, chapter 74, of the statutes (Smith-Burd's Ill. Rev. Stats. 1928, p. 1739) which provides:

"Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay of payment."

The cases upon which plaintiff relies disclose facts where the accounts between the parties had been liquidated. The evidence here does not disclose any such settlement of account with an ascertainment of a balance as is contemplated by the statute. At any rate, if the jury was to be permitted to pass upon the question of allowing interest, the instruction should have been accurate. It was not.

The court erred in giving this instruction, but the error may be cured by a remittitur. If, therefore, plaintiff

...and the question of interest. The court instructed the jury that if they should find in favor of defendant they should take into consideration the fact that there was an admitted amount due and owing plaintiff; and further:

"Whether or not they (plaintiff) are entitled to interest on this is for you to decide. I just give you that little bit of instruction so that you will not be misled by any statement that I have made to you or you thought I made to you."

As already stated, interest was allowed by the jury and included in the judgment. Plaintiff insists that interest should have been allowed on the basis of Bankers' Trust Co. v. City of New York, 100 N.Y. 288, and Bank v. City of New York, 100 N.Y. 288. The allowance of interest in cases of this character is controlled by section 2, chapter 74, of the statutes (Bankers' Trust Co. v. City of New York, 100 N.Y. 288, which provides:

"Creditors shall be allowed to receive at the rate of five per centum per annum for all money after they become due, on any bond, bill, promissory note or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of accounts from the day of liquidating accounts between the parties and ascertaining the balance on money received for the use of another, and retained without the owner's knowledge, and on money withheld by an unaccountable and vexatious delay of payment."

The cases upon which plaintiff relies are those where the accounts between the parties had been liquidated. The evidence here does not disclose any such settlement of accounts, and an ascertainment of a balance as is contemplated by the statute. As a result, it is the duty of the court to refuse to give the instruction allowing interest, the instruction therein have been accurate. It was not.

The court erred in giving this instruction, but the error may be cured by a verdict, It, therefore, plaintiff

within ten days will remit the amount of interest allowed, which was \$1288.90, the judgment will be affirmed for the balance; otherwise it will be reversed and remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

O'Conner and McSurely, JJ., concur.

34985

W. C. HANDLEY,
Appellant,

vs.

ROY OLSON et al.,
Appellees.

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2627 A. 642³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

July 16, 1929, judgment by confession was entered in favor of plaintiff, W. C. Handley, and against defendants, Roy Olson and Bridget Dickie, for the sum of \$503.00. January 22, 1930, upon motion of Bridget Dickie an order was entered that the judgment be set aside and stand as security, and that her petition stand as an affidavit of merits. The cause was tried by the court and there was a finding in favor of Bridget Dickie and a judgment in her favor for costs against plaintiff, to reverse which plaintiff has perfected this appeal.

The affidavit of merits set up in substance that Roy Olson was negotiating with the West Town Auto Sales Company for the purchase of an automobile and that he wished Bridget Dickie to identify him with the Sales Company; that she lived near the place of business of the company and was well known to its agents and employees; that she went to the office at the request of Olson and signed an instrument in writing presented by the employees of the Sales company to her; that her sight was so poor she was unable to read the paper given her to sign; that she did not know the writing was a promissory note when she signed it; that she did not know the contents thereof; that the writing was not read to her; that the agents of the Sales company were aware of these facts and knew that she did not comprehend the papers given to her to sign and that she did not know that the signing of the papers meant she

U. S. MARSHAL
Applicant
NOT ORDERED BY
Appellate

U. S. MARSHAL
Applicant
NOT ORDERED BY
Appellate

282 I.A. 642

MR. PRESIDING JUSTICE HATHAWAY
DELIVERED THE OPINION OF THE COURT.

July 10, 1937. Judgment by confession was entered in

favor of plaintiff, W. C. Hendrick, and against defendant, Ray

Gison and Bridge Blanks, for the sum of \$200.00. January 27, 1937,

upon motion of Bridge Blanks an order was entered that the judg-

ment be set aside and stand as a nullity, and that her petition

stand as an affidavit of merits. The cause was tried by the

court and there was a finding in favor of Bridge Blanks and a

judgment in her favor for costs against plaintiff, in reverse

which plaintiff has petitioned this court.

The affidavit of merits set up in substance that Ray

Gison was negotiating with the West Low Lake Sales Company for

the purchase of an automobile and that he wished Bridge Blanks

to identify him with the Sales Company; that she lived near the

place of business of the company and was well known to its agents

and employees; that she went to the office at the request of Gison

and signed an instrument in writing presented by the employees of

the Sales company to her; that her right was so poor she was unable

to read the paper given her to sign; that she did not know the

writing was a promissory note when she signed it; that she did not

know the contents thereof; that the writing was not read to her;

that the agents of the Sales company were aware of these facts and

that she did not comprehend the papers given to her to sign

and that she did not know that the signing of the papers meant she

was assuming a financial obligation. In short, the defense set up by the affidavit was that the signature of Bridget Dickie to the note was obtained by fraud and misrepresentation. The affidavit of merits also averred that plaintiff was not an innocent purchaser of the note but was in fact and in law an agent of the seller, and that the assignment was a mere subterfuge and a disguise intended to protect the seller, who obtained her signature by fraud and connivance.

It is argued for reversal that the burden of proof was upon the defendants and that the finding and judgment is against the weight of the evidence and that it is the duty of this court to reverse for that reason. There is no question as to the law applicable and that it is the duty of this court to examine the evidence and to reverse where the finding and judgment is clearly and manifestly against the weight of it.

Defendant Bridget Dickie argues that the question is not before this court upon the record for the reason that it does not appear that plaintiff preserved any exception to the finding of the court at the entry of the judgment. To that point a number of cases are cited - Jacob v. C. & E. I. Ry. Co., 145 Ill. App. 140; Young v. Wells Glass Co., 137 Ill. App. 626; Rybaczynk v. Rybaczynk, 189 Ill. App. 587. There is no doubt that these cases state the rule which was formerly applied, but it is now held that the amend-
Ill.
ment of 1911 to section 81 of the Practice act (Smith-Hurd's Rev. Stats. 1929, p. 2132) has had the effect of doing away with the necessity of formal exceptions to rulings of the trial court. Miller v. Andersen, 269 Ill. 608. This contention therefore cannot prevail.

It should be further noticed, however, that while the burden of proof was upon defendants to establish the defense set up

[illegible]

It is argued for reversal that the burden of proof was upon the defendants and that the finding and judgment is against the weight of the evidence and that it is the duty of this court to reverse for that reason. There is no question as to the law applicable and that it is the duty of this court to examine the evidence and to reverse where the finding and judgment is clearly and manifestly against the weight of it.

... and before this court upon the record for the reason that it does not appear that plaintiff preserved any exception to the finding of the court at the entry of the judgment. In that point a number of cases are cited - Levy v. ... 100 Ill. App. 140;

III
 ment of 1911 to section 51 of the Practice act (Anti-Land's Rev.
 States, 1932, p. 2132) has had the effect of doing away with the
 necessity of formal exceptions to rulings of the trial court.

It should be further noted, however, that the

in the affidavit of merits, the finding of the Judge who tried the cause as to controverted questions of fact is entitled to the same weight in this court as the verdict of a jury. Caldwell v. Chicago City Ry. Co., 211 Ill. App. 310; Illinois-Indiana Fair Assoc. v. Phillips, 241 Ill. App. 454. The question here to be decided therefore is, whether applying these rules as to the burden of proof and the weight to be given to the finding of the trial Judge, this court upon a review of the whole evidence can say that the finding and judgment as entered is clearly against the weight of it.

No contention is made upon the trial nor is it argued here that plaintiff is an innocent holder for value. Upon the trial plaintiff introduced in evidence a note for \$451.60, dated July 10, 1929, payable to the West Town Auto Sales company as follows: \$20 on July 10, 1929, and \$8.64 each week thereafter. The note contains power to confess judgment, which is signed by Roy Olson. On the back of the note appears a printed joint and several unconditional guaranty of payment, authorizing the maker to obtain extension or extensions without notice and waiving presentment for payment, demand, protest and notice of protest and non-payment and providing that if the note or interest was not paid when due the amount remaining unpaid should immediately become due and payable at the option of the holder. It also provides that the acceptance of any installment by the payee or holder after the time it became due should not be held to establish a custom and should not relieve the endorsers or waive any rights of the payee or holder; further, that the holder of the note should not be required to look to the security for the payment of the note. It further provides:

"And we and each of the guarantors hereon hereby consent and agree that the defense of the maker of this note, if any, whether on account of misrepresentations, failure of consideration, fraud or otherwise, shall constitute no defense as against us or either of us."

in the affidavit of notice, the finding of the jury was that the
cause as to controverted questions of fact is entitled to the same
weight in this court as the verdict of a jury. Edwards v. Edwards
111 Ill. App. 484. The question here to be decided here-
fore is, whether requiring these rules as to the burden of proof and
the weight to be given to the finding of the trial judge, this court
upon a review of the whole evidence can say that the finding and
judgment as entered is clearly against the weight of it.
No contention is made upon the trial nor is it argued
here that plaintiff is an innocent holder for value. Upon the trial
plaintiff introduced in evidence a note for \$481.00, dated July 10,
1930, payable to the West Town Auto Sales company as follows: \$481.00
on July 10, 1930, and \$8.84 each week thereafter. The note contains
power to receive payment, which is signed by Ray Olson, on the
back of the note appears a printed joint and several unconditional
guaranty of payment, and stating the maker to obtain extension or
extensions without notice and without presentment for payment, de-
mand, protest and notice of protest and non-payment and providing
that if the note or interest was not paid when due the amount remain-
ing unpaid shall immediately become due and payable at the option
of the holder. It also provides that the acceptance of any in-
statement by the payee or holder after the time it became due
should not be held to establish a custom and should not relieve
the maker or holder of the note of the duty to pay when due, further,
that the holder of the note should not be required to look to the
guaranty for the payment of the note. It further provides:
"and we and each of the guarantors herein hereby consent and
agree that the holder of the note at any time, in any manner
or on account of misrepresentation, failure of consideration, fraud
or otherwise, shall constitute no defense as against us or either
of us."

Following this is the usual power to confess judgment with release of errors that might intervene in entering up the same and consent to immediate execution. This writing or guaranty on the back of the note appears to be signed by Roy Olson, Mrs. M. Dickie and Bridget Dickie. On the side of the note appear the words, "All signatures witnessed by John J. O'Leary."

Plaintiff then rested. Mrs. Dickie then testified to the effect that she was 72 years old; that Olson had been her son-in-law; that some years before there had been a divorce; that she knew the place of business of the Sales company and went there with Olson; that she was asked if she knew Olson and she said she did; that she was then asked to sign her name to a paper that she knew him, which she did, but could not tell what paper it was; that she signed the note a day or two after she was at the Sales company; that she went to the Sales company to tell them that she knew Olson; that a few days later she was at plaintiff's office on Madison street and then signed the paper that she knew him; that no one read the papers to her; that she did not read them herself; that she could not read them without her glasses; that using glasses made her head dizzy; that she had been that way about five or six years; that she had never been in business at all. She says that her husband died 23 years ago; that she earns her living by running a rooming house; that she owned two lots located in Garfield Ridge; that she remembered that the men at the Sales company said something to her about real estate but she could not tell what was said; that she had no interest in the automobile; that at the time she signed the note she did not know what it contained.

On cross-examination she stated that she paid taxes all the time on the two lots at the bank; that her daughter lived with her; that she had spectacles in her home but never used them; that she couldn't see the paper she signed; that her full name was

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at the note appears to be signed by Roy Olson, Mrs. M. Dickie and
Bright Dickie. On the side of the note appear the words "All
instrument witnessed by John J. O'Leary."
Witnesses then recede. Mrs. Dickie then testified to
the effect that when she was 17 years old; that Olson had been her son-
in-law; that some years before there had been a divorce; that she
knew the kind of business of the Sales company and went there
with Olson; that she was asked if she knew Olson and she said she
did; that she was then asked to sign her name to a paper that she
knew him, which she did, but could not tell what paper it was; that
she signed the note a day or two after she was at the Sales company;
that she went to the Sales company to tell them that she knew Olson;
that a few days later she was at Bright's office on Madison
street and then signed the paper that she knew him; that she was
told the paper to her; that she did not read the paper; that
she could not read them without her glasses; that when she signed
made her head dizzy; that she had been that way about five or six
years; that she had never been in business at all. She says that
her husband died 25 years ago; that she cannot now living by reading
a reading matter; that she owned two lots located in Northside Chicago;
that she remembered that the men at the Sales company said something
to her about real estate but she could not tell what was said; that
she had no interest in the matter; that at the time she signed
the note she did not know it was a contract.
On cross-examination she stated that she said later
all the time on the two lots at the bank; that her daughter lived
with her; that she had spoken in her name but never read them;
that she could not see the paper she signed; that her full name was

Mrs. Robert Dickie; that when she first went to the office of the Sales company she was told that Olson was buying a car and was asked about the lots; that Olson did not tell her the price of the car.

Roy Olson testified that he was asked by the Sales company to get some signers that knew him, and that he got Mrs. Dickie and Mrs. McCormick, a next door neighbor; that he asked what the signatures were for and was told "that they knew me and I said all right;" that he asked if ^{he} got out of work and couldn't pay, "then what?" and was told that the car would be taken back; that a few days later Mrs. Dickie went with him for a ride to plaintiff's office on Madison street; that when they got there Mrs. Dickie was asked to sign some other paper. He also testified:

"She did sign something, and I signed one, myself. She went and wrote it and she could hardly write and they asked her if she could write it, and I am pretty sure she wrote her own name."

He said that he did not know that Mrs. Dickie had signed a judgment note; that he could read, and that he saw the note, signed it and knew that he was signing to buy a car and knew it was a note and provided for payments; that he was not able to remember if he signed before or after Mrs. Dickie; that he asked her to sign it. He said, "They wanted to know if she had property and she said yes, she had two lots, and they asked her - they wanted to know if she knew me." He said they wanted to make sure he hadn't picked up somebody from any place to sign the paper.

Harry Rosenstein then testified for plaintiff that he conducted the business known as the West Town Auto Sales; that he knew Olson and had known Mrs. Dickie for some time; that he talked with Mrs. Dickie about the automobile sale about two days after Olson first came in to look at the car; that he had told Olson he would have to find somebody that had property to sign for his payment; that Olson told him that his mother-in-law would sign for

Mr. Robert Dickie; that when the first word of the article of the
false company was said that Dickie was saying a man and was
called about the fact; that Dickie did not tell her the name of
the car.

Ray Olson testified that he was asked by the false
company to get some signers that knew him, and that he got Mrs.
Dickie and Mrs. Westerman, a next door neighbor; that he asked
what the signers were for and was told "that they knew me and
I said all right;" that he asked ^{he} her out of work and couldn't
pay, "then what?" and was told that the car would be taken back;
that a few days later Mrs. Dickie went with him for a ride to
Dickie's office on Madison street; that when they got there Mrs.
Dickie was asked to sign some other paper. He also testified:

"She did sign something, and I signed one, myself. She
went and wrote it and she would hardly write and they asked
her if she could write it, and I am pretty sure she wrote her
own name."

He said that he did not know that Mrs. Dickie had signed a judgment
note; that he could read, and that he saw the note, signed it and
knew that he was signing to pay a car and knew it was a note and
provided for payments; that he was not able to remember if he
signed before or after Mrs. Dickie; that he asked her to sign it.
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Olson first came in to look at the car; that he had told Olson he
would have to find somebody that had property to sign for his pay-
ment; that Olson told him that his mother-in-law would sign for

him; that he said that if she wanted to do it let her come down and do so. He further testified that Olson told him that Mrs. Dickie wished to see him at home; that he went to the house and told Mrs. Dickie that if she signed for Olson and if Olson didn't make good she would have to pay; that she would have to sign a judgment note on the house because Olson had paid only \$20 down on the car. Rosenstein says that Mrs. Dickie told him Olson was her son-in-law, although the daughter was divorced; that she said, "He is the only boy I like in the family," and that if he didn't make good she would pay; that he told her that if Olson didn't pay she would have to pay, and that she replied, "He works steady, he'll pay;" that on the following day Mrs. Dickie came to his office with Olson and signed a blank note and was supposed to take it down to plaintiff's place of business but that plaintiff would not accept it. He says that the order for the car was signed that day; that he talked with Mrs. Dickie about the lot she owned and asked if the property was in her name, telling her that otherwise it couldn't be accepted; that he told Mrs. Dickie:

"I know you as a neighbor and if something would come up between you and your son-in-law, I wouldn't like to be between it because you are an old woman, and I hate to see you get in trouble, and she said, 'I will do anything for my boy.'"

He says this was the day she signed the paper and that the papers were taken to plaintiff the next day by his boy, and that Mrs. Dickie and Olson went with him; that when she came back from plaintiff he asked her whether she had signed all the papers; that she said it was all ready, and that he then released the car; that she said "Everything is all right, all signed up. He can have the car." This witness also testifies that Mrs. Dickie read the note and that he thinks she put her glasses on; that he explained the note to her and that he does not know what happened at Handley's.

Carl William Puls, manager and accountant for the

that he said that if she wanted to do it let her come down
do so. He further testified that Olson told him that Mrs.
Olson wanted to see him at home; that he went to the house and
Mrs. Dickie told him she signed for Olson and it Olson didn't
a good she would have to pay; that she would have to sign a
check note on the house because Olson had paid only \$20 down on
car. Rosenblatt says that Mrs. Dickie told him Olson was not
in-law, although the daughter was divorced; that she said, "The
the only boy I like in the family," and that at the time it was
she would pay; that he told her that if Olson didn't pay she
in have to pay, and that she replied, "We won't steady, will
"; that on the following day Mrs. Dickie came to his office
Olson and signed a check note and was supposed to take it
to plaintiff's place of business but that plaintiff would not
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he talked with Mrs. Dickie about the car and asked and asked
the property was in her name, saying that otherwise it
that he suggested; that he said Mrs. Dickie:
"I know you are a neighbor and if something would come up
between you and your son-in-law, I wouldn't like to be between
it because you are an old woman, and I hope to see you get in
trouble, and she said, 'I will do anything for my boy.'"
says this was the day she signed the paper and that the papers
taken to plaintiff the next day by his boy, and that Mrs.
Olson and Olson went with him; that when she came back from plaintiff
he asked her whether she had signed all the papers; that she
it was all ready, and that he then released the car; that the
"everything is all right, all signed up. We can have the
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that he thinks she got her glasses on; that he explained the
to her and that he does not know what happened at plaintiff's
Carl William Paine, manager and accountant for the

Handley Finance Company, testified that Mrs. Dickie came to the office in July; that Olson and the son of the automobile dealer came with her; that they produced the papers and that Mrs. Dickie laid them on the counter; that he looked at them and saw they were in blank and signed by Mrs. Dickie and Olson; that plaintiff then came out of his office and in the presence of the parties in the room asked Mrs. Dickie how she came to sign blank papers; that she said the automobile dealer had requested her to do so until she got to the office to sign the other papers and then plaintiff took this set of papers she brought in and tore them up in little bits and gave them to her and gave her a severe lecture; that he asked her if she understood that it wasn't a good thing to sign papers without anything written on them, to which she replied, "Yes;" that she said she had the papers and wasn't afraid of that because she would see that the proper notations were put on the papers; that plaintiff tore the papers up for her and a new set was made up and signed. This witness also says that when she signed the new papers he explained to her that she was endorsing a note for her son-in-law and her property was security for the purchase of that automobile; that she said she understood it all, it had been explained to her and she was willing to sign this note because "he was an honest boy and a hard working boy and that she knew he would take care of it." The witness says that he then explained to her that it would run for some time, and that if Olson lost his job she said she would help him out; that he told her how much Olson was paying down; that the reason her property was security was because her son-in-law was paying only \$20 down on the car, and he, the witness, told her what the payments were on the note each week; that all this conversation took place before she signed the second set of papers.

John J. O'Leary testified that he had been with the

and they discussed the matter, but they did not go to the
place in 1917; that Olson and the son of the automobile dealer
came with her; that they produced the papers and that Mrs. Dickie
saw them on the counter; that he looked at them and saw they were
a blank and signed by Mrs. Dickie and Olson; that plaintiff then
came out of his office and in the presence of the parties in the
room asked Mrs. Dickie how she came to sign blank papers; that she
said the automobile dealer had requested her to do so until she
got to the office to sign the other papers and then plaintiff took
his set of papers she brought in and gave them up in little bits
and gave them to her and gave her a receipt therefor; that he asked
her if she understood that it was a good thing to sign papers
without anything written on them, to which she replied, "Yes";
that she said she had the papers and when it came to that business
he would see that the proper notations were put on the papers;
that plaintiff told the person on the car and a man who was with
him and signed. This witness also says that when she signed the car
papers he explained to her that she was endorsing a note for her
son-in-law and her property was security for the purchase of that
automobile; that she said she understood it all, it had been ex-
plained to her and she was willing to sign this note because "he
is an honest boy and a hard working boy and that she knew he
could take care of it." The witness says that he then explained to
her that it would run for some time, and that if Olson lost his job
he said she would help him out; that he told her how much Olson
was paying down; that the reason her property was security was be-
cause her son-in-law was paying only \$20 down on the car, and he,
the witness, told her what the payments were on the note each week;
that all this conversation took place before she signed the second

Handley Finance Company for three years; that the parties came to the office of Handley in July; that the note was handed to them signed in blank; that Handley told Mrs. Dickie to never sign anything in blank; and he tore it up and threw it in the waste basket; that before the new note was made Handley told Mrs. Dickie that she had signed a judgment note and mortgage, but he, the witness, did not remember what she said in reply; that before Mrs. Dickie signed the other papers prepared in the office he told her that it was a judgment note and that if Olson didn't pay she was guaranteeing the payment; that she told him Olson was her son-in-law and she was sure he would pay and if he didn't pay she would help him out.

Mrs. Dickie testified in rebuttal, denying these conversations as recited and again stating that she was told she was only signing that she knew the man.

The record here presents a case where all the witnesses gave their testimony in a way indicating partisanship, and it is apparent that the whole truth has not been told with entire frankness. Two witnesses state facts tending to sustain the defense set up in the affidavit of merits, and three witnesses deny the truth of the facts as narrated by the witnesses for defendant. Plaintiff, who, according to the testimony of the witnesses produced by him, was present at the time in question, did not testify. The narrative about a paper signed in blank which plaintiff is said to have torn up, at the same time delivering a warning to defendant as to the danger of signing papers in blank and as to the responsibilities she was about to assume, does not seem probable under all the circumstances. It is apparent that the trial court did not believe this testimony and that he exercised his right to apply the well known rule that where a witness testifies falsely in regard to a material fact, his whole evidence may be disregarded unless corroborated. On the other hand, as already stated, the evidence of

...the witness was to
...the office of ... in ...; that the ... was ... to ...
...in ...; that ... in ...
...in ...; and he ... it up and threw it in the waste basket;
...before the ... was made ... said ...
...had signed a ... note and ...; but he, the witness,
...not remember what she said in reply; that before Mrs. ...
...the ... appeared in the ... he said that ...
...a ... note and that it ... that she was ...
...the ...; that she told him ... was her son-in-law and
...he was sure he would pay and if he didn't pay she would help him out.
...Mrs. ... testified in ...
...as testified and again stating that she was ... and was
...saying that ... knew the man.
The record here presents a case where all the witnesses
have their testimony in a way indicating partiality, and it is ap-
parent that the whole truth has not been told with entire frankness.
Two witnesses state facts leading to establish the defense set up in
the affidavit of ... and three witnesses deny the truth of the
facts as narrated by the witnesses for defendant. Plaintiff, who,
according to the testimony of the witnesses produced by him, was
present at the time in question, did not testify. The narrative
about a paper signed in blank which plaintiff is said to have torn
up, at the same time delivering a warning to defendant as to the
danger of signing papers in blank and as to the responsibility
he was about to assume, does not seem probable under all the cir-
cumstances. It is apparent that the trial court did not believe
his testimony and that he exercised his right to reject the whole.
Known also that when a witness testifies falsely in regard to a
material fact, his whole evidence may be disregarded unless cor-
roborated. On the other hand, as already stated, the evidence of

Olson does not seem to be frank, and Mrs. Dickie was of course very much interested in the result of the suit. However, upon a review of the whole record, this case would seem to be one in which the finding of the trial Judge, who saw and heard the witnesses, is entitled to very great weight. While the case is very close upon the facts, we with some hesitation conclude that this court would not be justified in holding that the finding of the trial court is clearly and manifestly against the weight of the evidence.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

...and it was of course
very much interested in the result of the trial. However, when a
review of the whole record, this case would seem to be one in which
the finding of the trial judge, who saw and heard the witnesses, is
entitled to very great weight. While the case is very close upon
the facts, we with some hesitation conclude that this court would
not be justified in holding that the finding of the trial court is
clearly and manifestly against the weight of the evidence.
The judgment is therefore affirmed.

REVEREND,

Donner and McGarity, JJ., concur.

34998 and 34999

ALINE MASON,
Appellee,

vs.

WASHINGTON FIDELITY NATIONAL
INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 542⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought two suits upon two policies of insurance on the life of Walter Mason, in each of which she was named as beneficiary. The suits were consolidated for hearing. The trial was by the court and judgment was entered in favor of plaintiff in one of the cases for \$127.50 and in the other for \$358. Appeals were perfected from both judgments, and the causes have been consolidated for hearing in this court.

When the cause came on for hearing it was agreed between the parties that the question involved was whether the insured was or was not in sound health at the time he made application for the policies and on the date upon which the policies were issued. The applications for the policies were in writing and executed September 5, 1928, and the policies were executed September 17, 1928. The insured died March 28, 1930.

Upon the trial defendant assumed the burden of proving that the insured was not in good health at the time the policies were issued and offered in evidence the proofs of death which plaintiff had filed with defendant to substantiate her claim as beneficiary in the policies, and these proofs were received in evidence over plaintiff's objection. In reply to questions by the court plaintiff stated in substance that defendant refused to pay the policies but offered to return the premiums which had been paid

24228 and 24229

ALICE KASON,
Appellee,

VERSUS
NATIONAL TIMELY NATIONAL
LAWYERS ASSOCIATION, a corporation,
Appellant.

202 I.A. 642

MR. CHIEF JUSTICE ROBERTS
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought two suits upon two policies of insurance on the life of Walter Kason, in each of which she was named as beneficiary. The suits were consolidated for hearing. The trial was by the court and judgment was entered in favor of plaintiff in one of the cases for \$127.50 and in the other for \$250. Appeals were perfected from both judgments, and the causes have been consolidated for hearing in this court.

When the cases came on for hearing it was agreed between the parties that the question involved was whether the insured was or was not in sound health at the time he made application for the policies and on the date upon which the policies were issued. The applications for the policies were in writing and executed September 2, 1928, and the policies were executed September 17, 1928. The insured died March 26, 1930.

Upon the trial defendant assumed the burden of proving that the insured was not in good health at the time the policies were issued and offered in evidence the reports of death which plaintiff had filed with defendant to substantiate her claim as beneficiary in the policies, and these reports were received in evidence over plaintiff's objection. In reply to questions by the court plaintiff stated in substance that defendant refused to pay the policies but offered to return the premiums which had been paid

thereon. Defendant then moved for a finding in its favor on the ground that the proofs of death showed that the insured was not in sound health on the date of the policies, but the motion was not granted. Defendant then produced as a witness Albert W. Mintz, who in response to questions testified that he had been employed by the defendant company four about four years; that he was a field superintendent of defendant and that he wrote the applications for insurance on the life of Walter Mason. He identified the applications which were produced and said that he asked the applicant all the questions which appeared thereon and put down the answers on both applications as they were given and that the applicant, Walter Mason, then signed these applications. The witness also identified the signature thereto as being that of the insured. The applications were received in evidence, and that numbered 983643, which was for the amount of \$127.50, stated that the insured was then in good health and free from the effects of any injury; that he had never been sick or disabled from accident, disease or injury; that he was not deaf, dumb, blind or ruptured, nor did he have any physical or mental defect or infirmity; that he affirmed the answers were true and agreed that they should form the basis and consideration for the issuance of the policy, and that if the answers were untrue the policy should be void and all money paid thereon should be forfeited to the company. After the signature of the insured appears in writing the certificate of the field superintendent to the following effect:

"I certify that I personally saw the life proposed and that he appears to be of the age stated and I consider him a good risk. I further certify that I witnessed the applicant's signature hereunto."

This certificate was signed by A. W. Mintz and dated September 5, 1923.

In application No. 0189938, which was for insurance in the amount of \$348, the applicant in response to the question, "What

The defendant then moved for a finding in its favor on the ground that the policy of death showed that the insured was not in second health on the date of the policies, but the motion was not granted. The defendant then produced as a witness Albert W. Hints, who in response to questions testified that he had been employed by the defendant company for about four years; that he was a field representative of defendant and that he wrote the applications for insurance on the life of Walter Hanson. He identified the applications which were produced and said that he asked the applicant all the questions which appeared thereon and put down the answers on both applications as they were given and that the applicant, Walter Hanson, then signed these applications. The witness also identified the signature thereto as being that of the insured. The applications were received in evidence, and that numbered 333643, which was for the amount of \$125.00, stated that the insured was then in good health and free from the effects of any injury; that he had never been sick or disabled from accident, disease or injury; that he was not deaf, dumb, blind or maimed, nor did he have any physical or mental defect or infirmity; that he affirmed the answers were true and agreed that they should form the basis and consideration for the issuance of the policy, and that if the answers were untrue the policy should be void and all money paid thereon should be forfeited to the company. After the signature of the insured appeared in writing the certificate of the field representative to the following effect:

"I certify that I personally saw the life proposed and that he appears to be of the age stated and I consider him a good risk. I further certify that I witnessed the applicant's signature thereto."

This certificate was signed by A. W. Hints and dated September 2, 1911. It is submitted that this is a valid certificate, which was not intended to be a certificate of fact, the applicant in response to the questions, "that

is the present condition of health?" answered "Good," and to the question, "When last sick?" answered "Never," and to the question, "Does any physical or mental defect or infirmity exist?" answered "No." Then follows a long list of ailments to which the human kind is subject, among which is "disease of the heart," and a negative answer was given by the applicant as to these and other ailments. The application states that the applicant had not been under the care of a physician within three years last past, had never been under treatment in a hospital, dispensary or asylum; that the statements recorded therein were true and complete; that he agreed that any misrepresentation wilfully made should render the policy void, and that the policy should not be binding upon the company unless upon its date he should be alive and in sound health. This application was also signed by the insured, and thereon appears the certificate of the field superintendent, Mintz, to the effect that September 5, 1928, he had personally seen and questioned the life proposed and recommended that the company accept the risk.

The proofs of death offered by defendant consist first of the claimant's certificate of death, which states that the cause of death was "heart trouble;" that she did not know what caused the disease; that the doctor who first treated the deceased was Dr. Jackson, and that the beneficiary was 35 years of age. Second, the attending physician's certificate, which is signed by Gordon H. Jackson, states that he had known the deceased one week and was his physician during that time; that the date of his first treatment in the last illness was March 22nd, and that of the last treatment March 28th. In response to questions calling for information regarding prior treatment, for what and by whom, the Doctor states, "Don't know." The Doctor further states that the immediate cause of death was "acute myocarditis;" that the con-

is the present condition of the patient? "No," and to the question, "When last sick?" answered "Never," and to the question, "Does any physical or mental defect or infirmity exist?" answered "No." Then follow a long list of ailments to which the human kind is subjected, among which is "disease of the heart," and a negative answer was given by the applicant as to these and other ailments. The applicant states that the applicant had not been under the care of a physician within three years last past, had never been under treatment in a hospital, dispensary or asylum; that the statements recorded therein were true and complete; that he agreed that any misrepresentation willfully made should render the policy void, and that the policy should not be binding upon the company unless upon its date he should be alive and in sound health. This application was also signed by the insured, and thereon appears the certificate of the field superintendent, dated to the effect that September 8, 1918, he had personally seen and questioned the life proposed and recommended that the company accept the risk.

The policy of death offered by defendant contains first of the applicant's certificate of death, which states that the cause of death was "heart trouble"; that she did not know what caused the disease; that the doctor who first treated the deceased was Dr. Jackson, and that the death occurred at 35 years of age. Second, the attending physician's certificate, which is signed by Doctor W. Jackson, states that he had known the deceased one week and was his physician during that time; that the date of his first treatment is the first illness was known to him, and that of the last treatment was known to him. In response to questions calling for information regarding prior treatment, for whom and by whom, the doctor states, "Don't know." The doctor further states that the immediate cause of death was "heart trouble"; that the con-

tributing cause of death was "chronic interstitial nephritis;" that deceased received treatment at the Cook County hospital; that the names of other physicians who treated him for the last illness were not known. The record shows the following questions with answers by Dr. Jackson thereto, which are not abstracted:

- "Q. When did deceased suffer from same or similar condition? A. Never.
- Q. State duration of illness. A. Three months.
- Q. From history of the case? A. Three months.
- Q. How was the history obtained? A. From deceased."

Third, the employer's certificate of death states that the deceased was 37 years of age; that the employer had first employed deceased January 1, 1929; that the age of deceased when employed was 37 years, and that he had last worked for the employer February 15, 1930. This certificate is signed David Packer, president of the David Packer Shoe company. There also appears in this document the following questions and answers, which have not been abstracted:

- "Q. Condition of deceased's health while in your employ? A. Good.
- Q. How long ailing before he quit work? A. Was not sick."

Dr. Benjamin Seid, called as a witness by defendant, testified that he was connected with the Cook County hospital; that he had a "faint remembrance" of having taken care of Walter Mason March 14th at Cook County hospital. He was shown the hospital report which appears in evidence as defendant's exhibit 4, and stated that the signature thereto was his own; that he filled in all the answers to the various questions asked; that "the information we obtained from the chart we keep at the hospital of the record of the case."

The witness having been temporarily withdrawn, Maryon Byrne was called as a witness and stated that she was the medical record clerk at the Cook County hospital; that in response to a

...of death was "chronic interstitial nephritis"; that
deceased received treatment at the Cook County Hospital; that the
names of other physicians who treated him for the last illness
were not known. The record shows the following questions with
answers by Dr. Jackson Thayer, which are not abstracted:

"When did deceased suffer from some or similar con-
dition?" A. Winter.
"State duration of illness." A. Three months.
"From history of the case?" A. Three months.
"How was the history obtained?" A. From deceased."

Third, the employer's certificate of death states that
the deceased was 57 years of age; that the employer had first em-
ployed deceased January 1, 1920; that the age of deceased when em-
ployed was 57 years, and that he had last worked for the employer
February 12, 1930. This certificate is signed David Jackson,
president of the David Jackson Shoe Company. There also appears in
this document the following questions and answers, which have not
been abstracted:

"Condition of deceased's health while in your
employ?" A. Good.
"How long illness before he quit work?" A. Not
known."

Dr. Benjamin said, called as a witness by defendant,
testified that he was connected with the Cook County Hospital; that
he had a "faint recollection" of having taken care of Walter Jackson
March 1930 at Cook County Hospital. He was shown the hospital re-
cord which appears in evidence as defendant's exhibit 4, and stated
that the signature Thayer was his own; that he filled in all the
answers to the various questions asked; that "the information was
obtained from the chart we keep at the hospital of the record of
the case."

The witness having been temporarily withdrawn, witness
Thayer was called as a witness and stated that she was the patient
referred to in the Cook County Hospital; that in response to a

subpoena duces tecum she had produced the records of the hospital pertaining to Walter Mason, who was admitted to the hospital March 14, 1930. She identified the hospital chart, but in response to the question answered that no part of the same was in her handwriting.

In response to further questions Dr. Seid stated that Walter Mason was assigned to him as a patient; that in making a chart he would see the patient and get a complete history of the case, do a thorough physical examination and prepare for the laboratory work, give the necessary medication at that time and prescribe for further treatment. Referring to the chart he said it was in his own handwriting, and he further stated that he could readily refresh his recollection as to the history and information that Walter Mason gave him if permitted to refer to the chart.

The chart was then offered in evidence and was received over the objection of plaintiff. This chart gives the patient's name as Walter Mason and his age as 37 years, and states that the diagnosis shows "chronic nephritis, general arteriosclerosis" and uremia complications; that Dr. Seid was attending; that the present complaints were: "1. Precordial pain, 6 years off and on." 4. Nocturia, four years. 5. Frequency, four years;" that the patient was well until about six years ago when he became ill with a recurrent rheumatic fever, which first attacked him in 1917; that he began to complain of precordial pain of a dull character which was not referable elsewhere; that for the past five years or so (the patient states) it has been necessary to urinate very frequently both day and night. The chart also shows: "Past History: Rheumatism 1917 and 1924. Venereal--Several chancres and G. C.;" that the patient states that he has had precordial distress for six years off and on and has drunk large quantities of water

...and had produced the records of the hospital pertaining to Walter Hanson, who was admitted to the hospital March 14, 1930. The identified the hospital chart, but in response to the question answered that no part of the same was in his hands.

In response to further questions Mr. Bold stated that Walter Hanson was assigned to him as a patient; that in making a chart he would use the patient and get a complete history of the case, do a thorough physical examination and prepare for the laboratory work. After the necessary examination at that time and prior to the treatment. Referring to the chart he said it was in his own handwriting, and he further stated that he could readily retrieve his recollection as to the history and information that Walter Hanson gave him it permitted to refer to the chart.

The chart was then offered in evidence and was received over the objection of the defense. This chart given the patient's name as Walter Hanson and his age as 37 years, and stated that the diagnosis was "chronic nephritis, general arteriosclerosis" and chronic complications; that Dr. Bold was attending; that the physical complaints were: "1. Hypertension, 2 years old; and on 2. Nephritis, 4 years old. 3. Hypertension, 4 years old; that the patient was well until about six years ago when he became ill with a recurrent rheumatic fever, when first attended him in 1927; that he began to complain of generalized pain of a dull character which was not relievable by salicylates; that for the past five years or so (the patient stated) it has been necessary to urinate very frequently both day and night. The chart also shows: "That his temperature 1917 and 1927. Generalized arteriosclerosis and on 3. 4. The patient stated that he had generalized arteriosclerosis for six years all over his body and that large quantities of water

for at least four or five years; that the urine was "albumen-- four plus." It appears from the chart that the opinions of the physicians in attendance as to the ailments of the insured are not harmonious. Dr. Seid said that the insured had chronic nephritis, hypertension and albumen four plus. Dr. Bennett said his impression was that the insured had chronic nephritis and arterio sclerosis. Dr. Pilot considered the case to be malignant sclerosis of kidneys and uremia. Dr. Jackson said the insured had acute myocarditis and the contributing cause was chronic interstitial nephritis. Dr. Seid stated that the insured had tertiary syphilis, being the last stage of syphilis; but Dr. Myers stated that the Wasserman test taken of the patient was "negative," thus contradicting Dr. Seid. There is not, however, in the record any statement by any of these physicians that the insured was afflicted with any of these diseases at the time he took out the policies. As plaintiff says, citing Briskine v. Davis, 25 Ill. 251, and Cantwell-Greg Co. v. Horst, 61 Ill. App. 330, presumptions run forward but not backward, and the fact that the insured may have had any or all of these diseases fourteen days before his death does not establish the fact that he was afflicted with any of them at the time the policies were taken out.

As the trial court, summing up the evidence, well observed: "There is nothing in the record to show he wasn't in good health at the time the policies were written."

For the reasons indicated the judgment in both cases is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

34999

ALINE MASON,
Appellee,

vs.

WASHINGTON FIDELITY NATIONAL
INSURANCE COMPANY, a Corporation,
Appellant.

82
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 642⁵

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The questions arising upon this record are precisely the same as those which arise in case general number 34998 between the same parties. The reasons which require an affirmance of the judgment in that case have been stated in an opinion filed therein this day.

For the same reasons in this case also the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

ALLIANCE
APPLICANT

VS.

AMERICAN FLINTLOCK SMITH CO.,
INDUSTRIAL CO., & ASSOCIATES
APPELLEE

CHICAGO, ILL.

36317.01

BEFORE THE COMMISSIONER OF THE COURT
OF THE DISTRICT OF COLUMBIA

The Commission existing upon this record and previously
the same as those which were in case General number 3498 between
the same parties. The Commission herein is appointed at the
instance of the party herein named as appellant and the
said law.

For the same reasons in this case when the Commission
of the said court is appointed.

Witness my hand

U.S. District Court, D.C., Chicago, Ill.

35034

ACACIA MUTUAL LIFE ASSOCIATION,
Complainant,

vs.

HELEN MARIE THOMAS et al.,
Defendants.

HELEN MARIE THOMAS,
Plaintiff in Error,

vs.

BERTHA ELECIA THOMAS,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

262 I.A. 643

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error has been sued out by Helen Marie Thomas, widow of Walter Clarence Thomas, deceased, seeking to reverse a decree entered in favor of Bertha E. Thomas, mother of the deceased. By a bill of interpleader filed by the Acacia Mutual Life Association it was sought to have determined the conflicting claims of Helen Marie Thomas and Bertha E. Thomas to the payment of the proceeds of two life insurance policies in the aggregate amount of \$5,000, issued by the Association on the life of Walter C. Thomas.

Pursuant to an interlocutory decree the sum of \$5220.49 was deposited with the clerk of the court, and the policies were deposited with the solicitors for the Association. The final decree awarded the above sum to Bertha E. Thomas and directed that the policies be delivered to the Association as satisfied. The cause was heard by the chancellor in open court without a reference.

There is really very little conflict in the evidence, from which it appears that the Association was chartered by an act of Congress March 3, 1869; that prior to September 22, 1922, it was a fraternal benefit society and known as the Masonic

AGASSA MUTUAL LIFE ASSOCIATION
Cincinnati, Ohio

WILLIAM HANLEY THOMAS et al.
Defendants

WILLIAM HANLEY THOMAS
Plaintiff in Error

WILLIAM HANLEY THOMAS
Plaintiff in Error

ORDER TO REMAND FOR
RE-ARREST

262 I.A. 643

THE COURT OF APPEALS OF THE STATE OF OHIO
DOUBLED THE OPINION OF THE COURT.

This writ of error has been used out by William Hanley Thomas, widow of Walter G. Thomas, deceased, according to a return a return entered in favor of William H. Thomas, mother of the deceased. By a bill of interpleader filed by the Agassia Mutual Life Association it was sought to have determined the conflicting claims of William Hanley Thomas and William H. Thomas to the payment of the proceeds of the life insurance policy in the aggregate amount of \$2,000, issued by the Association on the life of Walter G. Thomas.

Payment to an interpleader does not mean that \$2,000.00 was deposited with the clerk of the court, and the policies were deposited with the collector for the Association. The final decree awarded the above sum to William H. Thomas and directed that the policies be delivered to the Association as entitled. The court was heard by the chancellor in open court without a reference.

There is nothing to be done in the case.
The court is advised that the Association was notified by an act of Congress March 3, 1879; that after its dissolution in 1881, it was a (corporation) and was known as the Agassia Mutual Life Association.

Mutual Life Association of the District of Columbia. On December 31, 1919, it issued the policies in question to Walter C. Thomas, and the mother, Bertha E. Thomas, was named in each of them as beneficiary. Walter C. Thomas was then 23 years of age and was unmarried. He was a master mason in good standing. Each of the policies provides:

"A member may at any time secure a change of beneficiary or beneficiaries in his certificate of membership by making a written request setting forth to whom he desires the benefits paid, and the relationship of such person or persons to him, such change to be effective, if in conformity with the laws of the State, when endorsed by the Association on the contract."

The policies also provide in substance that upon furnishing satisfactory proof that the certificate of membership or contract of insurance was lost or destroyed, a duplicate thereof might be issued to the member.

July 20, 1927, while yet unmarried, the insured requested that the beneficiary in the policies be changed to Helen Marie Thomas as wife. September 17th thereafter the insured was married to Helen Marie Thomas and October 5, 1927, the change of beneficiary was endorsed on each of the policies in conformity with the request of July 20th. At that time the insured was an engineer custodian of the Board of Education and had investments of about \$2,000 in mortgages. What, if any, property Helen Thomas had in her own right at that time does not appear.

June 9, 1928, Helen Thomas rented in her own name a safety deposit box for a term of one year. June 16th thereafter she issued a permit to her husband to have access to this box. August 6, 1928, Walter C. Thomas was taken ill, as the wife testifies, from "ptomaine poisoning." At that time they lived in a flat on Elmdale avenue. She took him to his work on October 30, 1928, but during the day he fainted and was taken in a taxicab to the home of his mother. The mother called up the wife and asked

Annual Life Association of the District of Columbia. On December 22, 1910, it issued the policy in question to Walter E. Thomas, and the mother, Martha E. Thomas, was named in each of them as beneficiary. Walter E. Thomas was then 31 years of age and was unmarried. He was a master mason in good standing. None of the policies provided:

"A member may at any time secure a change of beneficiary or beneficiaries in his certificate of membership by making a written request setting forth to whom he desires the benefits paid, and the relationship of such person or persons to him, such change to be effective, it is conclusively within the laws of the State, when entered by the Association on the contract."

The policies also provide in substance that upon terminating certificate, proof that the certificate of membership or contract of insurance was lost or destroyed, a duplicate thereof might be issued to the member.

July 30, 1907, while yet unmarried, she insured to-
guessed that the beneficiary in the policy be changed to Helen Marie Thomas as wife. September 17th thereafter the insured was married to Helen Marie Thomas and October 2, 1907, the change of beneficiary was entered on each of the policies in conformity with the request of July 30th. At that time she insured was an assistant custodian of the Board of Education and had investments of about \$1,000 in mortgages. When, it may, property Helen Thomas had in her own right at that time does not appear.

June 7, 1909, Helen Thomas rented in her own name a salary deposited for her for a term of one year. June 10th thereafter she issued a power to her husband to have access to this fund.
August 2, 1909, Helen E. Thomas was again ill, as the wife of-
that, from "Stomachic poisoning." At that time they lived in a flat on Columbia street. She took him to his wife on October 20, 1909, but during the day he remained and was taken in a taxicab to the home of his mother. The mother called on her wife and Helen

her to come over, and the wife said she was too nervous to do so.

Helen Thomas, however, did visit her husband at his mother's home on November 7th and 8th. On November 14th he was taken to the hospital for an operation and his wife saw him there on November 17th. She says that on each occasion when she called to see him he put his arms around her, kissed her and greeted her in endearing terms. November 11th he wrote her a letter which is in his own handwriting and reads as follows:

"Dear Helen: Have been waiting to hear from you regarding finances, but as yet have heard nothing. I must tell you that things are not going to be so good. They had a consultation of a couple of doctors and it will be quite some time before I can go back to work, in fact, I might go away to the warm climate for awhile. Now here are the following bills as far as I can figure: This week misc. \$26.00--nurse misc. 3 weeks \$115.00, Dr. Skiles, apprx. \$100.00, rent 2 mos. \$110.00. Car \$100.00. Garage \$20. Phone \$5.00, total \$501.00. How much money have we now in savings bank? checking? You will please excuse me for short letter as I am so weak. Hoping you are well. I was told you all had a good time at bridge and sorority. Best wishes. Please write, let me know how things stand, as I can plan according. Best wish, love, Clarence."

It does not appear in evidence that she answered this letter or gave him any of the information asked. The mother testifies that about this time she called the wife at the husband's request and asked for the insurance policies and other effects and that the wife promised to send the same by registered mail the next day, but did not do so. The wife admits a telephone conversation with the mother at that time and other times, but denies that the policies were mentioned. She says the mother "asked for his clothes, his watch and things."

The wife was informed that the insured was taken to the hospital on November 14th for an operation. On the same day she rented a new box and removed the policies and his other effects therefrom. She did not see him for three days thereafter and she did not make any provision that he might have access to the new box she rented. She did not at any time inform him of the change made

in the boxes. She says the doctor informed her that her husband must not be disturbed. She held the policies in the box until she delivered the same to her own attorney, which was done prior to the death of her husband. On November 27, 1928, the insured was operated on, his left testicle being removed, and the next day he was returned to his mother's home. November 29th, Thanksgiving eve, he was taken to the flat at 1427 Elmdale avenue, where he had resided with his wife, but the locks on both front and rear doors had been changed, and he could not get in. The wife says she had the locks changed because she was afraid to stay in the flat alone with the locks as they were. He had keys which fitted the locks that were removed, and it is not in evidence that anyone besides the wife and he had such keys.

On the same day, November 29th, the insured dictated to his mother a request to the Insurance Association for new policies in which his mother instead of his wife would be beneficiary. He signed the letter and it was mailed to the Association and was received by it, as its stamp shows, December 4, 1928. November 30, 1928, the insured consulted with his attorney at the home of his mother. He told the attorney that he was having trouble with his wife about finances; that she told him she did not wish him to stay around the house while he was sick; that this had been going on ever since they were married, and that he wanted a divorce. He said he wanted to draw a will and that he had written the Insurance Association requesting that his mother be made the beneficiary of his insurance. December 6th his letter to the Association was acknowledged by a letter from it, which stated:

"We are in receipt of your letter of November 29 and for your convenience we are enclosing an application for duplicate policy, which must be filled out and executed by both you and the present beneficiary, Helen Marie Thomas, your wife. Both signatures must be acknowledged before a Notary Public."

As a matter of fact under the by-law it was not necessary for the

in the boxes. She says the doctor informed her that her husband
must not be disturbed. She held the policies in the box until she
delivered the same to her own attorney, which was done prior to the
death of her husband. On November 27, 1934, the insured was operated
on, his left testicle being removed, and the next day he was re-
turned to his mother's home. November 28th, Thanksgiving day, he
was taken to the flat at 1457 Alameda avenue, where he had resided
with his wife. But she looks on both fronts and that seems had been
insured, and he could not get in. The wife says she had the looks
changed; a person who was afraid to stay in the flat alone with the
looks as they were. He had kept with them and said that were
removed, and it is not in evidence that either husband or wife
was to have been kept.
On the same day, November 28th, the insured testified
to his mother a request to the Insurance Association for new poli-
cies in which his mother insured to his wife as beneficiary.
He signed the letter and it was mailed to the Association and was
received by it on its stamp above, December 1, 1934. November 30,
1934, the insured consulted with his attorney at the home of his
mother. He told the attorney that he was having trouble with his
wife about insurance; that she told him she did not wish him to stay
around the house while he was sick; that this had been going on
ever since they were married, and that he wanted a divorce. He
said he wanted to draw a will and that he had written the Insurance
Association requesting that his mother be made the beneficiary of
his insurance. December 5th his letter to the Association was re-
sponded by a letter from it, which stated:
"We are in receipt of your letter of November 30 and for
your convenience we are enclosing an application for duplicate
policy. This must be filled out and forwarded by both you and
the present beneficiary, Helen Marie Thomas, your wife. Both
signatures must be acknowledged before a Notary Public."
As a matter of fact when the policy is not necessary for the

wife to sign.

December 10, 1928, the attorney prepared a form for change of beneficiary, as instructed by the insured. He read it to the insured, who also read, signed and acknowledged it and it was sent by registered mail with a letter to the Acacia Mutual Life Association in Washington, D. C. The attorney also prepared an affidavit on a form furnished by the Association, which was signed by the insured and in which it was recited that the policies had been in his safety deposit box at the Capital State Bank, Chicago, and were either taken from there by his wife, Helen Marie Thomas, or were lost, and that he had been unable to determine what had become of the policies and requested the company to issue duplicate policies. This was mailed to the Association with a letter from insured's attorney dated December 11, 1928, which stated in substance that Mr. Thomas was desperately ill and had been for some weeks, although he was not fully aware of his condition; that Mr. Thomas was desirous of changing the beneficiary in his policy from Helen Marie Thomas, his wife, to Bertha E. Thomas, his mother, and that enclosed were the request for change of beneficiary executed by insured, a notice of change of address and an affidavit for duplicate policy for the one out of his possession.

The attorney testifies that insured told him at that time that he did not have the policies but that they had been removed from his safety deposit box at the Capital State Bank by his wife; that this conversation took place either on December 1st or 2nd, 1928. He further testified that the insured told him that before he went to the hospital he had his mother call Helen, asking her to send over his insurance papers and that when he returned from the hospital they were not there; that on the Saturday

with the same.

December 10, 1935, the attorney produced a form for
change of beneficiary, as instructed by the insured. He read it
to the insured, who also read, signed and acknowledged it and it
was sent by registered mail with a letter to the Accidental
Life Association in Washington, D. C. The attorney also prepared
an affidavit on a form furnished by the Association, which was
signed by the insured and in which it was recited that the poli-
cy had been in his safety deposit box at the Capital State
Bank, Chicago, and were either taken from there by his wife,
Kathleen Marie Thomas, or were lost, and that he had been unable to
determine what had become of the policies and requested the com-
pany to issue duplicate policies. This was mailed to the Associa-
tion with a letter from insured's attorney dated December 11, 1935,
which stated in substance that Mr. Thomas was desirous of a
policy for some weeks, although he was not fully aware of his
condition; that Mr. Thomas was desirous of changing the beneficiary
in his policy from Kathleen Marie Thomas, his wife, to Herman H.
Thomas, his nephew, and that enclosed was the request for change
of beneficiary executed by insured, a notice of change of address
and an affidavit for duplicate policy for the one out of his
possession.

The attorney testified that insured told him at that
time that he did not have the policies but that they had been
removed from his safety deposit box at the Capital State Bank by
his wife; that this conversation took place either on December
1st or 2nd, 1935. He further testified that he discussed with him
that before he was of the hospital he had his nephew call Helen,
saying not to send him his insurance papers and that when he re-
turned from the hospital he would call Helen, that is the last

night following Thanksgiving the insured went with his cousin, Earl Schroeder, to the Capital State Bank, and that he was carried into a taxicab and into the bank; that he was set down in a chair because he was too weak to stand and he gave the key to the girl at the vault; that the girl tried the key in the box, said the lock had been changed, and brought out a record showing his wife had surrendered the box on November 14, 1928, and had taken out another box. When the attorney asked the insured if Helen had brought his papers he said "No" and gave the attorney a list of things which he desired the attorney to ask about. This list included the two policies.

December 23, 1928, the insured died at the home of his mother. The cause of death, as stated in the death certificate and as shown by the testimony of the attending physician, was "acute ^{miliary} /tuberculosis," the contributory cause being tuberculosis of the left testicle. The insured left a will by which he gave his wife \$1 and left the remainder of his estate to his father and mother. The medical testimony tends to show that up to the time of his decease the insured was mentally capable, and, indeed, the pleadings do not allege any incapacity in that respect. After receiving the request and information as above set forth, the Association took no further action and immediately after the death of the insured the insurance was claimed by both the mother and the wife, the wife having, prior to the filing of the bill of interpleader, instituted suit in her own name on the policies.

Helen Marie Thomas testifies that there were no quarrels between her husband and herself; that they lived happily together, and after he was taken to the home of his mother she went there; that he took her in his arms and kissed her; that she saw him every day until Dr. Skiles ordered a nurse and no one was to

night following, the insured went with his cousin, Earl Schneider, to the Capital State Bank, and that he was carried into a taxi and into the bank; that he was not down in a chair because he was too weak to stand and he gave the key to the girl at the bank; that the girl tried the key in the lock, said the lock had been changed, and brought out a record showing the wife had transferred the box on November 14, 1935, and had taken out another box. Then the attorney asked the witness if he had any other things which he gave the attorney a list of things which he desired the attorney to ask about. This list included the two policies.

December 23, 1935, the insured died at the home of his mother. The cause of death, as stated in the death certificate and as shown by the testimony of the attending physician, was "myocardial infarction," the certificate cause being myocardial infarction of the left ventricle. The insured left a will by which he gave his wife \$1 and left the remainder of his estate to his father and mother. The medical testimony tends to show that up to the time of his decease the insured was mentally capable, and, indeed, the physician who not only saw the insured in that respect. After receiving the report and information as above set forth, the association took no further action and immediately after the death of the insured the insurance was claimed by both the mother and the wife, and the having, prior to the filing of the suit in bankruptcy, is attributed both in her own name on the policies.

There is no question that there were no other policies between the insured and the association; that the only policy between the insured and the association was the one which was issued, and that he was taken to the home of his mother and was there; that he was not in his home and did not die; that the only policy which the association issued was the one which was issued to the insured.

see him after that time; that this was about the 7th or 8th of November. She says she stayed in the reception room during the time he was being operated upon; that she went back a second time the day of the operation and saw him; that he then kissed her; that she went back the next day and was told she could not see him; that an aunt, Mrs. Schroeder, was in the room with him at that time; that she went back the following day and was again told she could not see him; that she went to Dr. Spruce to find out why Mrs. Schroeder was allowed in the room when no one was to see him, and the doctor told her that he could not control either the mother or the aunt. She further says that Dr. Spruce called her November 28th and said that her husband was going to leave the hospital; that she went to the hospital, greeted the superintendent, went upstairs and into the room, and as she entered ran over to her husband and he took her into his arms and kissed her; that his mother and father and Robert Spruce were there; that the nurse was packing her husband's grip; that when she kissed her husband his mother said, "Take your hands off of him; he might be your husband but he is my son, and you can't take him away;" that her husband then said, "Mother, step out of the room." She says they all went out of the room and she sat on her husband's bed; that he told her he was going away to Ottawa; that then her brother, who had taken her to the hospital, came into the room and she went out into the hall, and that the mother "yelled" at her and talked at her across the hall; that the nurse came and told the mother to keep still.

Plaintiff in error, Helen Marie Thomas, contends that the burden was upon Bertha E. Thomas to establish that there was a change of beneficiary from Helen Thomas to herself. We have no doubt that the production of the policies in which the wife is named as beneficiary made out a prima facie case in her favor. However, the evidence tending to show a desire on the part of the insured to

change the beneficiary is, we think, conclusive; and the only question to be determined is whether the steps taken by him to that end were sufficient to accomplish his purpose in that respect in a court of equity. The right to make the change was reserved in the policies by the insured. The necessary preliminaries are declared to be a written request stating to whom the insured desires the benefits paid and stating the relationship of the proposed beneficiary to him. If in conformity with the laws of the State (and there is no contention here that the request made did not conform to the laws of the State) the policy provides that the change is to become effective "when endorsed by the Association on the contract."

Plaintiff in error cites Modern Woodmen of America v. Little, 114 Iowa, 109, where the holder of a certificate delivered a request for a change to the clerk of a local camp, who forwarded the same to the head clerk of the society, by whom it was not received until after the death of the insured, and it was held that no change was effected. She also cites Thomas v. Thomas, 131 N.Y. 205. That is a case where the holder of a certificate having remarried undertook to change a certificate issued payable to his daughter, by making the certificate payable jointly to the daughter and his wife by writing after the daughter's name, "And my wife, Mary." The society was ^{not} notified of the change nor was any attempt made to notify it of the change, which was held ineffective.

However, most reliance seems to be placed on Freund v. Freund, 218 Ill. 189. In that case the controversy was between Bertha Freund, the wife, and Karl Freund, the son of the insured. Several times the insured had changed the beneficiary, alternating between the son and the wife. On June 16, 1902, he presented another statement for a change, accompanied by the policy, to the cashier of the Chicago office of the Insurance company. This time

change the beneficiary is, we think, conclusive; and the only question to be determined is whether the steps taken by him to that end were sufficient to accomplish his purpose in that respect in a court of equity. The right to make the change was reserved in the policies by the insured. The necessary preliminary was declared to be a written request stating to whom the insured desired the benefits paid and stating the relationship of the proposed beneficiary to him. It is contended by the laws of the State (and there is no contention here that the request made did not conform to the laws of the State) the policy provided that the change is to become effective "when endorsed by the association on the contract."

Plaintiff is correct after Roberts v. Insurance Co. 111 Ill. 109, where the holder of a certificate delivered a request for a change to the clerk of a local camp, who forwarded the same to the head clerk of the society, by whom it was not received until after the death of the insured, and it was held that no change was effected. This also after Thompson v. Thompson, 131 N.Y. 308. That is a case where the holder of a certificate having received endorsement to change a certificate issued payable to his daughter, by making the certificate payable jointly to the daughter and his wife by writing after the daughter's name, "and my wife," the society was notified of the change and was not notified of the change, which was held ineffective.

However, most reliance seems to be placed on Frank v. Frank, 112 Ill. 180. In that case the controversy was between Bertha Frank, the wife, and Earl Frank, the son of the insured. Several times the insured had changed the beneficiary, alternating between the son and the wife. On June 10, 1902, he presented another statement for a change, accompanied by the policy, to the cashier of the Chicago office of the insurance company. This time

the change was from the son to the wife. The insured died the following day before the papers filed in Chicago reached the head office of the company in New York. Upon interpleader between the wife and the guardian of the minor son, the Superior court held that the guardian was entitled to the proceeds of the policy. The decree upon appeal to the Appellate court was reversed with directions to award the proceeds to the wife. Upon a further appeal to the Supreme court the judgment of the Appellate court was reversed. It appears from the opinion that the policy was issued in New York; that the laws of New York were admitted to be applicable, and that there was a statute of that state which required the consent of the company to any change in the beneficiary. The policy also provided that such change should "not take effect until endorsed on this policy by the company at the home office." The opinion of the Supreme court points out that the policy was not issued by a fraternal society and states that in a fraternal society policy, unlike other insurance, the power to change the beneficiary exists unless expressly taken away. Delaney v. Delaney, 175 Ill. 187, is cited to that effect. The opinion further states that the distinction between fraternal insurance policies and ordinary life insurance policies in this respect is well recognized and quotes with approval from Joyce on Insurance, vol. 2, sec. 751, as follows:

"As a general rule it is probably true that, if the assured has taken all the steps necessary and otherwise done all in his power to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the officers of the society, then the change will be regarded as complete."

The opinion also states:

"In Black on Accident Insurance and Benefit Societies (2nd ed. sec. 223) it is said: 'When a member has done all that he is required to do under the contract to effect a change of beneficiary the change will be deemed complete, even though some ministerial acts of the officers of the society are still to be performed.'"

"A ministerial act may be defined to be 'one, which a person performs upon a given state of facts in a prescribed manner in

the change was from the son to the wife. The insured died the 1st-
moving day before the papers filed in Chicago reached the hands of-
lice of the company in New York. Upon inspection between the
wife and the husband of the minor son, the Superior court held
that the condition was entitled to the proceeds of the policy. The
court upon appeal to the Appellate court was reversed with direc-
tions to award the proceeds to the wife. Upon a further appeal to
the Supreme court the judgment of the Appellate court was reversed.
It appears from the opinion that the policy was issued in New York;
that the laws of New York were admitted to be applicable, and that
there was a statute of that state which required the consent of
the company to any change in the beneficiary. The policy also pro-
vided that such change should "not take effect until entered on
this policy by the company at the home office." The opinion of the
Supreme court states that the policy was not altered by a for-
eign statute and states that in a previous ruling, where
other insurance, the power to change the beneficiary exists unless
expressly taken away. Wainwright v. Wainwright, 178 Ill. 187, is cited to
that effect. The opinion further states that the distinction be-
tween (foreign) insurance policies and domestic life insurance poli-
cies in this respect is well recognized and applied with propriety.
From Wainwright v. Wainwright, 178 Ill. 187, it appears:
"As a general rule it is probably true that, if the contract
has been all the more necessary and otherwise done all in the
power to effect a change of beneficiary, and all that remains to
be done is some purely ministerial duty on the part of the officers
of the society, then the change will be regarded as complete."
The opinion also states:
"It is an established principle of insurance and benefit societies (that
all need not be said) it is held: 'When a member has done all that he is
required to do under the contract to effect a change of beneficiary,
the change will be deemed complete, even though some ministerial
duty of the society may still be to be performed.'
"A ministerial act may be defined to be 'one, which a person
performs upon a given state of facts in a prescribed manner (that

obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of doing the act.' (20 Am. & Eng. Ency. of Law, - 2nd ed., p. 793)."

Plaintiff in error also cites Hodalaki v. Hodalski, 161 Ill. App. 158, where a request for a change in beneficiary was made out and handed to the clerk of the local court and forwarded by him, together with the certificate, to the head clerk, who did not receive the request and certificate until after the death of the insured. It was held that it was not the province of a court of equity to decree that to be done which ought to have been done, where the claim to a right to have it done is by contract and where the conditions precedent had not been complied with, and that equity could not make a new contract for the parties.

It is also urged in behalf of plaintiff in error that Women's Catholic Order of Forresters v. Hill, 191 Ill. App. 629, is decisive of this case, but an examination of it does not justify the assertion. The contest there was between two daughters of the insured. The daughter Mary was named by the mother as beneficiary. Mary had the policy in her possession and paid a part of the premiums thereon. In the last illness of the insured, the other daughter induced the mother to join in a false affidavit to the effect that the policy was lost. The signature of the insured, as the opinion of the court states, was a series of scrawling, irregular marks bearing not the slightest resemblance to her signature, and the attending physician expressed doubt whether the mother could understand the purpose of the affidavit at the time it was made. The affidavit was received by the head office of the Order after the death of the insured and a new policy delivered to the second daughter a few days thereafter. The court held that the attempted change was not effective; that the same was a fraud against the daughter Mary who had paid the premiums and who had possession

reference to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of doing the act. (20 Am. & Eng. Ency. of Law, 2d ed. § 102.)

Plaintiff in error also offers in evidence...

Ill. App. 128, where a request for a change in beneficiary was made out and handed to the clerk of the local court and forwarded by him, together with the certificate, to the head clerk, who did not receive the request and certificate until after the death of the insured. It was held that it was not the province of a court of equity to decree that to be done which ought to have been done, where the claim to a right to have it done is by contract and where the conditions precedent had not been complied with, and that equity could not make a new contract for the parties.

It is also urged in behalf of plaintiff in error that

Thomas's Catholic Order of Foresters, Ill. 121, App. 480, is decisive of this case, but an examination of it does not justify the assertion. The contest there was between two daughters of the insured. The daughter Mary was named by the father as beneficiary. Mary had the policy in her possession and paid a part of the premiums thereon. In the last illness of the insured, the other daughter induced the father to join in a false affidavit to the effect that the policy was lost. The signature of the insured, as the opinion of the court stated, was a matter of certifying, irregularly made, but not the slightest resemblance to her signature, and the attention of the court was directed to the fact that the mother would not stand the purpose of the affidavit at the time it was made. The affidavit was received by the head office of the Order after the death of the insured and a new policy delivered to the second daughter a few days thereafter. The court held that the attempted change was not effective; and the case was a fraud against the

of the policy.

We have reviewed the cases cited in behalf of plaintiff in error, and it would seem to serve no useful purpose to review at length the many authorities cited in behalf of defendant in error. Here, the wife paid no premiums. She had no vested right in the policies. She had only a mere expectancy. (Martins v. Stubbins, 126 Ill. 387.) The policies were issued by a fraternal order and therefore, as already stated, except as restricted by the insurance contract or laws of the state, the insured had an absolute right to change them if he wished so to do. There are many authorities to the effect that if he did all he could towards completing the change, then Helen Marie Thomas could not defeat his purpose by withholding the policies upon which the endorsement of change was to be made. Kavanagh v. New England Mut. Life Ins. Co., 238 Ill. App. 72, and Walsh v. Trust Co., 148 Mo. App. 179, are only two of the many cases which so hold. It is earnestly insisted that the insured did not do all he could do to effect the change and that there is no evidence that he ever asked his wife for the policies. There was an issue of fact on that point. The mother testified to a demand made at the request of the insured by telephone and a promise by the wife to send the policies, which was not kept. There was a somewhat uncertain denial of this testimony, and the chancellor, who saw and heard the witnesses, found against Helen Marie Thomas on that issue. We have no right to disturb that finding on review unless it is clearly against the preponderance of the evidence. (Coari v. Olsen, 91 Ill. 273; Biggerstaff v. Biggerstaff, 186 Ill. 584; Schrader v. Schrader, 298 Ill. 469; O'Donnell v. Snowden, 318 Ill. 374.)

Moreover, a careful reading of the evidence in the

of the policy.

We have reviewed the cases cited in behalf of plaintiff in error, and it would seem to serve no useful purpose to review at length the many authorities cited in behalf of defendant in error. The wife paid no premiums. She had no vested right in the policy. She had only a mere expectancy. (See Wright v. Insurance Co., 111 Ill. 387.) The policies were issued by a fraternal order and therefore, as already stated, except as restricted by the insurance contract or laws of the state, she insured had an absolute right to change them if he wished so to do. There are many authorities to the effect that if he did all he could towards completing the change then Helen Marie Thomas could not defeat his purpose by withholding the policies upon which the insurance was to be paid. (See Wright v. Insurance Co., 111 Ill. 387; Wright v. Insurance Co., 111 Ill. 387; Wright v. Insurance Co., 111 Ill. 387.)

Wright v. Insurance Co., 111 Ill. 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Ill. Ill. 387.)

However, a careful reading of the evidence in the

original and additional abstracts leaves no doubt in our minds that such a demand would have been wholly unavailing. The surrender of the box to which the insured had access, the placing of the policies in another box from which he was excluded, the changing of the locks on the doors of his home to exclude him therefrom, the failure to inform him of these changes, the contents of the letter written to the wife and her significant failure to reply thereto, her continued absence from his bedside, are weighty facts which may not be overcome by testimony of an embrace, a kiss or words of endearment, however profuse these may have been. The desire of the deceased to change the beneficiary is clear, and he did everything he could do to that end.

We think the decree was justified and it is affirmed.

AFFIRMED.

O'Connor and McCurely, JJ., concur.

original and original... in our minds that
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ATTACHED.

O'Connor and Kennedy, LL, ...

TO THE HONORABLE

35115

EDWARD ELLENDT,
Appellant,
vs.
RICHARD ESPELAND,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 643²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

August 28, 1930, plaintiff Ellendt caused a judgment by confession to be entered against defendant Espeland for the sum of \$1,725 upon three promissory notes made to the order of Christ Berg and by him endorsed. The statement of claim was verified by the affidavit of plaintiff, which stated:

"* he is acquainted with the handwriting of said defendant, Richard Espeland, and the signature to said promissory notes and powers of attorney thereto attached are the genuine signatures of said defendant, Richard Espeland, that said promissory note was duly executed by said defendant, and that said defendant is still living."

On October 28th thereafter defendant made a motion to set aside the judgment supported by his petition duly verified, which alleged that defendant did not sign, execute or deliver the notes or any one of them; that the notes were not his obligation but were a forgery, and that he received no benefit therefrom; that the same were not signed by him or by anyone acting for or in his behalf, by or with his authority. The judgment was opened up and defendant allowed to present his case, the judgment in the meantime standing as security. There was a trial by the court and a finding in favor of defendant with judgment thereon, which plaintiff by this appeal seeks to reverse.

Upon the trial plaintiff did not testify to the knowledge indicated by his affidavit to the statement of claim, and in fact did not appear as a witness, and it seems to be conceded by all the parties that as a matter of fact defendant did not sign, execute or deliver the notes. Plaintiff, however, proceeds upon

RECEIVED
JULY 10 1936
U.S. DEPT. OF JUSTICE
RECORDS SECTION

CHICAGO

262 I.A. 643

RECEIVED THE OFFICE OF THE CLERK
JULY 10 1936

August 28, 1936, Administrative Assistant caused a statement
by conclusion to be entered against defendant regarding for the
sum of \$1,750 upon three promissory notes made to the order of
Charles Borg and by him endorsed. The statement of claim was
verified by the affidavit of plaintiff, which stated:

"I am acquainted with the handwriting of said defendant,
Richard Reginald, and the signature to said promissory notes
and parts of same are identical with the genuine signature
of said defendant, Richard Reginald, and said promissory
notes were duly executed by said defendant, and that said defendant
was at that time living."

On October 28th, 1936, the defendant made a motion to
set aside the judgment supported by his petition duly verified,
which alleged that defendant did not sign, execute or deliver the
notes or any one of them; that the notes were not his obligation
but were a forgery, and that he received no benefit therefrom; that
the same were not signed by him or by anyone acting for or in his
behalf, by or with his authority. The judgment was opened up and
defendant allowed to present his case, the judgment in the mean-
time standing as a nullity. There was a trial by the court and a
verdict in favor of defendant when judgment thereon, which plain-
tiff by this appeal seeks to reverse.

Upon the trial plaintiff did not testify to the
knowledge indicated by his affidavit to the contrary to be true,
and in fact did not appear as a witness, and it seems to be probable
by all the evidence that as a matter of fact defendant did not sign

the theory that these notes were signed and delivered by one Aaronson, who was authorized so to do, and authorities such as Hirster v. Strehmann, 22 Ill. App. 593, and Beckstrom v. Armstrong, 220 Ill. App. 598, are cited to the proposition that an agent duly authorized may bind his principal by the execution of a promissory note. There is, of course, no conflict of authority as to that proposition, the only question being as to whether the rule of law is applicable to facts such as appear in the record.

Plaintiff also contends, upon the authority of Hall v. Bennett, 188 Ill. App. 62, and Merrey v. Simpson, 197 Ill. App. 58, that when, as here, defendant files an affidavit denying the execution of a note, the burden is thereby cast upon plaintiff to establish the execution and delivery of the same, but that when plaintiff has established a prima facie case this is not overcome by the testimony of defendant that he did not sign the note or authorize any one in his behalf to do so. The cases cited do not sustain the proposition nor do we regard the proposition, even if it be conceded to be true, as applicable to the facts.

Indeed, under the pleadings the issue in the trial court was one of simple fact as to whether Aaronson was authorized to execute and deliver the note, and since the law is that the finding of the court is entitled to the same weight as the verdict of a jury would be, the sole question for our determination is whether the finding and judgment of the trial court is clearly and manifestly against the weight of the evidence. Although the brief of plaintiff does not discuss the evidence from this point of view, we have examined the evidence, and find that the principal witness for plaintiff was Borg, the payee named in the notes, who testified that in 1925 and 1926 he had business dealings with defendant Espeland and did work for him, and that Espeland and he bought a building together, and that later Espeland bought out his

the theory that these notes were signed and delivered by one
Aronson, who was authorized to do so, and authorized as such as
Hittler v. Hittler, 22 Ill. App. 308, and Hittler v. Hittler,
220 Ill. App. 308, are cited to the proposition that an agent duly
authorized may bind his principal by the execution of a promissory
note. There is, of course, no conflict of authority as to that
proposition, the only question being as to whether the rule of law
is applicable to facts such as appear in the record.
Plaintiff also contends, upon the authority of Hill v.
Hennett, 188 Ill. App. 82, and Hill v. Hennett, 187 Ill. App. 82,
that when, as here, defendant files an affidavit denying the execu-
tion of a note, the burden is thereby cast upon plaintiff to estab-
lish the execution and delivery of the same, but that when plain-
tiff has established a prima facie case this is not overcome by
the testimony of defendant that he did not sign the note or author-
ize any one in his behalf to do so. The cases cited do not sustain
the proposition that as to regard the proposition, even if it be
conceded to be true, as applicable to the facts.
Indeed, under the pleading the issue in this trial
court was one of simple fact as to whether Aronson was authorized
to execute and deliver the note, and since the law is that the
finding of the court is entitled to the same weight as the verdict
of a jury would not the sole question for our determination be
whether the trial and judgment of the trial court is of nearly
and conclusively against the weight of the evidence. Although the
trial of plaintiff does not discuss the evidence from this point
of view, we have examined the evidence, and find that the principle
and witness for plaintiff was wrong, the cases named in the notes,
and that in 1908 and 1909 he had business dealings with
defendant Hittler and did work for him, and that Hittler and Hittler

part; that in 1927 he received \$10,000 in notes in the matter which he turned over to the K. Jorgenson Company, who in turn gave them to different people. He says that he received the notes at Espeland's place of business, which was a cigar store; that the original notes were cancelled and he was then given these notes in their place and turned them over to Ellendt. The witness does not say that Espeland signed the notes or that Espeland delivered the notes to him. He says, however, that the work he did was ordered done by Espeland and was approved by Aaronson.

Defendant, on the other hand, testifies that he knew Aaronson and had business dealings with him; that Aaronson worked for him and that at times he gave Aaronson cash to pay bills which he owed; that Aaronson worked four or five years for him but was not working for him in 1927, 1929 and 1930; that the notes sued on do not bear his, the witness's, signature; that he never authorized any one to sign his name to them; that he never had seen the notes before and that he owed no money to Borg upon the date of the notes, September 15, 1929. He denies that he was indebted to Borg, but says that all the money Borg had coming to him was paid by Aaronson either by check or by cash; that he paid Borg for all the work he did, about ten or twelve thousand dollars, and that payment was made through Aaronson; that he never authorized Aaronson to sign any notes for him; that he did not know until suit was started that there were any notes signed in his name.

For plaintiff, one Cantwell, an employee of the Rittenhouse & Embree Co., testified that he met Aaronson through Borg, whom he knew; that he saw the signature on the three notes which Rittenhouse & Embree Co. got from Mr. Borg and which he, the witness, attempted to collect; that he first got in touch with Borg, who took him over to see Aaronson either in 1929 or early in

fact; that in 1937 he received \$10,000 in notes in the matter
 which he turned over to the A. J. Ferguson Company, who in turn
 gave them to different people. He says that he received the
 notes at Ferguson's place of business, which was a cigar store;
 that the original notes were cancelled and he was then given these
 notes in their place and turned them over to Elliott. The witness
 does not say that Ferguson signed the notes or that Ferguson de-
 livered the notes to him. He says, however, that the work he did
 was ordered done by Ferguson and was approved by Anderson.
 Defendant, on the other hand, testifies that on two
 occasions and had business dealings with him; that Anderson worked
 for him and that at times he gave Anderson cash to pay bills which
 he owed; that Anderson worked four or five years for him but was
 not working for him in 1937, 1938 and 1939; that the notes were in
 the name of the witness, a, defendant; that he never authorized
 any one to sign his name to them; that he never had seen the notes
 before and that he owed no money to Borg when the date of the
 notes, September 15, 1939. He denies that he was indebted to
 Borg, but says that all the money Borg had coming to him was paid
 by Anderson either by check or by cash; that he paid Borg for all
 the work he did, about ten or twelve thousand dollars, and that
 payment was made through Anderson; that he never authorized Ander-
 son to sign any notes for him; that he did not know until this
 was started that there were any notes signed in his name.
 For plaintiff, one Campbell, an employee of the
 All-American & Empire Co., testifies that he met Anderson through
 Borg, whom he knew; that he saw the signature on the three notes
 which All-American & Empire Co. got from Mr. Borg and which he, the
 witness, attempted to collect; that he first got in touch with
 Borg, who took him over to see Anderson at about 1935 or early in

1930; that Borg introduced him to Aaronsen, to whom the witness said that he had come to collect the note; that Aaronsen did not have any money. The witness further says he made five or six trips back there before he received a check from Aaronsen for \$50 payable to Rittenhouse & Embree Co.

The attorney for the Humboldt State Bank was produced as a witness for plaintiff and produced a signature card of Espeland which, it was admitted, bore his genuine signature. The card was admitted in evidence without objection.

Jorgenson testified for defendant that he was not a partner of Borg on September 15, 1929; that he requested Borg to leave his company in 1928, and that was during the period the work was done for Espeland; that there was \$675 due Jorgenson Company from Espeland at that time; that Borg collected it in cash but did not turn it over to the company. The witness stated that he had dealt with Borg as his partner for five years and had associated with him in business for eight years; that he had known him during that time and knew his reputation in the community for truth and veracity and that in was no good.

Under this conflicting evidence the question of fact was for the trial court who saw and heard the witnesses. As already stated, the finding of that court is entitled to the same weight upon review as is the verdict of a jury, and this court would not be justified in setting aside the finding unless it could say that the same was clearly and manifestly against the weight of the evidence. We are not able to so hold.

The judgment will therefore be affirmed.

AFFIRMED.

O'Connor and McGuirely, JJ., concur.

1930; that they introduced him to Anderson, so when the witness
said that he had come to collect the note; that Anderson did not
have any money. The witness further says he made five or six
trips back there before he received a check from Anderson for \$200
payable to Anderson & Embury Co.
The attorney for the defendant then asked the witness
as a witness for plaintiff and produced a signature card of Embury
and which, it was admitted, bore his genuine signature. The card
was admitted in evidence without objection.
The witness testified for defendant that he was not a
partner of Borg in September 19, 1927; that he requested Borg to
leave his company in 1928, and that was during the period the note
was made; that there was \$275 due the Borgerson Company
then testified at that time; that Borg collected it in cash but did
not turn it over to the company. The witness stated that he had
dealt with Borg as his partner for five years and had associated
with him in business for eight years; that he had known him during
that time and knew his reputation in the community for truth and
veracity and that in was no good.
Under this conflicting evidence the question of fact was
for the trial court who saw and heard the witnesses. An attorney
stated, the finding of that court is entitled to the same weight
upon review as is the verdict of a jury, and this court would not
be justified in setting aside the finding unless it could say that
the same was clearly and manifestly against the weight of the evi-
dence. We are not able to do hold.
The judgment will therefore be affirmed.

35146

WILLIAM E. CLOYES,
Appellant,

vs.

GREAT LAKES FINANCE CORPORATION,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

262 I.A. 643³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On November 21, 1930, the sheriff of Cook county levied an execution on a Ruxton automobile found in possession of W. F. Whitney, against whom the Great Lakes Finance Corporation had secured judgment. William E. Cloyes made claim to the automobile. There was a trial of the right of property before the County court, a jury having been waived, and a finding against the claimant, with judgment thereon, which he seeks to reverse by this appeal.

The facts in brief are as follows: Cloyes is a practicing attorney and Whitney was his client. Whitney had a claim against the Moon Motor Car Co. of St. Louis, Mo., which he assigned to Cloyes. Cloyes went to St. Louis and settled the claim by releasing it in consideration of the transfer to him of the automobile, he paying \$104 in cash to complete the transaction. After the car was turned over to Cloyes he caused it to be driven to Chicago, where he turned it over to Whitney, as he testifies, for the purpose of selling it. Cloyes therefore claims title to the car through this transfer from the Moon company, while the judgment creditor claims that the whole transaction and conveyance was pursuant to a plan or scheme in fraud of creditors and therefore void.

Section 4 of chapter 59 of the Illinois statutes (Smith-Hurd's Ill. Rev. Stats. 1929, p. 1532) provides:

"Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons,

WILLIAM E. GLOVER,

Attorney at Law,

GRAND LARSEN VIBRATOR CORPORATION,

Appellee.

262 I.A. 643

MR. JUSTICE BRADLEY
DELIVERED THE OPINION OF THE COURT.

On November 21, 1930, the sheriff of Cook county lawfully executed on a writ of habeas corpus the body of William E. Glover, against whom the Grand Jurors had returned judgment. William E. Glover made claim to the automobile. There was a trial of the right of property before the County Court, a jury having been waived, and a finding against the claimant, with judgment thereon, which he seeks to reverse by this appeal.

The facts in brief are as follows: Glover is a resident attorney and Whitney was his client. Whitney had a claim against the Motor Motor Car Co. of St. Louis, Mo., which he assigned to Glover. Glover went to St. Louis and settled the claim by receiving in consideration of the transfer to him of the automobile, no paying \$1000 in cash to complete the transaction. After the car was turned over to Glover he caused it to be driven to Chicago, where he turned it over to Whitney, as he testified, for the purpose of selling it. Glover therefore claims title to the car through this transfer from the Motor Company, while the judgment overrules claim that the title transaction and conveyance was not valid to a third person. It is found that the title was valid.

Section 4 of chapter 30 of the Illinois Statutes

(Smith-Hugh's Ill. Rev. Stat. 1935, p. 1552) provided:

"Every bill, grant, conveyance, assignment or transfer of, or interest in, real or personal, or right or claim in real or personal property, made with the intent to defraud, or to hinder or delay creditors or other persons, is void."

and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons."

Section 5 provides:

"The foregoing section shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Claimant contends that it was not a violation of this statute for the debtor to prefer one creditor over others and that such transfer does not hinder, delay or defraud creditors, citing 27 Corpus Juris 613, Schroeder v. Walsh, 120 Ill. 403, and Oakford & Fahnestock v. Dunlap, 63 Ill. App. 498, all of which so hold, and insists that as a matter of fact the conveyance of Whitney's claim to him was for a bona fide debt due from the debtor to him, and that the same was adequately established by the evidence; that since the debt was bona fide there was no violation of the statute, and further that the remedy of the creditor was in equity rather than through levy of an execution, citing 27 Corpus Juris 448, par. 73, and par. 452, par. 79, and Diets v. Atwood, 19 Ill. App. 96.

There is practically no conflict in the evidence.

Cloyes, as attorney, represented Whitney, the judgment debtor, in the case of Great Lakes Finance Corp. v. Whitney. He had been doing work as an attorney for Whitney since April, 1930, and during that time Whitney had paid him on account \$100, while Cloyes had paid out about \$65 as costs. He made three or four trips to St. Louis with Whitney to see the Moon Motor Car Co. representatives. Whitney had purchased three cars from that company and had been appointed distributor of the Ruxton automobile for it. Under his contract he had made a deposit of \$500 with the company. After he purchased the cars there was a drop in the price. November 3, 1930, Cloyes left Chicago and with Whitney went to the place of business of the Moon Motor Car Co. in St. Louis and had a talk with a Mr. Spoor there.

and every bank or other evidence of debt given, and commenced, de-
 over or judgment entered, with like intent, shall be void as
 against such creditor, purchaser and other persons."

Section 5 provides:

"The foregoing section shall not affect the title of a purchaser
 for a valuable consideration, unless it appears that he had notice
 of the fraudulent intent of his immediate grantor, or of the fraud
 venturing with the title of such grantor."

Objections are made that it was not a violation of this

statute for the debtor to prefer one creditor over others and that

such transfer does not hinder, delay or defraud creditors, citing

27 N.Y.2d 615, 340 N.Y.S.2d 615, 250 A.2d 615, and 250 A.2d 615.

It is contended that the debtor was not in violation of the statute, and

that the same was adequately established by the evidence; that since

the debt was paid prior to the transfer there was no violation of the statute, and

further that the remedy of the creditor was in equity rather than

through levy of an execution, citing 27 N.Y.2d 615, 340 N.Y.S.2d 615, and 250 A.2d 615.

and 250 A.2d 615, 340 N.Y.S.2d 615, and 250 A.2d 615.

There is practically no conflict in the evidence.

Cloyes, an attorney, represented Whitney, the judgment debtor, in

the case of Great Lakes Finance Corp. v. Whitney. He had been doing

work as an attorney for Whitney since April, 1930, and during that

time Whitney had paid him an account \$100, while Cloyes had paid out

about \$85 on account. He made three or four trips to St. Louis with

Whitney to see the Mann Motor Car Co. representatives. Whitney had

purported to own the Mann Motor Car Co. and had been operating the

franchise of the Mann automobile for it. Under his contract he

had made a deposit of \$200 with the company. After he purchased the

car from the Mann Motor Car Co. in 1930, Cloyes left

Chicago and after Whitney went to the place of business of the Mann

Motor Car Co. in St. Louis and had a talk with a Mr. [Name] there.

As a result of that talk Cloyes dictated an assignment as follows:

"Nov. 4, 1930.

Know all Men By These Presents:

That I Wildon F. Whitney of the City of Chicago, County of Cook, of the State of Illinois, for and in consideration of \$1.00 and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby sell, assign, transfer and set over unto William E. Cloyes all accounts, claims and demands of every kind and nature that I have against the Moon Motor Car Company of St. Louis, Missouri, and I hereby authorize the Moon Motor Car Company to account and adjust said accounts, claims and demands with said Wm. E. Cloyes and accept his receipt therefor.

Wildon F. Whitney."

At this time Cloyes knew that the Great Lakes Finance Corp. had a judgment against Whitney and understood that there was a balance owing on the judgment of about \$500. He knew that the judgment had been taken against Whitney with relation to the car in question here and that the Great Lakes Finance Corp. had begun an attachment proceeding in St. Louis. In making a settlement with the Moon Motor Car Co., Mr. Cloyes received a receipt dated November 4, 1930, as follows:

"Received of William E. Cloyes One Hundred Four and no/100 Dollars in Final Settlement for Car 100083--Motor 1013. Bill of sale to be mailed when executed.

\$104.00

Moon Motor Car Co.
L. H. Kilets."

When the car was delivered to Cloyes in St. Louis it had a St. Louis license on it which, he says, is still on it as far as he knows. The car was then driven to Chicago but Cloyes made no application to the State of Illinois for an Illinois license or to the City of Chicago for a vehicle tax license. Cloyes paid the \$104 in cash to the Moon Motor Car Co., and Whitney did not give him the money. He has not rendered any bills to Whitney but has talked with him about the matter. The \$100 payment on fees was made by Whitney to Cloyes sometime in July. Cloyes testified that he went to St. Louis to get the car because Whitney owed him money; that he had never driven the car "until we got it and I brought it

As a result of this said report received on assignment as follows:

Nov. 4, 1930.

Know all men by these presents:
That I, William T. Whitney, of the City of Chicago, County of Cook, of the State of Illinois, for and in consideration of \$1.00 and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby sell, assign, transfer and set over with all right and nature that I have against the Moon Motor Car Company of St. Louis, Missouri, and I hereby authorize the Moon Motor Car Company to accept and adjust said account, claims and demands with said M. T. Glyce and accept his receipt therefor.

Witness my hand and seal this 4th day of November, 1930.

At this time Glyce knew that the Great Lakes Finance Corp. had a judgment against Whitney and understood that there was a balance owing on the judgment of about \$800. He knew that the judgment had been taken against Whitney with relation to the car in question here and that the Great Lakes Finance Corp. had begun an attachment proceeding in St. Louis. In making a settlement with the Moon Motor Car Co., M. T. Glyce received a receipt dated November 4, 1930, as follows:

"Received of William T. Glyce one hundred four and no/100 dollars in final settlement for car 100055--St. Louis, Mo. Will of sale to be called when executed.
Moon Motor Car Co.
L. M. Killefer."

\$100.00

When the car was delivered to Glyce in St. Louis it had a St. Louis license on it which, he says, is still on it as far as he knows. The car was then driven to Chicago and Glyce made no application to the State of Illinois for an Illinois license or to the City of Chicago for a vehicle tax license. Glyce said the first he knew of the Moon Motor Car Co. was when he saw the car. He had not received any bills or statements and was not in touch with him about the matter. The \$100 payment on loan was made by Whitney to Glyce sometime in July. Glyce testified that he went to St. Louis to get the car because Whitney owed him money; that he had never given the car until he got it and I testified

here to sell to try to get my fees out of it." He further testified: "Mr. Whitney turned over an assignment in payment of my fees and that is the only way I had of getting anything. I talked with him about my fees but sent no bills."

In behalf of defendant, T. J. Tyke testified that he worked for Whitney from July 9th to the middle of November while he was distributor in Chicago of the Ruxton automobile; that he first saw the car in question about November 6, 1930, at Whitney's place of business at 2412 South Michigan avenue; that Whitney brought the car in; that he had a conversation with Whitney with regard to it; that he, the witness, drove the car; that it was kept most of the time at 2412 South Michigan avenue, and that Whitney drove it home or downtown; that at one time he went to Whitney to the American Radio Manufacturing company to sell the car and another attempt was made to sell it to a Mr. Buhrke; that he, the witness, drove the car several other places and in calling on prospects used this automobile; that as he remembered it the car was at Whitney's place of business about two or three weeks.

Another employee, John A. Reichart, testified that he worked on the car at Whitney's place of business; that Whitney drove the car into Whitney's place; that he, the witness, took care of the car and that Whitney told him that if anybody asked about the car he was to say it was a customer's car; that during the time the automobile was there it was driven by Whitney, Tyke and Burke, and that it was there about two or three weeks before the sheriff took it; that Whitney was indebted to the witness, and that the witness talked with Cloyes about selling the car, thinking he might get some money that way. The witness further said:

"I saw Mr. Cloyes, and told him, 'I understand that car, Ruxton car, is in your name.' 'Well, (he says, 'Yes.' I says, 'Mr. Whitney owes me' at that time \$180-- and he says, 'Well, Mr. Whitney owes me a lot of money.' He says, 'I have not seen Mr.

here to call to try to get my toes out of it." He further testi-
fied: "Mr. Whitney turned over an assignment in payment of my
toes and that he the only way I had of getting anything. I talked
with him about my toes but went no bills."
In direct testimony, E. J. Ryan testified that he
worked for Whitney from July 25th to the middle of November 1935
he was distributed in Chicago at the Austin automobile; that he
first saw the car in question about November 8, 1935, at Whitney's
place of business at 2412 South Michigan avenue; that Whitney
brought the car in; that he had a conversation with Whitney with
regard to it; that he, the witness, drove the car; that it was
kept most of the time at 2412 South Michigan avenue, and that
Whitney drove it home at downtown; that at one time he went to
Whitney in the American Radio Manufacturing company to call the
car and another attempt was made to sell it to a Mr. Murphy; that
he, the witness, drove the car several other places and in calling
on prospects used this address 115; that he remembered it the
car was at Whitney's place of business about two or three weeks.
Another employee, John A. Delaney, testified that
he worked on the car at Whitney's place of business; that Whitney
drove the car into Whitney's place; that he, the witness, took care
of the car and that Whitney told him that it somebody asked about the
car he was to say it was a customer's car; that during the time the
automobile was there it was driven by Whitney, Ryan and Delaney, and
that it was there about two or three weeks before the sheriff took
it; that Whitney was indebted to the witness, and that the witness
talked with Delaney about selling the car, thinking he might get
some money that way. The witness further said:
"I saw Mr. Delaney, and told him, 'I understand your car,
because it is your car.' 'Well, he says, 'Yes, I know,
' Mr. Whitney came in, he says, 'I have not seen it.
Whitney owes me a lot of money.' He says, 'I have not seen it."

Whitney for about ten days.' I says, 'I need money to buy food.' He says, 'Well, I will see Mr. Whitney about it.'

The witness further said that he had seen Whitney at entrance of the building on the morning of the trial and that Whitney had said he would probably want to have him testify in the case; that he spoke to Cloyes about the car, and that Cloyes said it belonged to him, Cloyes.

Mahoney, sales manager of the Moon Motor Car Co., testified that he had a conference with Cloyes with reference to the car on the Saturday preceding the trip to St. Louis; that Cloyes and Whitney and a Mr. Walker of the Moon company were present and talked about the ownership of the automobile prior to the time they got the car; that Cloyes and Whitney had written back and forth several times trying to get an adjustment; that Cloyes said Whitney had invested all of the money in the Ruxton business, the company had taken the cars away from him and he was at a tremendous loss; that Whitney had visited several to get finances but had been unsuccessful and asked Walker if he would arrange to give Whitney the difference between the drop in price of cars and his deposit; that the discussion then concerned the possibility of the creditor attaching the car; that Walker said the car should be in somebody else's name in order to protect Whitney from attachment; that Cloyes said it could be arranged; that this was not the original start of the discussion with reference to protecting Whitney against attachment; that when the first carload of cars was shipped to Chicago Whitney was unable to finance or unload them; that the car was returned to St. Louis where it was seized, and that as a result of that seizure some \$2,200 was paid by the Moon Motor Car Co. to the Great Lakes Finance Co.; that Cloyes tried to induce Walker to pay the Great Lakes Finance Co., telling him that Whitney could not continue the business with judgments

Whitney for about ten days. I say, I need money to pay
back. He says, 'Well, I will see Mr. Whitney about it.'

The witness further said that he had seen Whitney at
the residence of the building on the morning of the trial and that
Whitney had said he would probably want to have him testify in
the case; that he spoke to Glynn about the case, and that Glynn
said it belonged to him, Glynn.

Kearney, sales manager of the Moon Motor Car Co.,

testified that he had a conversation with Glynn with respect to
to the car on the Saturday preceding the trip to St. Louis; that
Glynn and Whitney and a Mr. Walker of the Moon company were present
and had talked about the ownership of the automobile prior to the
time they got the car; that Glynn and Whitney had written back
and forth several times trying to get an adjustment; that Glynn
said Whitney had invested all of the money in the Moon business,
the company had taken the cars away from him and he was at a tremendous
loss; that Whitney had visited several to get finances but had
been unsuccessful and asked Walker if he would arrange to give
Whitney the difference between the trip in price of cars and his
deposit; that the discussion then converted the possibility of the
vehicle attaching the car; that Walker said the car should be in
Whitney's name in order to protect Whitney from attachment;
that Glynn said it could be arranged; that this was not the
official start of the discussion with reference to protecting
Whitney against attachment; that when the first carload of cars
was shipped to Chicago Whitney was unable to finance or collect
them; that the car was returned to St. Louis where it was sold,
and that as a result of this sale Whitney lost \$2,500 was paid by the
Moon Motor Car Co. to the Great Lakes Finance Co.; that Glynn
tried to induce Walker to pay the Great Lakes Finance Co., selling
his car Whitney could not continue the business with the

against him; that Walker refused to do this; that Cloyes told Walker that he, Cloyes, had done all the work and had not received a single dollar, and that Walker said to Whitney as he left, "It is up to you, Mr. Whitney, to see that Mr. Cloyes is taken care of;" that Cloyes told Walker that unless this matter was straightened out Whitney would be out of business.

Cloyes testified in rebuttal that when he drove the car to Chicago he told Whitney to sell it for him; that he knew the car was in the physical possession of Whitney and Buhrke; that Buhrke came with the car and got him several times, but that he had never talked with Tyke; that the original wholesale price of the car was over \$3,000 and the sales price was cut to \$2,700; that the car had been used as a demonstrator and was in St. Louis because it had been found faulty. The witness further said, "Whitney owed me at the time \$2,000 but I had never rendered a bill."

Whitney testified that he went to St. Louis with Cloyes November 3rd and returned with him November 4th; that he went with Cloyes to Cloyes' home and at that time Cloyes delivered the car to him; that Tyke and Buhrke had driven the car and that his daughter had driven it once. He denied that he told Tyke it was his car but stated that he said the car belonged to a client and that his instructions were to sell the car.

Upon this evidence the court found the title of the claimant void as having been put in him for the purpose of defrauding his creditors. It is not urged that the finding is against the weight of the evidence, but the claimant, as already stated, relies for reversal upon the legal proposition that a debtor, even if in failing circumstances, may, if he acts in good faith, prefer one creditor to the exclusion of another, although

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"Walsh owed me at the time \$2,000 and I had never rendered a receipt it had been twenty. The witness further said, that the car had been used as a demonstrator and was in St. Louis the car was over \$2,000 and the sales price was put to \$2,700; had never talked with them; that the original wholesale price of Buick came with the car and got him several times, but that he saw to Chicago he told Walsh to sell it for him; that he knew Walsh testified in rebuttal that when he drove the

and that his instructions were to sell the car.

was his car but stated that he said the car belonged to a client
his daughter had driven it once. He denied that he told Tyne it
the car to him; that Tyne and Burke had driven the car and that
went with Tyne to a gym; some time at that time Tyne delivered
October November 2nd and returned with him November 4th; that he
Tyne testified that he went to St. Louis with

1. Upon this evidence the court found the claimant to be the owner of the claimant's vessel as having been put in him for the purpose of delivery to him as a vessel. It is not necessary that the claimant is against the weight of the evidence, but the claimant, as already stated, relies for recovery upon the legal proposition that a vessel, even if it is being chartered, may, if he acts in good faith, be treated as his own vessel for the purpose of the claimant's claim.

the claims of other creditors should thereby be defeated and although he must have known that such would be its effect. There is no doubt of these propositions of law, which are clearly stated in Nelson & Co. v. Leiter, 190 Ill. 414; Bartel v. Zimmerman, 293 Ill. 154, and Bank of Mansfield v. Moore Bank, 249 Ill. App. 237, but the application of these rules assumes the existence of two fundamental and controlling facts: (1) the transaction by which the property was conveyed must have been made in good faith; and (2) it must have been made for the purpose of securing or collecting the preferred claim.

Here, the circumstances are such that the trial court could reasonably infer therefrom that the real purpose of the series of transactions by which the title to the automobile was placed in the claimant and the possession and use of it left with the debtor and his family, was not that the very indefinite debt of the claimant for attorney's fees might be collected, and that the transactions were not had in good faith for that reason. The relationship of client and attorney, the evidence as to the frank discussion preceding the last trip to St. Louis, the fact that the journey was made by client and attorney together, the insolvency of the debtor, the fact that the possession and control of the automobile was left with the debtor, the failure to ascertain that any exact amount was due for attorney's fees prior to the transaction, the undisputed fact that no bill had ever been rendered for these fees - all these facts, in our opinion, tend to justify the finding of the court that the real purpose of it all was to protect the debtor and not to collect the attorney's fees.

It must be remembered that our courts hold that the statute must receive a liberal construction to the end that it may serve the purpose for which it was enacted (Waldardt v. Brown, 6 Ill. (1 Gil.) 397), and that the findings of the trial Judge upon

the claims of other creditors should thereby be determined and although he must have known that such would be the effect. There is no doubt of these propositions of law, which are clearly stated in Johnson v. Johnson, 100 Ill. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the application of these rules governs the existence of the legal and controlling facts: (1) the transaction by which the property was conveyed must have been made in good faith; and (2) it must have been made for the purpose of securing or collecting the preferred claim.

Here, the circumstances are such that the trial court would reasonably infer therefrom that the real purpose of the sale of transactions by which the title to the automobile was placed in the claimant and the possession and use of it left with the debtor and his family, was not that the very indefinite debt of the claimant for attorney's fees might be collected, and that the transactions were not made in good faith for that reason. The relationship of client and attorney, the evidence as to the transaction preceding the last trip to St. Louis, the fact that the journey was made by client and attorney together, the insolvency of the debtor, the fact that the possession and control of the automobile was left with the debtor, the failure to ascertain that any exact amount was due for attorney's fees prior to the transaction, the matter noted that no bill had ever been rendered for these fees - all these facts, in our opinion, tend to justify the finding of the court that the real purpose of it all was to protect the debtor and not to collect the attorney's fees.

It must be remembered that our courts hold that the claimant will receive a liberal construction to the end that it may serve the purpose for which it was made. (See Wells v. Wells, 111 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

conflicting evidence are entitled to the same weight as the verdict of the jury and will not be disturbed upon review unless manifestly against the weight of the evidence. (City of Chicago v. Smith, 48 Ill. 107; Lehman v. Rothbarth, 159 Ill. 270; Richmond v. Conner, 197 Ill. App. 105; Illinois-Indiana Fair Assoc. v. Phillips, 241 Ill. App. 484.) Moreover, if the amount claimed to be due for attorney's fees was a valid and subsisting claim, much better evidence than any produced by the claimant upon that point would have been easily available. That such evidence was not produced justifies an inference that it was not in fact available. (Clifton v. U. S., 4 Howard 240, 11 L. Ed. 957.) A recovery by the claimant under such circumstances would indicate an easy method by which the statute might be evaded.

It is not necessary to discuss all the cases cited. There is no conflict in the rules of law applicable as laid down by the decisions of the courts. All the cases agree that while the insolvent debtor has a right to prefer one creditor to the exclusion of others, the preference must be made in good faith and for the sole purpose of collecting a valid indebtedness. Beidler v. Crane, 135 Ill. 92; Zwick v. Catavenis, 331 Ill. 240, and Syalina v. Saravana, 341 Ill. 236, are only a few of the many cases so holding.

Under circumstances such as here appear, there is no merit in the contention of the claimant that defendant's remedy was in a court of equity alone. Gould v. Steinburg, 84 Ill. 170, and Phillips v. Kesterson, 154 Ill. 572.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

35179

JOHN F. HANLEY,
Appellee,

vs.

CARLOS AMES, ARCHIBALD J. CAREY
and EDWARD J. DENEMARK, as Civil
Service Commissioners of the City
of Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

262 I.A. 643⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

September 15, 1926, the Civil Service Commission of the City of Chicago entered an order discharging John F. Hanley from his position as patrolman. June 20, 1929, Hanley filed in the Superior court of Cook county a petition praying that a writ of certiorari be directed to the Civil Service Commission to turn the record of the case into the court that the same might be reviewed. The writ issued, and pursuant thereto on July 12, 1929, the record of the Civil Service Commission was returned. There was a motion by the Commission to quash the writ and a motion by the petitioner to quash the record. The motion to quash the writ was denied, and December 12, 1930, the court entered an order sustaining the motion of the petitioner. From that order the Commission has perfected this appeal.

The Civil Service Commission urges (as it has often been held) that the only office of the common law writ of certiorari is to certify the record of an inferior tribunal for review; that the matter is tried by an inspection of the record; that the judgment of the court will be either that the writ be quashed or that the record be quashed; that the record as returned must show jurisdictional facts, and that unless such jurisdictional facts are shown the record will be quashed. These rules are established by a long line of authorities. (Chicago & N. I. R. R. Co. v. Whipple, 22 Ill. 103;

JOHN F. SULLIVAN,

Appellant.

VS.

CARLOS A. SULLIVAN, JR.,
and
JOHN J. SULLIVAN, JR.,
Defendants.

Appeals from the Circuit Court of Cook County, Illinois.

MR. PRESIDING JUSTICE WATSON
DELIVERED THE OPINION OF THE COURT.

1930

On October 15, 1929, the Civil Service Commission of

the City of Chicago entered an order discharging John F. Sullivan

from his position as nightman. On October 15, 1929, Sullivan filed in

the Superior Court of Cook County a petition praying that a writ

of certiorari be directed to the Civil Service Commission to annul

the record of the case and that the court grant the writ of re-

view. The writ issued, and return thereon on July 12, 1930.

The record of the Civil Service Commission was returned. There

was a motion by the Commission to quash the writ and a return by

the Commission to quash the record. The motion to quash the writ

was denied, and December 12, 1930, the court entered an order an-

nulling the motion of the Commission. From that order the Commis-

sion has perfected this appeal.

The Civil Service Commission argues (as it has often

been held) that the only effect of the common law writ of certiorari

is to certify the record of an inferior tribunal for review; that

the matter is tried by an inspection of the record; that the judgment

of the court will be either that the writ be granted or that the

record be quashed; that the record as returned must show indis-

putable error, and that unless such indisputable facts are shown the

record will be quashed. These rules are established by a long line

of authorities. Chicago & N. W. Ry. v. Chicago, 22 Ill. 102;

2221 A. 643

Donahue v. County of Will, 100 Ill. 94; Carroll v. Houston, 341 Ill. 531.)

It is also the law that in such a case the court issuing the writ has no power to pass on the findings and conclusions of the inferior tribunal but may examine the same to determine whether the inferior tribunal ^{had} jurisdiction and whether it acted upon evidence and according to the law; that if the inferior tribunal proceeded legally and had jurisdiction to hear and determine the case, then the court issuing the writ is without power to review the order upon the ground that the inferior tribunal wrongfully removed petitioner from office. These rules are also established by numerous authorities. (Wilcox v. The People, 90 Ill. 186; The People v. Lindeblom, 182 Ill. 241; City of Chicago v. The People, 210 Ill. 84; Joyce v. City of Chicago, 216 Ill. 466; The People v. City of Chicago, 234 Ill. 416; Carroll v. Houston, 341 Ill. 531.)

In this case the return to the writ of certiorari shows that on September 6, 1926, the Commissioner of Police in the city of Chicago preferred written charges against petitioner, together with specifications of particular acts and conduct constituting a respective violation of the rules of the department; that the Commission caused a written form of notice to be issued upon said charges to the petitioner, commanding him to appear before it at a given time and place to answer and defend the charges, a copy of which was served with the notice; that on September 10, 1926, petitioner was duly served with a copy of the notice and the charges, and under his own name he acknowledged receipt of the same on that day; that a hearing was had, and that to sustain the charges the Commission heard the sworn testimony of witnesses; that the Commission thereupon caused its findings to be entered of record and signed by it, sustaining the charges and ordering the removal of petitioner from his

position. A copy of the charges filed by the Commissioner of Police shows that the petitioner was alleged to be guilty of a violation of section 2, rule 239 of the Rules and Regulations of the Department of Police, prescribed and in force December 15, 1924, as per Circular Order No. 361, "In that the said Sergeant John F. Hanley, Star No. 245, assigned to the 20th District, and detailed as Roundman Sergeant, while on duty, about 11:15 P. M., September 5, 1926, at Leavitt and Madison streets, was in an intoxicated condition. Attached statements of witnesses and report of Lieutenant David Schwartz 20th District, are hereby made a part of these specifications."

The return also shows that September 15, 1926, the Commission met in Room 612, City Hall, for the purpose of investigating the charges, and heard the testimony, a record of which was preserved and on file in the office of the Commission; that upon the conclusion of the evidence and argument, the Commission being duly advised, found that the petitioner at the time and place alleged and while on duty was intoxicated; that from a consideration of all the evidence before it the Commission found the petitioner guilty of the violations alleged, in that he was while on duty intoxicated, his walk unsteady, his breath smelled of intoxicating liquor, his speech was incoherent, and he was not fit for duty, "Whereupon the Civil Service Commissioners find the said John F. Hanley guilty of 'Intoxication' as alleged in the foregoing charges, and by reason of which finding of guilt it is ordered that the said John F. Hanley be and he is hereby ordered discharged from the position of Sergeant, Department of Police, and from the service of the City of Chicago."

It is urged in behalf of petitioner that the Superior court made an inquiry into the facts and desiring that substantial justice might be done, called the petitioner before the court, and after a painstaking inquiry and after plaintiff had agreed to waive

petition. A copy of the charges filed by the Commissioner of Police shows that the petitioner was alleged to be guilty of a violation of section 2, title 200 of the Rules and Regulations of the Department of Police, promulgated and in force December 15, 1934, as per City Order No. 501, "It was the said Sergeant John F. Hanley, West No. 1st, assigned to the West District, and detailed as Sergeant, while on duty, about 11:15 P. M., September 8, 1935, at Leavitt and Madison streets, was in an intoxicated condition. At- tached statements of witnesses and report of Lieutenant David Roberts, West District, who thereby made a part of these specifications." The return also shows that September 18, 1935, the Commission met in Room 212, City Hall, for the purpose of investi- gating the charges, and heard the testimony, a record of which was preserved and on file in the office of the Commissioner; that upon the conclusion of the witness and argument, the Commission having duly advised, found that the petitioner at the time and place alleged and while on duty was intoxicated; that from a consideration of all the evidence before it the Commission found the petitioner guilty of the violations alleged, in that he was while on duty intoxicated, and while on duty, his breath smelled of intoxicating liquor, his speech was incoherent, and he was not fit for duty. Whereupon the Civil Service Commissioners find the said John F. Hanley guilty of 'Intoxication' as alleged in the foregoing charges, and by reason of which finding of guilt it is ordered that the said John F. Hanley be and he is hereby ordered discharged from the position of Sergeant, Department of Police, and from the service of the City of Chicago." It is urged in behalf of petitioner that the Superior Court made an inquiry into the facts and decided that substantial justice might be done, called the petitioner before the court, and after a preliminary inquiry and after plaintiff had agreed to waive

all rights to back salary, the court quashed the findings of the Civil Service Commission. This the court was without authority or jurisdiction to do. The trial of a case of this kind must be solely upon the record as returned, as all the cases hold. Moreover, as there was a delay of more than six months by petitioner in suing out the writ of certiorari, he was barred by laches from obtaining the relief sought. (City of Chicago v. Condell, 224 Ill. 595; Blake v. Lindeblom, 225 Ill. 555; Clark v. City of Chicago, 233 Ill. 113; Schultheis v. City of Chicago, 240 Ill. 167; The People v. Burdette, 285 Ill. 48; Carroll v. Houston, 341 Ill. 531.)

In a proceeding of this nature it would seem that if the Commission has complied with due forms of law, a reviewing court is without authority to interfere upon the sole ground that an injustice has been done. This is the construction put upon the statute by the highest court of the state, and if the law should be otherwise the matter is for the legislature rather than for the courts.

The order is reversed.

REVERSED.

O'Connor and McSarely, JJ., concur.

All rights to back salary, the court reversed the findings of the
 Civil Service Commission. This the court was without authority to
 do. The trial of a case of this kind must be held
 upon the facts as presented, not on the law alone. However, as
 there was a delay of more than six months by decision in such
 and the writ of certiorari, he was barred by laches from obtaining
 the relief sought. (111 Cal. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In a proceeding of this nature it would seem that it
 the Commission has complied with the terms of law, a reviewing
 court is without authority to interfere upon the sole ground that
 an injustice has been done. This is the constitution and upon the
 basis by the highest court of the state, and if the law should
 be otherwise the matter is for the legislature rather than for the
 courts.

The order is reversed.

REVEREND.

Constitution and Statutes, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

35311

FREDERICK THOMAS,
Complainant,

vs.

SAMUEL J. DAMOND et al.,
Defendants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

Interlocutory Appeal of BERTHA LANSKY,
formerly Bertha Freiden,
(Defendant) Appellant.

262 I.A. 644

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal Bertha Lansky, one of the defendants, asks the reversal of an interlocutory order appointing a receiver in a foreclosure proceeding.

The complainant, appellee here, in the first part of his brief argues that the appeal should be dismissed. This court does not entertain motions which appear only in the briefs. Rule 15 of this court prescribes the procedure with reference to motions and should be followed.

However, we might state that there is no merit in the so-called motion of complainant which is predicated upon the assumption that Paragraph 122 of the Practice act, which provides for appeals from interlocutory orders, requires the filing of a complete record of the cause in the Appellate court. The statute does not so provide, but that the cause should be docketed "upon filing of the record." Without discussing the matter at length, we hold that there is nothing in the Practice act discriminating between records on interlocutory and final appeals. In either case the party appealing is required to bring up enough of the record to present for the determination of this court the errors of which complaint is made. The practice with reference to records in interlocutory appeals is governed by Paragraph 81 of

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the Practice act.

The instant record shows that a receiver was appointed upon bill and petition filed by complainant and there is nothing upon the face of the record which indicates that a reference to any portion of the record not before us is necessary to pass upon the point involved. Hogan v. Akin, 181 Ill. 448.

Defendant says that the verification of the bill is fatally defective. The verification is open to the objections stated in Grabowski v. MacLuskey, 257 Ill. App. 484, and cases there cited. But the petition is properly verified and a receiver may be appointed upon a petition properly verified, although the bill itself is not verified. Cowell v. Gnatzig, 178 Ill. App. 482; Daley v. Nelson, 119 Ill. App. 627.

A majority of this court is of the opinion that the receiver was improvidently appointed for the reason that there was no sufficient showing that the appointment was necessary. There is an averment that bonds aggregating \$4500, part of the original series of \$85,000, with interest amounting to \$2310, secured by a first mortgage, are unpaid; also that there are subsequent mortgages aggregating \$18,000. The bill seeks a partial foreclosure of these first mortgage bonds aggregating \$4500. There is no averment of the value of the security. The petition alleges that the premises are "scent security for the amount due; that the premises are not being properly taken care of, and are becoming in a run-down condition, and that it will necessitate immediate repairs in order to conserve the premises." These are mere conclusions and are of no evidentiary value. Facts should be stated, upon which the court may exercise its discretion as to whether or not a receiver is necessary.

Complainant seems to contend that a receiver should be appointed solely upon the ground that the trust deed conveyed the

The instant record shows that a receiver was appointed upon bill and petition filed by complainant and there is nothing upon the face of the record which indicates that a reference to any portion of the record was before us in necessity to pass upon the point involved. Wagon v. Wagon, 108 Ill. 448.

Talbot says that the verification of the bill is totally defective. The verification is open to the objections stated in Wagon v. Wagon, 108 Ill. 448, and cases there cited. But the petition is properly verified and a receiver may be appointed upon a petition properly verified, although the bill itself is not verified. Wagon v. Wagon, 108 Ill. 448, 449; Wagon v. Wagon, 119 Ill. 487.

A majority of this court is of the opinion that the receiver was improperly appointed for the reason that there was no evidence showing that the appointment was necessary. There is an account that bonds amounting \$4800, part of the original series of \$25,000, with interest amounting to \$2310, secured by a first mortgage, was unpaid; also that there are subsequent mortgages amounting \$15,000. The bill seeks a partial foreclosure of these mortgages and bonds amounting \$2300. There is no account of the value of the security. The petition alleges that the purchase was "made recently for the amount due; that the purchase is not being properly taken care of, and are becoming in a run-down condition, and that it will necessitate immediate repairs in order to conserve the premises." There are no calculations and are of no evidentiary value. It should be stated, upon which the court may exercise its discretion as to whether or not a receiver is necessary. Complaint seems to contend that a receiver should be appointed solely upon the ground that the trust had conveyed the

rents and profits as part of the security. We have repeatedly held that such provisions are not conclusive upon the chancellor upon such a motion; that while they are entitled to weight, the chancellor should consider all the equities of the case. Bothman v. Lindstrom, 221 Ill. App. 262. Such provisions are not sufficient where it would be inequitable to appoint a receiver. If the property is ample security a receiver ought not to be appointed. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76; Aetna Life Ins. Co. v. Brooker, 166 Ind. 576; Davis v. Blair, 252 Ill. App. 417; Grabowski v. MacLuskey, 257 Ill. App. 434; Chicago Title & Trust Co. v. McDowell, 257 Ill. App. 492; Reliance Bank & Trust Co. v. Skanski, number 35042, Appellate Court, opinion filed May 19, 1931. We are in accord with what is said in Aetna Life Ins. Co. v. Brooker, 166 Ind. 576:

"The appointment of a receiver is a remedy; it is a part of the procedure of courts of chancery to conserve and enforce equitable rights, but it is not an equity in itself, and parties cannot bargain concerning the exercise of the jurisdiction. Such provisions, no doubt, may be entitled to some weight upon the application, but a court of equity will not enforce them where it would be inequitable or unconscionable so to do."

Also in Brick v. Hornbeck, 43 N. Y. Supp. 301:

"Unless the land is inadequate security, the appointment of a receiver is an unnecessary annoyance and hardship.*** Parties may not by contract impose an obligation upon courts in such a respect. Extraordinary remedies are not resorted to unless required in order to do full justice. It is for the court in every instance to determine whether it should take upon itself such a trust, and whether it should do so in a case like this depends upon whether it is necessary for the security or protection of the mortgagee."

Rohrer v. Deatherage, 336 Ill. 450, cited by complainant, is not in point. That case involved the controversy between a receiver and a tenant as to which was entitled to possession of the mortgaged premises pending foreclosure.

For the reasons indicated we hold that the record did not justify the appointment of a receiver and the order of

[illegible][illegible]

The following information was obtained from the records of the Bureau of Prisons, Washington, D.C., regarding the above-named individual:

NAME: [REDACTED]
DATE OF BIRTH: [REDACTED]
PLACE OF BIRTH: [REDACTED]
RACE: [REDACTED]
HEIGHT: [REDACTED]
WEIGHT: [REDACTED]
EYES: [REDACTED]
HAIR: [REDACTED]
SCARS OR TATTOOS: [REDACTED]
CRIMINAL RECORD: [REDACTED]

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[illegible]

It is not justly the enjoyment of a receiver and his right to
but the reasons indicated we hold that the receiver
the receiver is not entitled to possession of
a receiver and a trust as to which was entitled to possession of
and, is not in point. That case involved the controversy between
Baker v. Carrington, 254 Ill. 480, cited by counsel.

appointment is therefore reversed.

REVERSED.

O'Connor, P. J., specially concurring:

The verification of the bill is sufficient. Farrell v. Halberg, 262 Ill. 407; Peterson Co. v. Asphalt Sales Co., 235 Ill. App. 592.

Matchett, J., dissenting:

I agree with the opinion of the court insofar as the motion to dismiss the appeal is concerned, but I do not agree that the order appointing a receiver should be reversed. As the opinion states, the trust deed expressly conveys the rents, issues and profits, and I take it the parties had the perfect right to make such an agreement. The inevitable effect of reversing this order is to prevent the bondholders from receiving the benefit of security conveyed in trust for them under the provisions of the deed. I cannot discover equity in such a rule. As I understand Rohrer v. Deatherage, 336 Ill. 450, the order should be affirmed.

appointment in receiver's favor.

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35302

CATHERINE WOOD,
Appellee,

vs.

MACLEAN DRUG COMPANY et al.,
Defendants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK
COUNTY.

HARRY E. WHITE and FRED S. WHITE,
Appellants.

262 I.A. 814²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 2, 1929, complainant, Catherine Wood, filed her bill against defendants, and on November 2, 1929, an amended bill, which was thereafter amended. This amended bill avers that complainant is over sixty years of age, a housewife, without business experience; that the Maclean Drug Company was incorporated as an Illinois corporation in 1908 to manufacture and deal in drugs and sundries, with a capital of \$10,000, consisting of 100 shares of the par value of \$100 each; that Alexander Maclean, a brother of complainant, originally held 49 shares; that George F. Burke and Herbert J. Burke held 25 shares and 26 shares respectively; that on January 1, 1909, Alexander Maclean purchased the Burkes' interest and dominated the company until January 21, 1924; that Fred S. White and Harry E. White entered into the employ of the company in 1910 and 1911 respectively; that on July 1, 1911, George R. Wood, husband of complainant, entered into the employ of the company, purchased an interest therein and became secretary and treasurer; that complainant's son, Archibald Wood, became a delivery boy for the company about that time; that the company prospered and operated a central warehouse in Chicago and 15 stores; that on January 1, 1924, Alexander Maclean sold his stock to George R. Wood, Harry E. White, Fred S. White and

Archibald M. Wood; that George R. Wood, complainant's husband, died January 13, 1927; that at his death he bequeathed his stock to complainant, and after his death the board of directors was composed of Harry and Fred White, Archibald Wood, Mr. Cunningham and Mr. Coates; that Harry and Fred White are nephews of complainant; that complainant had the utmost confidence in the Whites and in her son; that Harry and Fred White conspired together for the purpose of defrauding her, and that by various devices they prevented her from receiving dividends on her stock, paid large salaries to themselves, and July 1, 1928, Harry White, without the knowledge of complainant, entered into negotiations for the sale of the assets of the company; that August 10, 1928, Harry White offered the assets of the corporation to representatives of Liggett for \$1,500,000, and then stated that he, Fred White, and Archibald Wood, owned all the stock except one block, which he could easily secure; that Harry White kept the knowledge of these negotiations from Archibald Wood and told Archibald Wood that there was no truth in rumors that he was negotiating for the sale of the stores; that August 24, 1928, by false representations Harry White undertook to purchase complainant's stock for \$100,000, knowing that it was worth more than \$400,000; that on the same day Archibald Wood stated to complainant that he had been assured by Harry White that there was to be no sale of the company's assets; that at that time complainant's sister was seriously ill in California and complainant was advised that she must hurry to that State and was in a distressed and troubled state of mind, all of which was known to Harry White; that complainant, in ignorance of the truth and relying upon the statements of Archibald Wood and having confidence that the Whites would divulge all facts having a bearing upon the value of her stock, and being in a distressed state of mind about her sister,

Archibald M. Wood, (now known as Wood, complainant's husband, died
January 15, 1937; that at his death he bequeathed his stock to com-
plainant, and after his death the board of directors was composed
of Harry and Fred White, Archibald Wood, Mr. Cunningham and Mr.
Gordon; that Harry and Fred White are members of complainant; that
complainant had the largest ownership in the stock and in her own
that Harry and Fred White conspired together for the purpose of
defrauding her, and that by various devices they prevented her from
receiving dividends on her stock, paid large salaries to themselves,
and July 1, 1938, Harry White, without the knowledge of complainant,
entangled into negotiations for the sale of the assets of the
company; that August 10, 1938, Harry White altered the records of
the corporation to representatives of liquidator for \$1,000,000, and
then stated that he, Fred White, and Archibald Wood, owned all the
stock except one block, which he could, legally, transfer; that Harry
White kept the proceeds of these negotiations from Archibald Wood
and told Archibald Wood that there was no stock in interest that he
was negotiating for the sale of the assets; that August 10, 1938,
by false representations Harry White undertook to purchase complainant's
stock for \$100,000, knowing that it was worth more than
\$100,000; that on the same day Archibald Wood stated to complainant
that that he had been assured by Harry White that there was to be
no sale of the company's assets; that at that time complainant's
attorney was seriously ill in California and complainant was advised
that she must hurry to that State and was in a distressed and
troubled state of mind, all of which was known to Harry White;
that complainant, in ignorance of the facts and relying upon the
statements of Archibald Wood and Harry White, and the advice
of her attorney, all three having a feeling that the value of her
stock, and being in a distressed state of mind, sold her stock.

accepted the offer of \$100,000 on August 9, 1928, and wrote the Illinois Merchants Trust Co. authorizing it to deliver her stock to the MacLean Drug Co., or Harry E. White upon receipt of \$100,000 on or before August 31, 1928, deposited her stock with the Trust company and thereafter on August 11th received a check for \$100,000 that the Whites knew all the time that the stock was worth more than \$100,000 and fraudulently failed to inform her of its true value, and because of the confidence she had in them as her nephews and the associates of her deceased husband, she accepted their offer.

The amended bill further avers that on September 29, 1928, the assets of the MacLean Drug Co. were sold to the Liggetts for cash and stock, out of which defendants received \$1,500,000; that November 1, 1928, a division of the proceeds of the sale was made among the stockholders, other than complainant; that on August 11, 1928, complainant went to California, where she remained with her sister until her death; that she knew nothing of the sale to Liggetts until September 15, 1928.

Complainant offers in her bill to do equity and asks that the sale of her stock may be rescinded and a new distribution to the stockholders directed; that she be paid the difference between the value of her stock and what she received. She prayed that an injunction issue restraining defendants from further distributing the assets of the corporation, or from diverting any of the moneys, funds or other assets of the company from a proper and lawful use; that a receiver might be appointed with full power to collect and hold the assets of the company, to wind up its affairs and distribute its assets among the stockholders. She also prayed for general relief.

The bill was duly verified. By an amendment complainant

suggested the offer of \$100,000 on August 9, 1938, and wrote the Illinois Merchants Trust Co. recommending it to deliver her stock to the National Bank Co., or Harry R. White upon receipt of \$100,000 on or before August 31, 1938, deposited her stock with the Trust Company and thereupon on August 11th received a check for \$100,000.00 that the Whites knew all the time that the stock was worth more than \$100,000 and presumably failed to inform her of its true value, and because of the confidence she had in them as her husband and the associates of her deceased husband, she accepted their offer.

The amended bill further avers that on September 22, 1938, the assets of the National Bank Co. were sold to the Liquidator for cash and stock, out of which defendant received \$1,000,000; that September 1, 1938, a division of the proceeds of the sale was made among the stockholders, when defendant received \$1,000,000; that September 1, 1938, defendant went to California, where she remained with her sister until her death; that she knew nothing of the sale or liquidation until September 15, 1938.

Complaint offers in her bill to do equity and asks that the sale of her stock may be rescinded and a new distribution to the stockholders directed; that she is paid the difference between the value of her stock and what she received. She prays that an injunction issue restraining defendant from further distributing the assets of the corporation, or from diverting any of the money, funds or other assets of the company upon a proper and lawful writ that a receiver might be appointed with full power to collect and hold the assets of the company, to wind up the affairs and distribute the assets among the stockholders. She also prays for general relief.

The bill was duly verified. An affidavit was filed.

averred that Harry E. White failed to inform her of the true value of her stock; that because of the social, business and blood relationship between Harry White and herself, she believed that he would reveal the true value of her stock and because of that belief and her reliance upon and confidence in the two Whites, she accepted the offer of \$100,000; that Archibald Wood, relying upon statements made to him by Harry White, stated to complainant prior to her acceptance of the offer that he had been assured by Harry White that there was no truth in the rumors that there were negotiations for the purchase of the Company; that complainant relied upon the statement of Archibald Wood and in ignorance of any negotiations for the sale of the company believed that Archibald Wood would have full information of any such negotiations and that he and the Whites would divulge all the facts and in that reliance accepted the offer.

Harry and Fred White and the MacLean Drug Company answered the bill, denying conspiracy and fraud and that there was equity in the bill. February 18, 1930, the cause was put at issue and referred to a master. December 12, 1930, complainant made a motion for an injunction pendente lite in accordance with the prayer of the amended bill and, particularly, to enjoin defendants from disposing of a certain escrow fund created about October 16, 1928, by Harry and Fred White and Archibald Wood. December 12th this motion was also referred to a master to hear evidence and report the same with his conclusions and recommendations thereon. The order further stated:

"*** and the said solicitor (for defendants) having stated to the court that pending a reference of the said motion and a determination thereof by this court, that the escrow would continue in the same condition and be managed as at present and continue to remain with the Foreman-State National Bank or the Foreman State Trust & Savings Bank."

March 26, 1931, complainant filed a petition reciting the filing of the verified bill and amendments thereto, in which she prayed for a temporary injunction restraining defendants from

March 22, 1911. Complaint filed a petition requesting
a ruling of the verified bill and amendments thereto, in which
March 22, 1911. Complaint filed a petition requesting

in any manner making further distribution among themselves or from diverting any of the moneys, funds or other assets acquired in the sale of the Maclean Drug Co., to Liggetts, Inc., and further reciting the filing of answers and the reference of the cause to the master. The petition avers that March 24, 1931, the master prepared a report which is pending before the master, the time to file objections being set for April 3, 1931; that the report is made a part of the petition; that the report finds that in accordance with the allegations of the amended bill of complaint the Whites are guilty of active and actual fraud against complainant and that she is entitled to recover \$318,830. The petition recites the motion of December 12, 1930, the existence of the escrow agreement, and the reference of the motion for an injunction to the master.

The petition avers that after the sale to the Liggetts Harry and Fred White and Archibald Wood, by the agreement of October 16, 1928, deposited in an escrow fund with the Foreman State Trust & Savings Bank securities and other assets purchased by them with the moneys obtained from the said sale; that the master finds that the escrow fund was held subject to the joint order of Harry White and either one of the other parties to it; that said contract contemplated that upon the dissolution of the Maclean Drug Co., its remaining assets should become a part of the escrow fund; that the master recommended a temporary injunction; that after the reference to the master an agreement was made between the solicitors for the parties that the fund would not be disturbed or any substitution of securities made until the master was advised thereof, and that this agreement was violated and substitution was made without the master's knowledge; that the moneys in said escrow rightfully belonged to complainant, and that the fund should be preserved

in any manner making further distribution among themselves of the
 assets of the company, funds or other assets deposited in the
 name of the company, to the extent of the assets of the company in
 the name of the company, and the balance of the assets of the company
 the master. The petition avers that March 24, 1931, the master
 prepared a report which is pending before the master, the time
 to file objections being set for April 3, 1931; that the report
 is made a part of the petition; that the report finds that in
 accordance with the allegations of the amended bill of complaint
 the United are guilty of active and actual fraud against complainant
 and that they are entitled to recover \$125,000. The petition
 recites the action of December 12, 1930, the existence of the co-
 trust agreement, and the testimony of the action for an injunction
 to the master.

The petition avers that after the sale to the Liggett
 Company and Fred White and Archibald Wood, by the agreement of October
 16, 1928, deposited in an escrow fund with the Vermont State Trust
 Company Bank, securities and other assets belonging to them with
 the money obtained from the said sale; that the master finds that
 the escrow fund was held subject to the joint order of Harry White
 and either one of the other parties to it; that said master has
 determined that upon the dissolution of the company fund of the
 company assets should be a part of the assets of the company; that the
 master recommended a judgment in favor of the company; that the
 to the master an agreement was made between the parties for the
 parties that the fund would not be distributed on any subdivision
 or settlement made until the master was advised thereof, and that
 this agreement was violated and substitution was made without the
 master's knowledge; that the money in said escrow rightfully
 belonged to complainant, and that the fund should be preserved

pending the final disposition of the case, for want whereof the complainant will be unduly prejudiced. The petition prayed an injunction enjoining all the defendants from dealing with any of the assets in said escrow fund or from attempting to terminate it in any manner. This petition was also verified.

On the same day the court entered an order reciting that the court had considered complainant's verified bill as amended and verified petition and had heard the arguments of counsel and evidence; that it appeared to the court that certain assets were deposited with the Foreman State Trust & Savings Bank, as escrowee, pursuant to an agreement of July 17, 1930, which was introduced in evidence before the master as "Complainant's Exhibit 2"; that a representative of the bank was present in court, and that it further appearing that the master has recommended in his draft of a report the issuance of an injunction upon complainant's bond of \$500 being filed, and that said report has not yet been filed but that the time for filing objections thereto has been set for April 13, 1931, and that the court has had called to its attention the recommendation of the master and has had presented to it a copy of the report, and it further appearing that due notice of the application has been given and that complainant will be unduly prejudiced if the injunction is not issued, it was ordered that each and all of the defendants, their agents, representatives and assigns be restrained until the further order of the court from dealing in any manner with the assets now held in the escrow fund. It was further ordered that in the event conditions rendered it advisable to sell any securities, defendants should apply to the court for leave so to do, and the court should prescribe the conditions upon which the sale might be made, to the end that either the proceeds should be deposited in the escrow fund or that other securities

pending the final disposition of the case, for want whereof the
complaint will be usually protected. The petition prayed an
injunction enjoining all the defendants from dealing with any of
the assets in said answer filed or from attempting to terminate
it in any manner. This petition was also verified.

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2"; that a representative of the bank was present in court, and that
it further appearing that the master has recommended in his draft
of a report the issuance of an injunction upon complainant's bond
of \$500 being filed, and that said report has not yet been filed
but that the time for filing objections thereto has been set for
April 1, 1931, and that the court has had called to its attention
the recommendation of the master and has had presented to it a copy
of the report, and it further appearing that due notice of the an-
nouncement has been given and that complainant will be usually pro-
tected if the injunction is not issued, it was ordered that each and
all of the defendants, their agents, representatives and assigns do
restrain and until the further order of the court from dealing in
any manner with the assets now held in the answer filed. It was
further ordered that in the event conditions rendered it advisable
to call any securities, defendants should apply to the court for
leave so to do, and the court should prescribe the conditions upon
which the same might be made, to the end that either the proceeds
should be deposited in the answer fund or that other securities

should be deposited therein in lieu of such securities, and that defendants be enjoined from making any demand upon the bank as escrowee for any of the property.

To reverse that order this appeal has been prosecuted.

It is contended in the first place that it was error to issue the injunction because it was not supported by proper averments in the bill, and, with other cases, we are cited to Johnson v. Crough, 244 Ill. App. 105, (a case where a temporary injunction was issued without any notice to the defendants) and to Czarnecki v. Czarnecki, 341 Ill. 629. There is, of course, no doubt of the elementary proposition announced in these cases. The allegations of the bill, the proof and the decree must correspond. The injunctive order in this case does not, in our opinion, disregard that rule. The allegations of the bill are to the effect that the sale and distribution of the assets of the company have been made in disregard of the rights of complainant and through fraud practiced upon her, by taking advantage of the confidential relationship which existed between complainant and certain of the parties defendant. The bill prayed an injunction restraining the further distribution of these assets or the diversion of any of the moneys, funds or other assets of the Maclean Drug Co. from the proper and lawful uses of that company. It is true that the escrow fund is not specifically mentioned in the bill, but complainant shows that the escrow fund is a part of these assets. Defendants did not demur to the bill but answered, ^{thus} in effect admitting that if its allegations were true, there was equity in it and that it was not subject to a general demurrer. If the averments of the bill are true, then the escrow fund is a part of the assets of the corporation and is being devoted to the fraudulent scheme in which certain of the defendants are alleged to have been engaged. The

should be required therein in lieu of such evidence, and that
evidence be required in such cases, and that the same be
submitted to the jury.

It is further stated that this appeal has been presented.

It is submitted in the first place that it was error

to issue the judgment because it was not supported by proper

evidence in the bill, and, with other cases, we are cited to

James v. Green, 224 Ill. App. 102, (a case where a temporary

injunction was issued without any notice to the defendant and in

Green v. Green, 224 Ill. App. 102. There is, of course, no

doubt of the temporary injunction issued in these cases. The

objection to the bill, the prayer and the finding and conclusion

The injunction issued in this case was not in the nature of a

perpetual injunction. The objection to the bill is that it was

that the wife and children of the wife of the plaintiff have

been made an object of the prayer of the bill and that

therein prayed upon her, by taking advantage of the confidential

relationship which existed between her and certain of the

parties defendant. The bill prayed an injunction restraining the

further disposition of these assets of the plaintiff or any of the

assets, funds or other assets of the plaintiff and Co. from the

proper and lawful use of that company. It is true that the prayer

therein is not specifically directed to the bill, but the prayer

shows that the prayer is a part of the bill. ^{there} It is not

the bill, but answered, ^{there} It is not answered, but answered, ^{there}

at the time when the bill was filed, and it is not true that it

was not subject to a general answer. If the answer of the

bill is true, then the answer is a part of the assets of the

company and is being given to the plaintiff and is being

given to the plaintiff and is being given to the plaintiff.

pleadings, in our opinion, are sufficient to support the order.

It is next urged that the evidence did not justify the issuance of an injunction. The court had before it allegations of fact as set forth in the bill and in the petition, to which was attached the report of the master in chancery. It is urged that there were no specific findings of fact in the order, but this is not necessary where, as here, the evidence is preserved by certificate. It is not an unusual practice to issue a preliminary injunction upon the recommendation of a master endorsed upon the bill, or sometimes the chancellor examines the verified bill and issues the injunction without any such recommendation. The record here shows that the interest of complainant in this escrow fund had been recognized in an oral stipulation of defendants' counsel before the injunctive order was issued, and the injunctive order does little more than give to that oral stipulation the force and effect of a judicial order.

It is strenuously urged that the effect of the injunction is to seize property of solvent individuals by what is equivalent to an attachment in aid without any showing which would justify a court in issuing such attachment. This is a quite erroneous conception of the situation. If the allegations of the bill of the petitioner are true (which we must assume for the purpose of this discussion), defendants are about to divert money and property which is in their possession but which belongs to complainant. There is no good reason why a court of equity should in such case permit this, thus leaving complainant to pursue in a court of law her remedy to secure the return of that which belongs to her and is already within the jurisdiction of the equity court. Equity is not so weak of arm nor lame of foot.

It is next insisted that the facts show no real and imminent danger to complainant such as would justify an injunction.

...in our opinion, are sufficient to support the order.
It is next urged that the evidence did not justify
the issuance of an injunction. The court had before it all the
evidence at that time as it had in the present, and it was
was attached the report of the master in chancery. It is urged that
there were no specific findings of fact in the order, but this is
not necessary where, as here, the evidence is preserved by certified
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upon the recommendation of a master answered upon the bill,
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ception of the situation. If the allegations of the bill of the
petitioner are true (which we must assume for the purpose of this
discussion), defendants are about to divert money and property which
is in their possession but which belongs to complainant. There is
no good reason why a court of equity should in such cases permit
this, thus leaving complainant to pursue in a court of law her
remedy to secure the return of that which belongs to her and is
already within the jurisdiction of the equity court. Equity is
not so much of the law as of fact.
It is next insisted that the facts show no real and

and it is pointed out that defendants disclaim any wrongful intent. We are not called upon to decide this case upon the merits. We must assume the truth of the facts sworn to by complainant. If by untrue averments complainant secures an order to which she is not entitled, the court upon an investigation of the merits may award to defendants a speedy and complete remedy.

In a case where a temporary injunction is issued by a court of equity to preserve the statu quo until the rights of the parties have been adjudicated, the controlling question is the relative inconvenience to the parties which will result on the granting or refusal of the injunction. Even where there are serious doubts as to which party should prevail on the merits, the injunction will usually issue where otherwise the effect would be (if complainant should win upon the merits) a barren victory, and where the temporary injunction can do defendants little, if any, harm. (Young v. Federal Union Surety Co., 183 Ill. App. 278; City of Newton v. Levis, 79 Fed. 715). Such injunctions will usually be granted even in doubtful cases, if less harm will ensue to the enjoined party if he should be finally victorious than would accrue to the complainant in the absence of the injunction if he were the winning party, (Rego v. Village of Melrose Park, 161 Ill. App. 18; McGinniss v. First Nat'l Bank of Canton, 214 Ill. App. 295) and in such case the matters of the main controversy are not necessarily involved (Swift v. McCormick, 121 Ill. App. 556; Fishwick v. Lewis, 258 Ill. App. 402.) These rules are controlling here. If complainant is entitled to win upon the merits, she may be very much damaged if it should be found necessary that she collect the sums of which it is claimed she has been defrauded by means of an execution as at law. Defendants, it would seem, cannot be materially harmed by the maintenance of the status quo until the merits have been determined.

The order is affirmed.

AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

and it is pointed out that defendant's affidavit was wrongfully issued. We are not called upon to decide this case upon the merits. It must stand on the basis of the facts shown by the complaint. If by means of defendant's complaint we are to order to which and is not entitled, the court upon an investigation of the merits may grant to defendant a speedy and complete remedy.

It is also pointed out that a temporary injunction is issued by a court of equity to preserve the status quo until the rights of the parties have been adjudicated, the controlling question is the relative inconvenience to the parties which will result on the granting or refusal of the injunction. When there are serious doubts as to which party should prevail on the merits, the injunction will usually issue where otherwise the effect would be (1) defendant should win upon the merits) a barren victory, and where the temporary injunction can be defendant's right, if any, is granted even in doubtful cases, it less harm will come to the plaintiff party if he should be finally victorious than would accrue to the defendant in the event of the injunction if he were the winning party. (See Smith v. Smith, 100 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 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2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 22

35308

BORIS KRILOFF,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation, JOHN H. ALCOCK, Acting Commissioner of Police, JAMES A. KEARNS, City Treasurer, GEORGE LOHMAN, Acting City Collector, MICHAEL BRENNAN, Acting Building Commissioner, HERMAN M. BUNDESEN, Commissioner of Health, and PETER J. BRADY, City Collector of the City of Chicago,

Appellants.

INTERLOCUTORY APPEAL

TAKEN FROM SUPERIOR

COURT OF COOK COUNTY.

262 I.A. 644

Opinion filed June 24, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an appeal from an interlocutory order of the Superior Court of Cook County, granting an injunction to restrain the City of Chicago and certain of its officials from interfering with complainant in the opening and maintenance by him of a retail food establishment at 4601 Calumet Avenue, Chicago, Illinois.

The order for a temporary injunction is founded upon a verified amended bill of complaint alleging in substance that complainant is a resident of Chicago and a person of good moral character and standing; that he entered into a lease for premises located at 4601 Calumet Avenue, Chicago, expiring April 30, 1936, and obligated himself to pay a term rental therefor of \$4,320. in monthly installments of \$60. each; that he purchased store fixtures and equipment and incurred other liabilities in preparation for opening and operating the proposed retail food establishment.

The amended bill further sets forth an ordinance of the City of Chicago with reference to the licensing of retail food stores, and alleges that complainant applied to the City Collector for a license to operate his proposed establishment and paid the required fee of \$10. therefor, but that the City Collector has

BOBIE KELLY

Appellee

v.

CITY OF CHICAGO, a Municipal

Corporation, JOHN H. ALBERT,
Acting Commissioner of Police,
JOHN A. LARSEN, City Treasurer,
JACOB KENNEDY, Acting City
Collector, RICHARD J. BROWN, Acting
Building Commissioner, EDWARD S.
MURPHY, Commissioner of Health,
and PETER J. SMITH, City Collector
of the City of Chicago,

COUNTY OF COOK, COMITY.

INTERESTED PARTY

IN THE CIRCUIT COURT OF COOK COUNTY

35353 I.A. 644

Appellants.

Opinion filed June 24, 1931

MR. JUSTICE BREWER delivered the opinion of the

court.

This is an appeal from an interlocutory order of
the Superior Court of Cook County, granting an injunction to restrain
the City of Chicago and certain of its officials from interfering
with complainant in the opening and maintenance by him of a retail
food establishment at 4801 Belmont Avenue, Chicago, Illinois.
The order for a temporary injunction is founded upon

a verified amended bill of complaint alleging in substance that
complainant is a resident of Chicago and a person of good moral
character and standing; that he entered into a lease for premises
located at 4801 Belmont Avenue, Chicago, existing April 30, 1930,
and obligated himself to pay a term rental thereon of \$2,500. in
monthly installments of \$200. each; that he purchased store fixtures
and equipment and incurred other liabilities in preparation for
opening and operating the proposed retail food establishment.

The amended bill further sets forth an ordinance of
the City of Chicago with reference to the licensing of retail food
stores, and alleges that complainant applied to the City Collector
for a license to operate his proposed establishment and paid the
required fee of \$100. therefor, but that the City Collector has

refused to issue such license and the City and its officials have all refused to sanction the issuance of a license without any legal or proper excuse therefor, pretending that the proposed location for the store is zoned for residences only, whereas several other stores are located and conducted in the same block, indicating that the restriction on said location to residences only, if any existed, has heretofore been abandoned by the City. The amended bill concludes with an allegation that unless the injunction is issued, complainant will suffer irreparable injury, his investment for fixtures and equipment will be lost and he will be compelled to pay the rental for the premises incurred under the written indenture of lease entered into by him,

Complainant has filed no brief in this court, but it appears sufficiently from defendant's brief and argument that the injunction was improperly issued for the following reason: The City's ordinance requires food purveyors to be licensed. Complainant has not attacked the validity of this ordinance but on the contrary admits by his amended bill of complaint that it is in full force and effect. From these facts it appears that if the City has unlawfully withheld the issuance of a license, complainant has an adequate remedy at law by way of mandamus.

It has been consistently held by our courts that when the remedy of mandamus is available to compel the issuance of a license, unlawfully withheld, a court of equity has no jurisdiction, and that allegations of irreparable injury and hardship do not in any wise change this rule. (Grace Missionary Church v. City of Zion, 300 Ill. 513; Hamilton v. City of Chicago, 227 Ill. App. 281; Fila Classics of Illinois v. Bever, 234 Ill. App. 614.)

The order of the Superior Court granting a temporary injunction will therefore be reversed and the cause remanded with directions to dissolve the injunction heretofore entered herein.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

refused to issue such license and the City and its officials have
all refused to execute the issuance of a license without any legal
proper cause therefor, pretending that the proposed location
for the store is suited for residences only, whereas several other
stores are located and conducted in the same block, indicating that
the restriction on said location to residences only, if any existed,
has heretofore been abandoned by the City. The amended bill con-
tains also an allegation that unless the injunction is issued,
complaints will suffer irreparable injury, the investment for
fixtures and equipment will be lost and he will be compelled to pay
the rental for the premises located under the written indenture of
lease entered into by him.

Complainant has filed no writ in this court, but it
appears sufficiently from defendant's brief and argument that the
injunction was improperly issued for the following reasons: The
City's ordinance relative to such purveyors is no license. Complainant
has not attacked the validity of this ordinance but on the contrary
states by its amended bill of complaint that it is in full force and
effect. From these facts it appears that it is clearly and unambiguously
established the issuance of a license, complaint has no standing
thereby at law by way of injunction.
It has been consistently held by our courts that when

the remedy at law is available to secure the issuance of a
license, mandamus is denied, a writ of equity has no jurisdiction,
and that allegations of irreparable injury and hardship do not in
any way change this rule. (See Wright v. City of Chicago, 107 Ill. App. 2d 111, 112; Wright v. City of Chicago, 107 Ill. App. 2d 111, 112; Wright v. City of Chicago, 107 Ill. App. 2d 111, 112.)

The order of the Honorable Court granting a temporary
injunction will therefore be reversed and the same returned with
directions to dissolve the injunction previously entered herein.
Very respectfully,
[Signature]

34796

MORAW CONSTRUCTION COMPANY,
an Illinois corporation,
Defendant in Error.

v.

JAMES A. ROYER,
Plaintiff in Error.

WRIT OF ERROR TO SUPERIOR COURT,
COOK COUNTY.

262 I.A. 644⁴

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 7, 1928, plaintiff commenced in the Superior court an action in assumpsit to recover of defendant a balance of \$2497.06, claimed to be due on a building contract, signed by the parties and dated December 1, 1926, wherein plaintiff (under the name of Moraw Building Company) agreed to erect on defendant's real estate in Chicago, "in a good, substantial and workmanlike manner" and for the price of \$53,000, "ten (10) bungalows, agreeable to the plans and specifications hereto annexed and made a part of this contract, of good and substantial materials, and to deliver said buildings to the first party (defendant) completely finished in accordance with said plans and specifications on or before April 1, 1927." Plaintiff also sought to recover the further sum of \$1638 for extra work done at defendant's request, and also interest on certain notes amounting to \$133.30. Plaintiff's total claim was \$4,268.36. A jury trial, lasting about a week and at which much ^{and} oral/documentary evidence was introduced by both parties, was had in April, 1930, resulting in a verdict in plaintiff's favor for \$3500 and the entry of a judgment in that sum against defendant. It is sought by this writ of error to reverse the judgment.

The pleadings are lengthy. Plaintiff's declaration consists of eleven counts, to which copies of the contract and specifications are attached and made a part. In October, 1928,

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 1st day of October, 1933.

JOHN COONEY.

BY

CLERK OF COURT
IN CHARGE

1933.10.01

THE FOLLOWING VERIFICATION BEING FIRSTLY READ AND THE COURT, IN THE COURT OF THE COUNTY OF COOK, ILLINOIS.

On June 7, 1933, Plaintiff commenced in the Superior Court of Cook County, Illinois, a suit against Defendant.

To wit: An action in replevin to recover of Defendant a certain quantity of goods and chattels, alleged to be the property of Plaintiff.

Plaintiff claims to be the owner of the said goods and chattels, and that Defendant is in possession of the same without lawful authority.

Plaintiff and Defendant entered into a contract on or about the 1st day of October, 1933, whereby Defendant agreed to sell to Plaintiff a certain quantity of goods and chattels.

Plaintiff claims that Defendant has failed to deliver the said goods and chattels, and that Plaintiff is entitled to recover the same.

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defendant filed a plea of the general issue and an affidavit of merits. The affidavit was ordered stricken and defendant filed an amended affidavit of merits. In December, 1929, defendant, by leave of court, filed a plea of set off and another amended affidavit of merits. In the "recapitulation" at the end of the plea, as well as at the end of said affidavit, plaintiff is given a total credit of \$3097.06. This sum is made up of two items, viz: \$2497.06, "amount claimed by plaintiff for completing contract," and \$600 "for furnishing and installing water pipe from curb to street." As against this total credit, thirteen items of charges against plaintiff, aggregating \$5,840, are enumerated, and defendant claims that plaintiff is indebted to him in the net sum of \$2442.94. It is alleged in the plea that plaintiff did not deliver the buildings, "completely finished," on April 1, 1927, as provided; that the first one was not delivered until about May 1st, and the remaining nine until about June 1st, and that defendant suffered damage thereby to the extent of \$450. It is alleged also that plaintiff did not erect and finish the buildings "in a good, substantial and workmanlike manner;" that certain enumerated carpentry work and brick work was defective; that certain furnaces, porch wings, porch steps, etc., had to be repaired, all causing damage to defendant; that a certain bedroom closet was placed by mistake in the hall and was rebuilt at defendant's cost; and that certain window shades and curtain rods were entirely omitted and had to be furnished by defendant, etc. Early in the trial plaintiff, by leave of court, filed an amendment to each of the eleven counts by adding allegations to the effect that it was originally incorporated as an Illinois corporation under the name of "Moraw Building Company," that on August 19, 1927, its name was duly changed to that of "Moraw Construction Company," and that it is now the same corporation under the new name as it was under the old, and is still in existence.

Defendant objected to the order allowing such amendments, but then elected to have its pleas, etc., on file stand to the amended counts. After most of the evidence had been heard and on the day before the jury returned their verdict, defendant, by leave of court and over plaintiff's objection, filed a new or amended set of pleas as follows: (1) General issue; (2) non est factum, viz., that said contract as introduced in evidence was "not his deed;" and (3) a further amended plea of set-off. And defendant also filed a further amended affidavit of merits sworn to by him. In said plea of set-off the items of charges against plaintiff, as contained in the former plea, are repeated and certain additional items are set forth, and defendant alleged that after allowing all credits to plaintiff it is indebted to him "in the sum of \$5,000." The present transcript does not disclose that plaintiff filed a replication to said last amended plea of set-off, and defendant's counsel here contend for the first time that the court erred in submitting the cause to the jury before plaintiff had filed such replication. Inasmuch as it does not appear that defendant's attorney on the trial, or before judgment entered, called plaintiff's or the court's attention to the omission, we do not think that the contention should here be considered by us. (Moyers v. Illinois Central R. Co., 197 Ill. App. 179, 186.) The transcript further discloses that after the filing of the new or amended pleas the trial before the jury continued as if a formal replication to said amended plea of set-off had been filed.

Defendant's counsel also contend that the court on the trial erred in refusing to admit in evidence "Defendant's Exhibit 1." This was a copy of the specifications in the possession of defendant. This copy varied from the copy in possession of plaintiff, and which was attached to its declaration, in two particulars. In defendant's copy it was provided "the entire lot to be fenced with wire fence

Defendant's counsel also contends that the court on the trial erred in refusing to admit in evidence "Defendant's Exhibit 1." This was a copy of the specifications in the possession of Defendant. This copy varied from the copy in possession of Plaintiff, and which was attached to the indictment, in two particulars. In Defendant's copy it was provided that the entire lot be burned with white phosphorus.

and two gates," while in plaintiff's copy there was no such provision. And in defendant's copy it was provided that "window shades and curtain rods were to be furnished," while in plaintiff's copy the provision was that they "were not to be furnished." He do not think that the court committed any reversible error in refusing to admit in evidence the instrument. When the ruling was made plaintiff's copy had already been introduced in evidence, and a similar copy had been attached to plaintiff's declaration, and in defendant's affidavit of merits, which was then on file, he had admitted that "the terms and conditions of the contract are substantially as set forth in plaintiff's declaration." It further appeared from defendant's testimony that said two changes in his copy of the specifications had been made by him, - in the one case by writing in long hand the provision as to the fence and gates, and in the other by erasing the word "not". Defendant claimed that he had made these changes in the presence of and with the consent of one Calhoun, an employee of plaintiff, but the entire evidence does not sufficiently show that Calhoun had authority to make any agreement as to changes in the specifications or to consent to changes. Furthermore it appears that plaintiff actually built the fence and agreed to do so by reason of defendant's subsequent promise that he would pay the balance then due under the contract. Furthermore, it appears that, when late in the trial defendant asked leave to file his last amended plea of set-off, the court granted such leave on the theory that defendant's claim for such shades and rods, amounting to the sum of \$263 and concerning which he had introduced evidence, might properly be taken into consideration by the jury. Furthermore, the verdict is considerably less than plaintiff's total claim, including extras, and, for aught that appears to the contrary in the present transcript, the jury in reaching their verdict may have allowed to defendant said sum for such shades and rods.

and two pages." While in Plaintiff's copy there was no such provision. And in Defendant's copy it was provided that "whereas and certain facts were to be furnished," while in Plaintiff's copy the provision was that they "were not to be furnished." He does not think that the court committed any reversible error in refusing to admit in evidence the instrument. When the ruling was made Plaintiff's copy had already been introduced in evidence, and a similar copy had been attached to Plaintiff's declaration, and in Defendant's affidavit of service, which was filed on file, he had admitted that "the terms and conditions of the contract are substantially as set forth in Plaintiff's declaration." It further appeared from Defendant's testimony that said two changes in his copy of the specifications had been made by him, - in the one case by adding in long hand the provision as to the lanes and gates, and in the other by striking the word "not". Defendant claimed that he had made these changes in the presence of and with the consent of one Calhoun, an employee of Plaintiff, but the entire witness does not sufficiently show that Calhoun had authority to make any agreement as to changes in the specifications or to consent to changes. Furthermore it appears that Plaintiff actually built the lanes and gates to be by reason of Defendant's independent promise that he would pay the balance then due under the contract. Furthermore, it appears that, when late in the trial Defendant asked leave to file his last amended plea of assent, the court granted such leave on the theory that Defendant's claim for each shade and robe, amounting to the sum of \$250 and concerning which he had introduced evidence, might properly be taken into consideration by the jury. Furthermore, the verdict is considerably less than Plaintiff's total claim, including extras, and, for aught that appears to the contrary in the present transcript, the jury in reaching their verdict may have allowed to Defendant said sum for

Defendant's counsel also contend that the court erred in refusing to admit certain evidence offered by defendant concerning certain so called "latent defects" in some of the buildings, and also certain offered evidence regarding the insufficiency of the type of furnaces installed to heat the buildings. We deem it unnecessary to enter upon a detailed discussion of the testimony, admitted or offered and not admitted, bearing upon the contention. Suffice it to say that after full consideration we do not think that the court's rulings complained of constituted reversible error.

Defendant's counsel also contend that the judgment should be reversed because the evidence discloses that plaintiff did not substantially comply with its contract in the erection of the buildings. In our opinion the contention is without merit. It may be true that in certain particulars there was not a compliance with all the requirements of the specifications and that damage was occasioned to defendant thereby, but it is apparent that the jury made allowances for such damage in the amount of the verdict returned, \$3500, which is about \$700 less than plaintiff's total claim and of which claim more than \$3,000 was admitted to be due (less claimed set-offs) in defendant's sworn affidavit of merits on file when the trial commenced as above mentioned. Furthermore, the question as to whether there has been a substantial compliance with the provisions of a building contract is one of fact for the jury to determine. (Bauer v. Hindley, 222 Ill. 319, 322.) In the present case the jury by their verdict found that there was a substantial compliance with the contract sued upon, the trial court sustained the verdict, and we think that the actions of both jury and trial court were amply sustained by the entire evidence.

Complaint is made of the giving by the court of one instruction, offered by plaintiff, bearing upon the question of substantial compliance with a building contract, and of several

Defendant's counsel also contends that the court erred in refusing to admit certain evidence offered by defendant concerning certain so-called "latent defects" in some of the buildings, and also certain offered evidence regarding the exact identity of the type of furnace installed in some of the buildings. It seems to me necessary to enter upon a detailed discussion of the testimony admitted or offered and not admitted, bearing upon the contention. It is to say that after full consideration we do not think that the court's rulings complained of constituted reversible error. Defendant's counsel also contends that the judgment should be reversed because the evidence discloses that plaintiff did not substantially comply with its contract in the erection of the buildings. In our opinion the contention is without merit. It may be true that in certain particulars there was not a compliance with all the requirements of the specifications and that damage was occasioned to defendant thereby, but it is apparent that the jury made allowances for such damage in the amount of the verdict returned, \$32,000, which is about 1000 less than plaintiff's total claim and of which claim more than \$1,000 was admitted to be due (less claimed set-off) in defendant's sworn affidavit of merits on file when the trial commenced as above mentioned. Furthermore, the question as to whether there has been a substantial compliance with the provisions of a building contract is one of fact for the jury to determine. (Honey v. Honey, 211 Ill. 512, 522.) In the present case the jury by their verdict found that there was a substantial compliance with the contract and upon the trial court sustained the verdict, and we think that the actions of both jury and trial court were amply sustained by the entire evidence. Complaint is made of the giving by the court of the instruction, offered by plaintiff, bearing upon the question of substantial compliance with a building contract, and of reversal

other given instructions, offered by plaintiff, on the measure of its damages; also that certain other instructions, bearing on these questions and offered by defendant, were refused. We find nothing substantially wrong in the instruction first above mentioned, nor in the given instructions concerning the measure of plaintiff's damages, particularly when consideration is given to the theory on which the attorneys for both parties tried the case. After reviewing all the given instructions we think that the jury were fully and fairly instructed and that the trial court did not commit reversible error in refusing to give the said instructions offered by defendant.

Complaint is also made of certain claimed improper remarks made by the court in the jury's presence during the trial. We do not think that any one of these remarks, or all of them taken together, were so prejudicial as to require a reversal of the judgment. Furthermore, it does not appear that objections or exceptions were made or taken by defendant's attorney to the remarks at the time they were made.

Our conclusion is that the judgment against defendant for \$3500 should be affirmed, and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

other given instructions, offered by plaintiff, on the manner of
 its transfer; also that certain other instructions, bearing on these
 questions and offered by defendant, were refused. No link existing
 substantially wrong in the instruction lines above mentioned, nor
 in the given instructions concerning the manner of plaintiff's
 transfer, particularly when consideration is given to the likely
 as which the attorneys for both parties tried the case. After review
 ing all the given instructions we think that the jury were fairly and
 fairly instructed and that the trial court did not commit reversible
 error in refusing to give the said instructions offered by defendant.
 Complaint is also made of certain claimed improper remarks
 made by the court in the jury's presence during the trial. We do not
 think that any one of these remarks, or all of them taken together,
 were so prejudicial as to require a reversal of the judgment. Further-
 more, it does not appear that objections or exceptions were made or
 taken by defendant's attorney in the presence of the jury that were
 such as to require a reversal of the judgment. Our conclusion is that the judgment against defendant for
 \$1000 should be affirmed, and it is so ordered.

APPROVED.

Walter and Norman, Jr., counsel.

34808

JOSEPH SEEBERGER,
Appellant,

v.

JOHN W. FOWLER,
Appellee.

9/17
APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

262 I.A. 645

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit commenced in the Superior court on April 9, 1928, wherein plaintiff sought to recover of defendant \$16,000 and certain claimed interest, there was a trial before a jury in June, 1930, resulting in a verdict in favor of defendant. After overruling the motion for a new trial the court entered judgment against plaintiff for costs on September 20, 1930, and the present appeal followed.

The action is based upon two written instruments, each signed by defendant and dated respectively August 15, 1919, and September 11, 1919. One is as follows:

"In consideration of Joseph Seeburger having purchased \$10,600 par value of preferred stock of the Webster Hotel Company, carrying with it as a bonus 26-1/2 shares of the common capital stock of said company, I hereby agree that at any time upon demand by said Joseph Seeburger I will repurchase the above described preferred stock carrying with it the common stock recited above, paying for said preferred stock the sum of \$10,600, together with interest at 8 per cent from last dividend paying period."

The other instrument is similar and by it defendant agrees to repurchase 54 shares of the capital stock of the Lott Hotel Company, "any time upon demand made" by plaintiff, for the sum of \$5400, with interest at the rate of 8 per cent from the last dividend paying period. On December 6, 1926, plaintiff caused to be served on defendant two written demands for the repurchase of said stocks. In one, after setting forth the agreement of August 15, 1919, and stating that not-

2621.A.645

COOK COUNTY

STATE OF ILLINOIS

Plaintiff

Defendant

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In an action in rem brought in the Superior Court

on April 9, 1928, wherein plaintiff sought to recover of defendant

\$15,000 and certain claimant interest, there was a trial before a

jury in June, 1929, resulting in a verdict in favor of defendant.

After overruling the motion for a new trial the court entered judg-

ment against plaintiff for costs on September 20, 1929, and the

verdict appeal followed.

The action is based upon two written instruments, each

signed by defendant and dated respectively August 15, 1919, and

September 11, 1919. One is as follows:

"In consideration of twenty thousand dollars having purchased
10,000 par value of preferred stock of the Hotel Hotel Company,
I hereby agree that I will purchase the above described preferred
stock comprising 10,000 shares of the common stock of said
Hotel Hotel Company, the sum of \$10,000, together with interest at 6
per cent from last dividend paying period."

The other instrument is similar and by it defendant agrees

to purchase 10 shares of the capital stock of the Hotel Hotel Company,

any time upon demand made by plaintiff, for the sum of \$5000, with

interest at the rate of 6 per cent from the last dividend paying period.

On January 6, 1926, plaintiff caused to be served on defendant two

written demands for the purchase of said stock. In one, after

setting forth the agreement of August 15, 1919, and stating that the

withstanding numerous verbal demands for the repurchase of said preferred stock of the Webster Hotel Company defendant has failed and refused to comply with the same, it is further stated:

"You are hereby further advised that demand is now made upon you to repurchase the stock described in the above agreement for the sum of \$10,600, together with interest from the last dividend paying period, and that upon your default to repurchase said stock in accordance with the terms of your agreement, within five (5) days from the date hereof, I shall without further notice apply to the courts for relief. All said shares of stock are available at my office at 36 South State street, Chicago."

The other written demand is similar, viz., that defendant repurchase said 54 shares of the stock of the Lott Hotel Company. Defendant did not thereafter repurchase either of the stocks or any part thereof, although actual tenders of the stock were made to him.

In plaintiff's declaration, consisting of several counts, the agreements and the demands for the repurchase of the stocks were set forth; and he claimed in his affidavit that \$16,000, and certain interest, were due to him from defendant. To the declaration defendant filed a plea of the general issue. In the affidavit of merits, in setting forth the nature of the defense, it is alleged that "on or about the 9th day of February, 1923, the agreements set forth in plaintiff's declaration * * were cancelled and rescinded by the mutual agreement of the parties, and each party on said date then and there agreed to and did release the other party from all obligation arising out of said two agreements."

As to the affirmative defense of the cancellation or rescission of said written agreements by the claimed oral agreement of the parties on February 9, 1923, we are of the opinion, after a careful review of all the testimony and especially that of defendant and plaintiff, that said defense is not sustained by the greater weight of the evidence. (Rae v. Blotter, 329 Ill. 59, 62.) As the case will doubtless be tried again we refrain from outlining the testimony of the several witnesses. We may say, however, that it was

without calling numerous verbal demands for the return of said preferred stock of the Webster Hotel Company defendant has failed and refused to comply with the same, it is further stated:

"The one hereby further advised that demand is now made upon you to return the stock described in the above agreement for the sum of \$10,000, together with interest from the last dividend paying period, and that upon your failure to return same, I will in accordance with the terms of your agreement, within five (5) days from the date hereof, I shall without further notice apply to the courts for relief. All said shares of stock are available at my office at 30 South State Street, Chicago."

The other written demand is similar, viz., that defendant

repurchase said 54 shares of the stock of the Hotel Company.

Defendant did not thereafter repurchase either of the stocks or any part thereof, although actual delivery of the stock was made to him.

In plaintiff's declaration, consisting of several counts,

the agreements and the demands for the repurchase of the stock were set forth; and he claimed in his affidavit that \$11,000, and certain

interest, were due to him from defendant. In the declaration defendant

filed a plea of the general issue. In the affidavit of motion, in

answer thereto the nature of the defense, it is alleged that on or

about the 21st day of February, 1923, the agreements set forth in plain-

plaintiff's declaration * * were cancelled and rescinded by the mutual agree-

ment of the parties, and each party on said date then and there agreed

to and did release the other party from all obligation existing and to

make and execute.

As to the affirmative defense of the cancellation or

rescission of said written agreements by the alleged oral agreement

of the parties on February 21, 1923, we are of the opinion, after a

careful review of all the testimony and especially that of defendant

and plaintiff, that said defense is not sustained by the greater

weight of the evidence. (See V. Webster, 229 Ill. 52, 53.) As the

case will be decided by a jury we refrain from outlining the

testimony of the several witnesses. We may say, however, that it was

defendant's theory on the trial that the claimed oral agreement, to cancel or rescind the said written agreements, was made because plaintiff wanted to borrow about \$50,000 from a certain bank, of which defendant then was president, and that, in consideration of defendant agreeing to assist in causing said bank to make such a loan upon collateral, plaintiff verbally agreed to cancel said written agreements. Plaintiff denied ^{that} any such verbal agreement was made at the interview between the parties on February 9, 1923, or at any other time, and it appears from defendant's testimony on cross-examination that plaintiff solicited the loan of him in December, 1921, and that about a month prior to February 9, 1923, the directors of the bank had arranged to make the loan to plaintiff when it was necessary for him to have the funds during March, 1923, to consummate a business deal which he had made.

And we think the jury's verdict for defendant probably was occasioned by the court giving two instructions (Nos. 1 and 2) offered by defendant, which instructions under all the evidence we consider erroneous and prejudicial to plaintiff. Furthermore, we think that the court erroneously admitted in evidence, over plaintiff's objection, a certain envelope on which there was the following endorsement in defendant's handwriting: "Agreement with Joseph Seeberger on Webster Hotel Co. and Lott Hotel Co. stock. Cancelled by agreement Feb. 9/23." We regard said envelope and endorsement thereon as a mere self-serving instrument. Defendant testified that during his interview with plaintiff on February 9, 1923, he produced and showed to plaintiff an envelope, which then contained his (defendant's) copies of the two written agreements, and that, after the claimed oral agreement to cancel said written agreements had been made, he (defendant) made said endorsement on the envelope. He further testified, however: "I wanted to have them (the written agreements) cancelled as no liability; both of them were in the envelope at

the time; I did not ask Mr. Seeberger to sign those; * * I didn't ask him to sign a separate agreement that they were cancelled; I simply took his word on the cancellation; * * if the agreements were not cancelled I knew I would be obligated to pay \$16,000 with interest at 3% from the last dividend date." Plaintiff testified that during said interview the subject of the cancellation of the two written agreements "was not mentioned at all," and that then he "didn't see Mr. Fowler have an envelope." It is said in Selman v. Geary, 334 Ill. 642, 650: "There is nothing in writing relative to the alleged rescission. Parties to a written contract may not only modify it orally but may rescind it in the same manner, although evidence of rescission of a written contract by a subsequent parol agreement must be clear, positive and above suspicion." In the present case it is certainly strange that, if at said interview it was verbally agreed between the parties, as claimed by defendant, to cancel or rescind said two written agreements, defendant did not then cause plaintiff to sign a writing on defendant's copies of the agreements, then in defendant's hands, or some other writing, indicating plaintiff's acquiescence in the cancellation or rescission of said agreements.

Our conclusion is that there should be another trial of the case and accordingly the judgment of the Superior court of September 20, 1930, is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

the time; I did not ask Mr. Rosenberg to sign them; * * I didn't
ask him to sign a separate agreement that they were cancelled; I
simply took his word on the cancellation; * * if the agreements
were not cancelled I knew I would be obligated to pay \$10,000 with
interest of 8% from the last dividend date. * *
that having said interview the subject of the cancellation of the two
written agreements "was not mentioned at all," and that then he "didn't
see Mr. Foster have an envelope." It is said he signed a bill
III. 442, 450: "There is nothing in writing relative to the alleged
cancellation. I believe in a written contract may not really be
exactly but may record it in the same manner, although evidence of
recognition of a written contract by a subsequent party agreement must
be clear, positive and above suspicion." In the present case it is
certainly strange that, if as said interview it was verbally agreed
between the parties, as claimed by defendant, to cancel or rescind
said two written agreements, defendant did not then cause plaintiff to
sign a writing on defendant's copies of the agreements, then in defend-
ant's hands, or some other writing, indicating plaintiff's recognition
in the cancellation or rescission of said agreements.
Our conclusion is that there would be another trial of
the case and accordingly the judgment of the Superior Court of
September 20, 1950, is reversed and the cause remanded.

REVEREND AND HONORABLE,
JUDGE OF THE SUPERIOR COURT,
ALBANY, NEW YORK.

34322

92 7

NEWTON B. LAUREN and
STATE BANK OF CHICAGO, a
corporation, Trustee of the
estate of Charles M. Nichols,
deceased,

Plaintiffs in Error,

v.

GEORGE W. PRASSAS and GEORGE
C. HIELD,

Defendants in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

262 I.A. 645²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a foreclosure proceeding commenced on June 5, 1929, the circuit court sustained the several general demurrers of two of the defendants, George W. Prassas and George C. Hield, to complainants' amended bill on March 27, 1930, and dismissed the bill for want of equity as to said defendants. The present writ of error was sued out by complainants in this court on November 12, 1930, to reverse said order of the circuit court.

The original bill, verified by Newton B. Lauren, was in the usual form of one to foreclose a trust deed, and prayed for the usual relief. The named defendants were Joseph J. Hobin; Chicago Title & Trust Co., trustee; Eugenia Sweeney and Martin Sweeney, her husband; unknown owners, etc.; and said Prassas and Hield. The bill also alleged on information and belief that Prassas and Hield had, or claimed to have, some interest in the mortgaged premises, but that such interest was subordinate to complainants' lien by virtue of the trust deed. Only Prassas and Hield and the Chicago Title & Trust Co., as trustee, were served with process and all filed answers. The answers of Prassas and Hield disclaimed any interest in the property.

DATE

WILLIAM E. HARRIS and
WILLIAM E. HARRIS, JR.
Plaintiffs in Error

vs.

EDWARD V. HARRIS and GEORGE
E. HARRIS, JR.
Defendants in Error

262 I.A. 645

THE FOLLOWING VERDICT WAS DELIVERED BY THE JURY ON THE SEVENTH DAY OF JUNE, 1930.

In a foreclosure proceeding commenced on June 2, 1929, the circuit court sustained the several general demursers of the defendants, George E. Harris and George E. Harris, Jr., to the complaint, entered on March 27, 1930, and dismissed the bill for want of equity as to said defendants. The present writ of error was sued out by complainants in this court on November 11, 1930, to reverse said entry of the circuit court. The original bill, verified by Newton B. Larson, was in the usual form of one to foreclose a first deed, and prayed for the usual relief. The named defendants were George E. Harris, Chicago Title & Trust Co., Trustee; Eugene Henry and Martin Henry, her husband; unknown persons, etc.; and said Thomas and Hilda. The bill also alleged an information and belief that Thomas and Hilda had, or claimed to have, some interest in the mortgage, but that such interest was subordinate to complainants' lien by virtue of the trust deed. Only Thomas and Hilda and the Chicago Title & Trust Co., as trustees, were served with process and all filed answers. The answers of Thomas and Hilda disclaimed any interest in the property.

Thereafter, by leave of court, on January 15, 1930, complainants filed an amended or substituted bill, which also was verified by Lauren and which, as complainants' counsel state in the brief, was filed not only to foreclose the trust deed but also "for a deficiency decree against the defendant, George W. Prassas." Counsel also state that Prassas and Hield "were made parties defendant on the theory that they are the real and beneficial owners of the property and primarily liable for the purchase price of the same, because of certain contracts and agreements had with them by complainants;" and counsel further state that "the bill is still pending below against the other defendants."

In the amended bill complainants alleged that they hold the promissory notes hereinafter set forth; that on and prior to October 16, 1925, Lauren and others were the beneficial owners in fee, through the Chicago Title & Trust Co., as trustee, under its Trust No. 13300, of certain real estate in Cook County (describing it); that on October 16, 1925, a written agreement (Exhibit A) was entered into between Lauren and Prassas for the conveyance to Prassas "or his assigns" of the real estate for a consideration of \$220,000; that said sum was to be paid by a payment of \$10,000, as earnest money, by a further payment of \$50,000 within 30 days after the title to the real estate had been found to be good, and by a first mortgage, of \$160,000, payable \$10,000 on or before one year, \$10,000 on or before two years, \$15,000 on or before three years, \$15,000 on or before four years, and the balance of \$110,000 on or before five years from the date thereof, with interest at 6% per annum, etc.; and that on October 19, 1925, Lauren and Prassas entered into a further written agreement (Exhibit B), wherein it is provided that "the buyer (Prassas) may take title in some person other than himself, and in such event the mortgage of \$160,000, herein referred to, shall be executed by the grantee in the deed," and wherein it is provided that the mortgage shall contain

Thereafter, by leave of court, on January 12, 1930,

complainants filed an amended or substituted bill, which also was verified by James and which, as complainants' counsel state in the brief, was filed not only to retrocede the trust deed but also "for a delivery of money against the defendant, George W. Tresson". Counsel also state that Tresson and Hild "were made parties defendants on the theory that they are the real and beneficial owners of the property and primarily liable for the purchase price of the same, because of certain contracts and agreements had with them by complainants", and counsel further state that "the bill is still

Revised Bill Against the Other Defendants.

In the amended bill complainants alleged that they had

the primarily noted mortgage for and that on and after the

October 16, 1928, James and others were the beneficial owners in

fact, through the Chicago Title & Trust Co., as trustee, under its

Trust No. 12800, of certain real estate in Cook County (hereinafter

referred to as the "property"), which was a written agreement (Exhibit A) was

entered into between James and Tresson for the purpose of having

"a mortgage" of the property for a consideration of \$100,000,

that said sum was to be paid by a payment of \$1,000, as interest money,

by a further payment of \$50,000 within 180 days after the date of the

trust agreement and then to be paid, and by a final mortgage of

\$100,000, payable in 100 years or at least two years, \$10,000 on or before

two years, \$15,000 on or before three years, \$15,000 on or before four

years, and the balance of \$10,000 on or before five years from the

date hereof, with interest at 6% per annum, etc.; and that on October

1, 1928, James and Tresson entered into a further written agreement

(Exhibit B), wherein it is provided that the above (Tresson) was to

file in some proper court some instrument, and in such event the mortgage

of \$100,000, payable hereafter, shall be amended by the trustee in

the deed", and wherein it is provided that the mortgage shall contain

a clause giving the right to the mortgagor "to subdivide the premises, or any part thereof, and to file of record said subdivision map or plat * * and from time to time to have released from the lien of this indenture any or all of said lots described in said map or plat, upon payment to the holder or holders of the indebtedness herein described, an amount or amounts in accordance with a schedule of prices of said lots, etc.," and that "all sums paid on account of releases shall be applied as partial payment on the principal of the first maturing notes."

Complainants further alleged that on January 18, 1926, Prassas wrote or caused to be written across the face of the written agreement of October 16, 1925 (Exhibit A) the following "pretended" assignment: "January 15, 1926. For value received I hereby assign all my right, title and interest in the within contract unto Joseph J. Hobin;" that Prassas and Hobin each signed the assignment; that the same is null and void, - no consideration having passed from Hobin to Prassas; that Hobin acted as the agent and trustee of Prassas in signing the promissory notes (Exhibits C and D) and trust deed (Exhibit E) hereinafter mentioned; and that Prassas was on October 16, 1925, and since that date has been, the "beneficial and real owner" of the real estate and "is personally liable for the balance of the purchase price."

Complainants further alleged that on January 15, 1926, Prassas, "being justly indebted to the legal holder or holders of the promissory notes hereinafter set forth in the aggregate principal sum of \$160,000." made and executed, "by and through Joseph J. Hobin," said principal notes; and that the same were delivered to complainants by Prassas "through the Chicago Title & Trust Co., as trustee, under its Trust No. 13300." (Here are described 100 principal notes, of different amounts and maturities and aggregating \$160,000, each signed by Hobin, and drawing interest at 6% per annum, payable semi-annually,

a clause giving the right to the mortgagee "to substitute the
 premises, or any part thereof, and to file of record said substitution
 map or plan" and from time to time to have released from the lien
 of this mortgage any or all of said land included in said map or
 plan, upon payment to the holder or holders of the Indianapolis herein
 described, an amount to amount in substance with a schedule of values
 of said lots, etc., and that "all such paid or payment of release
 shall be as if it were a partial payment on the principal of the first
 mortgage noted."

Complainant further alleged that on January 15, 1926,
 Process was at once to be issued against the heirs of the within
 agreement of October 15, 1925 (which is the following "promissory
 assignment": "January 15, 1926. The value received I hereby assign
 all my right, title and interest in the within contract with Joseph
 J. Kohn, that Thomas and Helen each signed the assignment; that
 the name is null and void, - no consideration having passed from Helen
 to Thomas; that Helen is the owner and holder of interest in
 signing the promissory notes Exhibits 1 and 2) and that said
 (Exhibit 1) promissory notes mentioned; and that Thomas was on October 15,
 1925, and since that date had been, the beneficial and real owner
 of the real estate and "is personally liable for the balance of the
 purchase price."

Complainant further alleged that on January 15, 1926,
 Thomas, Helen jointly indebted to the legal holder or holders of
 the promissory notes mentioned and that in the promissory assignment
 sum of \$100,000, made and executed, "the promissory notes of Helen,
 said promissory notes; and that the same were delivered to complainant
 by Thomas, Helen and the Chicago Title & Trust Co., as trustees, under
 the Trust No. 12300." (There are described 100 principal notes, of
 different amounts and maturities and aggregating \$100,000, each signed
 by Helen, and bearing interest at 6 per annum, payable semi-annually,

said interest payments being evidenced by 600 coupon notes.)

Complainants further alleged that on the same day, to secure the payment of the notes, Hobin, a bachelor and "as the agent and trustee and for the use and benefit of said defendants, Frassas and Hield, and at their direction," executed and acknowledged the trust deed herein sought to be foreclosed, and that Frassas delivered it to said Chicago Title & Trust Co., and it was duly recorded. (Some of the provisions of the trust deed (Exhibit W), which is on a printed form, are set forth). And complainants further alleged that, while certain of the notes had been paid as they matured, others had not, and default had been made on January 15, 1929 and that there was due to Lauren the sum of \$119,741.56, including principal and interest to June 19, 1929, and to the State Bank of Chicago, as trustee of the estate of Charles E. Nichols, deceased, the sum of \$20,109.39.

Complainants further alleged that contemporaneously with the execution of the written agreements (Exhibits A and B) in October, 1925, Frassas stated to Lauren that he (Frassas) had sold and assigned part of his interest in said written agreement, Exhibit A, to Hield, that both Frassas and Hield were real estate subdividers on a large scale, and that they desired Hobin to take title to the real estate for them; that it then was "understood and agreed" that Hobin was only an employee of Frassas in his Chicago real estate office and that he (Hobin) "should not respond to pay said obligation of \$160,000, or any other sum;" that on January 16, 1926 (the next day after Hobin had executed said notes and trust deed), pursuant to said written agreements and said understanding, Hobin, without a further consideration and at the direction of Frassas, conveyed by deed the said real estate, subject to said trust deed securing said notes of \$160,000, to Frassas and Hield; that thereafter they caused the real estate to be surveyed and subdivided; that on June 5, 1928,

said interest payments being evidenced by 600 coupon notes.)
The defendant further alleged that on the same day, he
received the payment of the notes, which, a bachelor and "as the
agent and trustee and for the use and benefit of said defendant,
Francis and Alice, and at their direction," executed and acknowledged
the trust deed herein sought to be foreclosed, and that Francis
delivered it to said Chicago Title & Trust Co., and it was duly
recorded. (Some of the provisions of the trust deed (Exhibit B).
There is on a printed form, are set forth.) and complainant further
alleges that, while certain of the notes had been paid as they
matured, others had not, and details had been made on January 10, 1929
and that there was due to Laura the sum of \$115,741.50, including
principal and interest to June 15, 1929, and to the State Bank of
Chicago, as trustee of the estate of Charles E. Nichols, deceased,
the sum of \$20,150.50.
Complainant further alleges that contemporaneously with
the execution of the written agreement (Exhibits A and B) in October,
1928, Francis stated to Laura that he (Francis) had sold and assigned
part of his interest in said written agreement, Exhibit A, to Alice,
that both Francis and Alice were real estate investors on a large
scale, and that they desired Laura to take title to the real estate
then owned; that it then was "understood and agreed" that Alice was only
an trustee of Francis in his Chicago real estate office and that he
(Alice) should not attempt to pay said mortgage of \$150,000, or
any other sum; that on January 10, 1929, the said real estate
had executed said notes and trust deed, pursuant to said written
agreement and said understanding, which, without a further con-
sideration and at the direction of Francis, conveyed by deed the
said real estate, subject to said trust deed, according to said note of
January 10, 1929, to Francis and Alice; and thereafter they caused the
real estate to be conveyed and recorded; that on June 15, 1929,

they also caused a plat of said subdivision to be filed in the office of the recorder of deeds of Cook County, Torrens Department, as document No. L. R. 410340; and that on said plat on August 22, 1927, Frassas and Hield made a sworn affidavit that they were the owners of the real estate.

Complainants further alleged that at the time the notes and trust deed were executed Frassas paid, as part of the consideration, the sum of \$50,000, and thereafter paid the further sum of \$20,000; that Hobin never paid any part of the purchase price and it was not the intention of the parties that he should or be in any way responsible for any portion thereof; that thereafter Frassas and Hield sold various lots and parcels of land in the subdivision to divers persons; that, pursuant to the written agreements and understandings, Frassas and Hield paid to Lauren a certain percentage for the purchase price of the various lots sold, and Lauren released those lots from the lien of the trust deed; that the remainder of the real estate is now "scant security" for the payment of the amount due on the notes; and that, in order that complainants may recover the full amount of said purchase price as represented by the unpaid notes, "it will be necessary that this court enter a deficiency decree against said defendant, George W. Frassas."

Complainants further alleged that on April 24, 1929, Frassas and Hield conveyed the real estate (except the lots previously sold by them) to Eugenia Sweeney; that neither she nor any one in her behalf paid any consideration to them or to complainants and that said conveyance to her is void; that Frassas "is still personally liable for the payment of the balance of said purchase price;" that at the time of the signing of the written agreements in October, 1925, (Exhibits A and B) Frassas was given actual possession of the real estate and he since and without interruption has been in exclusive, open and notorious possession of the same; and that

they also caused a list of said subdivisions to be filed in the
office of the recorder of deeds of Cook County, Illinois Department,
at document No. 1. E. 11000; and that on said date on August 22,
1917, Tresson and Field made a sworn affidavit that they were the
owners of the real estate.
Complainant further alleged that at the time the notes
and first deed were executed Tresson paid, as part of the consid-
eration, the sum of \$25,000, and thereafter paid the further sum of
\$25,000; that Field never paid any part of the purchase price and
it was not the intention of the parties that he should or be in any
way responsible for any portion thereof; that thereafter Tresson
and Field sold various lots and parcels of land in the subdivision
to diverse persons; that, pursuant to the written agreements and
understandings, Tresson and Field paid to certain persons a certain percentage
for the purchase price of the various lots sold, and Tresson released
those lots from the lien of the trust deed; that the remainder of the
real estate is now "rent free" for the payment of the amount due
on the notes; and that, in order that complainant may recover the
full amount of said purchase price as represented by the unpaid
notes, "it will be necessary that this court enter a declaration
thereon against said defendant, George W. Tresson."
Complainant further alleged that on April 24, 1920,
Tresson and Field conveyed the real estate (except the lots previously
sold by them) to Eugene C. Cawsey; that neither she nor any one in her
benefit paid any consideration to them or to complainant and that
said conveyance to her is void; that Tresson "is still personally
liable for the payment of the balance of said purchase price;" that
at the time of the signing of the written agreements in October,
1915, (Exhibits A and B) Tresson was given actual possession of the
real estate and he alone and without interruption has been in
exclusive, open and notorious possession of the same; and that

neither Robin nor Eugenia Sweeney (or her husband, Martin Sweeney) ever were in possession thereof, but were mere agents acting for Prassas.

The named defendants to the amended bill were the same as in the original bill, and complainants prayed inter alia that Prassas "may be decreed to be in default in payment of the balance of the purchase price of said real estate;" that an account may be taken, etc.; that defendants, or some of them, may be decreed within a short day to pay the amounts severally due to complainants, and that in default of such payment the premises be sold, etc.; that "the execution and delivery of said trust deed and promissory notes be decreed to be the act of defendant, George W. Prassas;" and that complainants "have execution" against him "for any balance that may remain due of the principal or interest of said notes and for the balance due as the purchase price of said real estate under and by virtue of the terms of said written agreement marked 'Exhibit A'."

Mrs. Sweeney and her husband filed an answer to the amended bill, and it was ordered that the answer of the Chicago Title & Trust Co., as trustee, filed to the original bill, stand as its answer to the amended bill. Prassas and Hield filed separate general demurrers to the amended bill and on March 27, 1930, those demurrers were sustained by the court and the amended bill was dismissed as to them for want of equity, as first above mentioned. So far as the present transcript discloses the cause is still pending and undetermined as to the remaining defendants. And it does not appear that the defendant, Robin, has been served with process or in any manner notified of the pendency of the action.

Counsel for complainants here urge several points as grounds for a reversal of the order in question, to which counsel for Prassas and Hield make reply, but, in our opinion, it is unnecessary and, indeed, improper for us under the present record to consider the

... (on her husband, William ...)
... were in possession thereof, but were agents acting for
...
The named defendant is the amended bill were the same
as in the original bill, and complainant prayed infer also that
"Treasurer" may be decreed to be in default in payment of the balance
of the purchase price of said real estate; that an account may be
taken, etc.; that defendant, or some of them, may be decreed within
a short day to pay the amount severally due to complainant, and
that in default of such payment the premises be sold, etc.; that "the
execution and delivery of said trust deed and promissory notes be
decreed to be the act of defendant, George F. Treasurer," and that
complainant "have execution" against him "for any balance that may
be due of the principal or interest of said notes and for the
balance due on the purchase price of said real estate under and by
virtue of the terms of said written agreement marked 'Exhibit A'."
Mrs. Treasurer and her husband filed an answer to the amended
bill, and it was ordered that the answer of the Chicago Title & Trust
Co., as amended, filed to the original bill, stand as its answer to
the amended bill. Treasurer and Wife filed separate general demurrers
to the amended bill and on March 27, 1930, these demurrers were sus-
tained by the court and the amended bill was dismissed as to them
for want of equity, as that above mentioned. As far as the present
transcript discloses the cause is still pending and undetermined as
to the remaining defendants. And it does not appear that the
defendant, Hester, has been served with process or in any manner
advised of the pendency of the action.
General the complainant have urged several points as grounds
for a reversal of the order in question, to which counsel for Treasurer
and Wife make reply, but, in our opinion, it is unnecessary and,
indeed, improper for us under the present record to consider the

points. We think that the present writ of error must be dismissed, - there not having been any final decree entered in the cause in the circuit court. It is a well settled rule that a cause cannot be heard in an appellate court "by piecemeal" (Chicago Steel Works v. Illinois Steel Co., 133 Ill. 9, 16; Farson v. Gorham, 117 id. 137, 140); and that "if a bill is dismissed as to one or more parties, the complainant cannot prosecute a writ of error until there has been a final disposition of the case as to all other parties." (Thompson v. Follansbee, 55 Ill. 427, 428; People v. Banks, 285 id. 137, 140.) While there is an exception to the rule, where great hardship or a denial of justice will result from not allowing an appeal or dismissing a writ of error, we do not think that the present record discloses a case that comes within the exception. (Dreyer v. Goldy, 171 Ill. 434, 437; Pain v. Kinney, 175 id. 264, 266; People v. Banks, 285 id. 137, 140.) While in the amended bill it is alleged that the real estate in question is "scant security" for the payment of the amount due on the notes and that it will be "necessary" that the court enter a "deficiency decree" against Prassas, these allegations are mere conclusions, and for aught that appears to the contrary from the facts as alleged in the bill, upon a foreclosure sale being had, the real estate may sell for such an amount that there will be no deficiency.

The present writ of error should be and is dismissed at the costs of plaintiffs in error.

WRIT DISMISSED.

Kerner and Scanlan, JJ., concur.

34867

CHICAGO TRUST COMPANY,
as Receiver for Roosevelt-Bankers
State Bank,

Defendant in Error.

v.

MAX ALEXANDER,

Plaintiff in Error.

Error to

Superior Court,

Cook County.

262 I.A. 645³

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 9, 1930, a judgment by confession for \$22,163.04 was entered in the superior court in favor of Chicago Trust Company, as receiver for the Roosevelt-Bankers State Bank, and against Max Alexander, on a judgment note for \$20,000, dated Chicago, January 9, 1930, payable on demand to the order of Roosevelt State Bank and signed "Calumet Market Co., by Max Alexander," with interest at 7% per annum after date. The amount of the judgment is made up of the principal sum, accrued interest and \$1132.50 for attorney's fees. On October 15, 1930, on defendant's motion supported by his verified petition, the court ordered that the judgment be opened, that defendant's petition stand as a plea, and that the cause be set for hearing.- the judgment in the meantime standing as security. On October 23, 1930, there was a trial before the court without a jury, during the course of which defendant filed another plea. After defendant had testified in his own behalf and his witness, Alexander Flower, for him, and after plaintiff had introduced certain writings (exhibits 1, 2 and 3) the court on the same day found the issues in favor of plaintiff and adjudged that the judgment as confessed stand in full force and effect as of the date of its rendition and that plaintiff have execution, etc. By the present writ of error defendant seeks to reverse the judgment.

CHICAGO TRUST COMPANY,
as Receiver for Honorable-Deane Bank,
State Bank,
Bellevue in River,

Plaintiff in Error,
vs.
JAMES A. HARRIS,
Defendant in Error.

3621 A. 345

THE COURT IN THIS CASE HAS THE HONOR TO ORDER

On October 1, 1930, a judgment by confession for \$22,122.00 was entered in the Superior Court in favor of Chicago Trust Company, as receiver for the Honorable-Deane State Bank, and against James A. Harris, on a judgment note for \$22,000, dated Chicago, January 9, 1927, payable on demand to the order of Honorable-Deane State Bank and signed "Calumet Mining Co., by James A. Harris," with interest at 7% per annum after date. The amount of the judgment is made up of the principal sum, accrued interest and \$122.00 for attorney's fees. On October 15, 1930, on defendant's motion supported by his verified petition, the court ordered that the judgment be opened, that defendant's petition stand as a plea, and that the cause be set for hearing. The judgment in the meantime standing as executory. On October 23, 1930, there was a trial before the court without a jury, during the course of which defendant filed another plea. After defendant had testified in his own behalf and his witness, Alexander Flower, for him, and after plaintiff had introduced certain witnesses (Exhibits 1, 2 and 3) the court on the same day found the issue in favor of plaintiff and adjudged that the judgment be confessed and stand in full force and effect as of the date of its rendition and that plaintiff have execution, etc. By the present writ of error defendant seeks to reverse the judgment.

In plaintiff's declaration it is alleged that on January 9, 1930, defendant executed and delivered the note to "Roosevelt State Bank, in and by which defendant, by the name and description of Calumet Market Co., by Max Alexander, promised to pay to the order of the Roosevelt State Bank the sum of \$20,000, on demand after date, with interest," etc.; that the Roosevelt State Bank afterwards, on June 16, 1930, consolidated and merged with Bankers State Bank, under the name and description of Roosevelt-Bankers State Bank, and duly transferred the note to the consolidated bank; that afterwards "on August 16, 1930, Chicago Trust Company (plaintiff) was duly appointed receiver for Roosevelt-Bankers State Bank, by the Auditor of Public accounts of the State of Illinois, pursuant to law," and the appointment "was afterwards duly confirmed by an order entered of record in this court," by means of which appointment and order "it was then and there appointed and ordered that said sum of money * * should be collected by and paid to the plaintiff;" and that by means thereof defendant became liable to pay to plaintiff said sum of money; yet defendant has not paid it, to plaintiff's damage, etc.

In defendant's verified petition of October 15, 1930, it is alleged that the note in question "was an accommodation note," signed by him "as an accommodation for the Roosevelt State Bank at the request of Alexander Flower, then its president;" that defendant received no consideration for the note; that at the time Flower requested him to sign the note he (Flower) stated that "certain bonds had to be taken out of the bank to prove up in court;" that he (defendant) "never saw any bonds, did not know what bonds this note was to cover, nor were any bonds at any time delivered to him;" that at the time of said consolidation "the consolidated bank (being the Roosevelt Bankers State Bank) carried said judgment note among its assets in place of the \$20,000 Par Value Bonds, which your petitioner

In plaintiff's declaration it is alleged that on January 9, 1910, defendant executed and delivered the note to plaintiff. The note is and by which defendant, by the name and designation of Edward J. Fox, is indebted to plaintiff in the sum of \$50,000, on demand after date, with interest, etc.; that the Hovey State Bank and the Hovey State Bank afterwards, on June 1, 1910, consolidated and merged with Hovey State Bank, under the name and designation of Hovey State Bank, and duly transferred the note to the consolidated bank; that afterwards on March 10, 1910, Chicago Trust Company (plaintiff) was duly appointed receiver for Hovey State Bank, by the Auditor of Public Accounts of the State of Illinois, pursuant to law, and the plaintiff was afterwards duly confirmed by an order entered of record in the court, by means of which appointment and order "it was then and there specified and ordered that said sum of money" should be collected by and paid to the plaintiff, and that by means thereof defendant became liable to pay to plaintiff said sum of money; yet defendant has not paid it, to plaintiff's damage, etc.

In defendant's verified petition of August 10, 1911, it is alleged that the note in question was an unauthorized issue, signed by him "as an accommodation for the Hovey State Bank at the request of Alexander Hovey, then its president"; that defendant received no consideration for the note; that at the time Hovey requested him to sign the note he (Hovey) stated that "certain funds had to be taken out of the bank to prove up its assets"; that he (defendant) "never saw any funds, did not know what funds this note was to cover, nor were any funds at any time delivered to him"; that at the time of said consolidation "the consolidated bank being the Hovey State Bank" carried said judgment note among its assets in place of the \$50,000 for value bonds, which were retained

(defendant) has recently been informed are Argyle Building Bonds * * and were at a later date delivered by the bank to Pritzker and Pritzker, attorneys, to be proven up in a foreclosure proceeding;" that defendant "had no profit in the deal;" that "the entire transaction was handled as an accommodation for the benefit of the bank;" that defendant had no dealings whatsoever with said attorneys; that "any dealings with reference to said bonds with Pritzker and Pritzker, or anyone else, was by the Roosevelt State Bank or its successor;" and that defendant "does not claim any interest in the bonds, has no interest in the same, and did not appear before any master in chancery in any foreclosure of any bonds of any kind or description, nor did he ever claim any interest in said bonds." Therefore, "because of the failure of consideration" defendant prays that the confessed judgment may be opened and he be given leave to appear and defend, etc.

In said other plea, filed on the day of the trial, defendant alleged that the note was only to be held by said Roosevelt State Bank "temporarily and while certain bonds, known as 'Argyle Building Bonds,' of the par value of \$20,000, assets of said bank, were or would be delivered by the bank to Pritzker & Pritzker, attorneys, for the purpose of proving up said bonds as evidence of mortgage indebtedness in a certain foreclosure proceeding then pending;" that defendant "had no personal or direct interest whatsoever by way of profit or other valuable consideration to himself in fact or in prospect in exchange for said accommodation;" that he had no personal relationship with said attorneys in the handling of said foreclosure matter; that he executed the note "with the understanding between him and said Flower, as president of said bank, that it would be returned to defendant when, or within a reasonable time thereafter, the bonds or proceeds thereof upon the consummation of said foreclosure would be returned to said bank as such assets thereof;" and that after the making of the note the Roosevelt State Bank consolidated with the Bankers State Bank and

(delendant) has testified that he has no knowledge of the
and that at a later date delivered by the bank in London and
delendant, attorney, to be proved up in a foreclosure proceeding.
that delendant "had no profit in the deal," and "the whole transac-
tion was handled as an accommodation for the benefit of the bank."
that delendant had no dealing whatever with said attorney; that
"any dealing with reference to said bonds with Winkler and Winkler,
or anyone else, was by the Reserve State Bank on its account," and
that delendant "does not claim any interest in the bonds, has no
interest in the same, and did not appear before any master in equity
in any foreclosure of any bonds or investigation, nor did
he ever claim any interest in said bonds." Therefore, "because of
the failure of consolidation," delendant prays that the court should
grant him to be removed and he be given leave to appear and defend, etc.
In said other plea, filed on the day of the trial, delendant
alleges that the note was only to be sold by said attorney; that said
"temporarily and while certain bonds, known as 'United States Bonds'
of the par value of \$20,000, against said bank, were or would be
delivered by the bank to Winkler & Winkler, attorneys, for the pur-
pose of proving up said bonds as evidence of mortgage indebtedness in
a certain foreclosure proceeding then pending," that delendant "had no
personal or direct interest whatever by way of profit or other val-
uable consideration to himself in fact or in prospect in exchange for
said accommodation;" that he had no personal relationship with said
attorney in the handling of said foreclosure matter; that he executed
the note "with the understanding between him and said Winkler, as
president of said bank, that it would be returned to delendant, then,
or within a reasonable time thereafter, the bonds or proceeds thereof
upon the consummation of said loanmaking would be returned to said
bank as such sale proceeds;" and that after the making of the note the
Reserve State Bank consolidated with the Reserve State Bank and

"the Roosevelt Bankers State Bank, organized under said consolidation, became and was and is now the successor of said Roosevelt State Bank;" and so defendant says that said note was made without any good or valuable consideration.

It will be noticed that neither in said petition nor said other plea are the allegations of plaintiff's declaration denied. Defendant's only stated defense is that the note was an accommodation note and without consideration.

At the opening of the trial without a jury, defendant's attorney stated that the sole defense was "want of consideration" and that the note sued upon was given by defendant "to take up a previous note." Thereupon the receiver's (plaintiff's) attorney made the following statement in substance, as to certain facts, which were not questioned by defendant's attorney:

"For many years prior to June 16, 1930, there were two banks operating on the south side of Chicago, - one the Roosevelt State Bank located at 35th and Grand Boulevard, and the other the Bankers State Bank located at 47th and Grand Boulevard, or South Parkway. On June 16, 1930, after proper application had been made, accompanied with statements of assets, etc., to the State Auditor, the latter issued a charter for the Roosevelt Bankers State Bank and it took over all of the assets and assumed all of the liabilities of the two first mentioned banks. On August 2, 1930, it did not open and, upon the request of its directors, the State Auditor took charge, and on August 16th, plaintiff was appointed as receiver for the bank by the auditor, and a few days thereafter such appointment was confirmed by order entered by the superior court upon a bill filed by the Attorney General under the statute. The note in question was among the assets of the consolidated bank at the date of its opening and also one of its assets which came to the receiver on August 16th. Prior to the opening of the consolidated bank, the maker of the note had been a director of the Roosevelt State Bank and he became and was a director of the consolidated bank both when opened and when closed.

Thereupon it was agreed that the note, upon which the judgment had been confessed, might be considered as having been offered in evidence by plaintiff, and, the court having stated that the burden of proving defendant's defense was upon him, defendant testified on direct examination in substance that he had been engaged in the business of conducting a butcher shop at 345 East 35th street

"The Receiver's Bankrupt Estate Fund, organized under said consolidation, became and was and is now the successor of said Receiver's Bankrupt Estate Fund."

and no defendant says that said note was made without any good or

valuable consideration.

It will be noticed that neither in said petition nor said

other place are the allegations of plaintiff's declaration denied.

Defendant's only stated defense is that the note was an accommodation note and without consideration.

At the opening of the trial without a jury, defendant's

attorney stated that the note defense was "want of consideration."

and that the note was given by defendant "to take up a

previous note." Thereupon the receiver's (plaintiff's) attorney made the following statement in substance, as to certain facts, which were

not questioned by defendant's attorney:

"For many years prior to June 16, 1930, there were two banks operating on the north side of Chicago, - one the Northwestern State Bank located at 28th and Grand boulevards, and the other the Farmers State Bank located at 4th and Grand boulevards, in North Chicago. On June 16, 1930, after proper application had been made, accompanied with statements of assets, etc., to the State Auditor, the latter issued a charter for the Northwestern State Bank and it took over all of the assets and assumed all of the liabilities of the two last mentioned banks. On August 2, 1930, it did not open and, upon the report of its directors, the State Auditor took charge, and on August 10th, plaintiff was appointed as receiver for the bank by the auditor, and a few days thereafter upon appointment was confirmed by order entered by the auditor upon a bill filed by the Attorney General under the statute. The note in question was among the assets of the consolidated bank at the date of its opening and also one of the assets which came to the receiver on August 10th. Prior to the opening of the consolidated bank, the maker of the note had been a director of the Northwestern State Bank and its business and was a director of the consolidated bank both when opened and when closed."

Thereupon it was agreed that the note, upon which the

defendant had been confessed, might be considered as having been

effected in evidence by plaintiff, and the court having stated that

the burden of proving defendant's defense was upon him, defendant

testified on direct examination in substance that he had been engaged in the business of conducting a butcher shop at 324 East 25th Street

for about 22 years; that the note sued upon (dated January 9, 1930) was executed at the request of Alexander Flower, then president of the Roosevelt State Bank; that defendant "did not receive anything for the note," and when the note was signed "Flower stated that he just wanted to put it in there, that he had some Argyle bonds, amounting to \$20,000, which he had to take to a lawyer, and that he wanted to replace that note until the bonds came back;" that that was why Flower wanted a \$20,000 note; that Flower further stated as to the note, "I will take care of it; it will only be for a few weeks until we get the bonds back;" and that "when he got the bonds back he would return the note right away;" and that he (defendant) never paid any interest on the note.

On cross-examination defendant further testified that the conversation with Flower, as above related, occurred on the day of the execution of the note, January 9, 1930; that Flower then stated that he (defendant) would "never have to pay the note," and that, "if he (defendant) had to pay it, he (Flower) would make good on it;" that Flower "did not give him (defendant) any written agreement to that effect," and that Flower "just gave his word that he would pay the note if I were called upon to pay it." On the witness' attention being called to the fact that the note sued upon was a renewal note, he further testified that it "was renewed once;" that Flower "told me to sign another note because he could not get his bonds back;" that the note sued upon "is the same as the first \$20,000 note, given to the bank in 1928 at Flower's request," and that "it was in 1928 that Flower stated that if I had to pay the note he would make good;" that when Flower told him about having to take \$20,000 worth of Argyle Bonds down to a lawyer for foreclosure purposes, he (the witness) did not see the bonds "because they had already been taken down town;" that "I just took Flower's word for it that the Roosevelt State Bank owned \$20,000 of Argyle bonds when

The above is a copy of the note which was presented to
 the President of the Republic of Liberia, then President of
 the Republic of Liberia, and the defendant "did not receive anything
 for the note," and when the note was signed "Trower stated that he
 had wanted to get it in there, that he had some of the bonds, amount-
 ing to \$20,000, which he had to take to a lawyer, and that he wanted
 to replace that note with the bonds some day; that that was why
 Trower wanted a \$20,000 note; that Trower further stated as to the
 note, "I will take care of it; it will only be for a few weeks until
 we get the bonds back;" and that "when he got the bonds back he would
 return the note right away;" and that he (defendant) never paid any
 interest on the note.
 The cross-examination defendant further testified that
 the conversation with Trower, as above related, occurred on the day
 of the execution of the note, January 2, 1920; that Trower then
 stated that he (defendant) would "never have to pay the note," and
 that "it he (defendant) had to pay it, he (Trower) would make good
 on it;" that Trower "did not give him (defendant) any written agree-
 ment to that effect," and that Trower "just gave him word that he
 would pay the note if I were called upon to pay it." On the witness'
 attention being called to the fact that the note was given with a
 printed note, he further testified that it "was removed again;" that
 Trower told me to sign another note because he could not get his
 bonds back; that the note was given "in the name of the first
 \$20,000 note, given to the bank in 1918 of Trower's request," and
 that "it was in 1920 that Trower stated that if I had to pay the note
 he would make good;" that when Trower told him about having to take
 \$20,000 worth of Lytle bonds down to a lawyer for foreclosure
 purposes, he (the witness) did not see the bonds "because they had
 already been taken down town;" that "I just took Trower's word for
 it that the Republic's State Bank owned \$20,000 of Lytle bonds when

I executed the note;" that neither he (defendant), individually, nor the Calumet Market Co. (the name under which he conducted his butcher shop business), "at any time owned any bonds to the extent of \$20,000;" and that sometimes the Roosevelt State Bank "made small loans, maybe \$1,000 at the most" to the Calumet Market Co. upon written applications therefor, accompanied by written statements. The witness was then shown an instrument marked "Plaintiff's Exhibit 1 for identification," which later in the trial was offered in evidence by plaintiff and admitted. The witness identified the signature to the instrument, "Calumet Market Co. by Jacob Janowitz," and stated that Janowitz "is a partner of mine in the business known as Calumet Market Co." The instrument is dated March 6, 1929, is a statement of the assets and liabilities of said "Calumet Market Co.," showing total assets of \$49,000, total liabilities of \$20,500, and "capital (net worth)" of \$28,500. Among the enumerated assets are "Bonds \$20,000."

Defendant further testified on cross-examination that when he executed the note sued upon he did not make any application to the Roosevelt State Bank for a loan of \$20,000; that, when in 1928, he first executed a note payable to said bank for \$20,000, he did not then make a written application to said bank for a loan; and that he did not remember whether or not that note was renewed in January 1929 and again in 1930, but that he was "pretty sure" that the note was renewed only once and then in January, 1930. The witness then was shown an instrument, marked "Plaintiff's Exhibit 2 for identification." He admitted that the signature "Calumet Market, by Max Alexander, director" was his signature. This instrument later in the trial was introduced in evidence by plaintiff. It is dated "Chicago, January 9, 1929," and addressed to the "Board of Directors of the Roosevelt State Bank" and it states that "the undersigned hereby makes application * * for a loan, described as follows: Amount

I executed the note, and either as (defendant), individually,
or, the defendant, Marked Co. (the name under which he conducted his
business, "at any time owned any bonds or the assets
of \$10,000", and that sometime the defendant State Bank "made small
loans, maybe \$1,000 at the most" to the defendant Marked Co. upon
written applications therefor, accompanied by written statements.
The witness was then shown an instrument marked "Exhibit A" which
I the defendant, which later in the trial was offered in evi-
dence by plaintiff and admitted. The witness identified the sig-
nature to the instrument, "defendant Marked Co. by Jacob J. Janssen",
and stated that Janssen "in a position of mine in the business known
as defendant Marked Co.". The instrument is dated March 6, 1929, in
a statement of the assets and liabilities of said "defendant Marked
Co.", showing total assets of \$48,000, total liabilities of \$38,000,
and "capital (net worth)" of \$10,000, among the enumerated assets
are "Bonds \$25,000".
Janssen further testified on cross-examination that
when he executed the note upon which he did not make any application
to the defendant State Bank for a loan of \$1,000, that in
1929, he first executed a note payable to said bank for \$5,000, and
it not then make a written application to said bank for a loan; and
that he did not remember whether or not that note was renewed in
January 1929 and again in 1930, but that he was "pretty sure" that
the note was renewed only once and then in January, 1930. The wit-
ness was then shown an instrument, marked "Exhibit B" for
identification. He admitted that the signature "defendant Marked Co.
by Jacob J. Janssen" was his signature. This instrument later
in the trial was introduced in evidence by plaintiff. It is dated
Chicago, January 8, 1929, and addressed to the "Board of Directors
of the defendant State Bank" and it recites that "the undersigned
hereby makes application for a loan, described as follows: amount

\$20,000; rate of int. 6%; terms on demand; security none; this application is presented to your body for approval in accordance with the requirements of section 10 of the State Banking Act." Below the signature to the application is the following statement, signed by six directors of the bank including Alexander Flower, and not including defendant; "The foregoing application for a loan, as above described, was submitted to the Board of Directors at its regular meeting and approved by a majority of its members."

Defendant further testified on cross-examination that when he made said application he did not obtain \$20,000. On being asked what was his purpose in making said application, he stated: "I don't know what I signed it for. * * I thought if the rest of the directors signed it, I could sign it, too; that is what I thought." And he further stated that he "did not know whether or not \$20,000 ever was deposited in his account in the Roosevelt State Bank," or whether or not \$20,000 ever was withdrawn from that account. Later in the trial plaintiff introduced in evidence, as "Plaintiff's Exhibit 3," a ledger sheet of said bank, showing deposits and withdrawals of moneys in the account of the Calumet Market Co. with the bank, for the month of July, 1928, and part of August. It shows that on July 30, 1928, \$20,000 was credited as a deposit, and on the same day \$20,000 was debited as a withdrawal.

Defendant further testified on cross examination that before the consolidated bank was opened in June, 1930, he signed "some papers" as a director, which the State Auditor required; that he then "knew that his said note for \$20,000 was in the bank;" that he also knew that said note was there when plaintiff was appointed receiver of said bank; that "he asked Flower about it;" that he "thought Flower had taken it out and had put in \$20,000 or the bonds;" but that on the day following the closing of the bank Flower "said no".

120,000; rate of 100. 25; even on demand; equally good; this application is presented in your name for approval in accordance with the requirements of section 10 of the State Banking Act. before the signature to the application is the following statement, signed by six directors of the bank including Alexander Hoyer, and not including defendant: "The foregoing application for a loan, as above described, was submitted to the board of directors at its regular meeting and approved by a majority of its members."

Defendant further testified on cross-examination that when he made said application he did not state \$20,000. On being asked what was his purpose in making said application, he stated: "I don't know that I signed it for. * * I thought it was best if the directors signed it. I could sign it, too; that is what I thought." And he further stated that he "did not know whether or not \$20,000 ever was deposited in his account in the Kansas City State Bank," or whether or not \$20,000 ever was withdrawn from said account. Later in the trial defendant introduced in evidence, as "plaintiff's exhibit 1," a ledger sheet of said bank, showing deposits and withdrawals of money in the account of the Calumet Bank Co. with the bank, for the month of July, 1922, and part of August. It shows that on July 27, 1922, \$20,000 was deposited in said account, and on the same day \$20,000 was withdrawn as a withdrawal.

Defendant further testified on cross-examination that before the specified bank was opened in June, 1922, he signed "some papers" as a director, which the bank's officers thought he had signed "some papers" and he said that he had signed the same in the bank. That he also knew that said bank was there when defendant was appointed receiver of said bank; that "he signed Hoyer about 1917" and he "thought Hoyer had taken it out and had put in \$20,000 on the books"; and that on the following day closing of the bank Hoyer "said no".

On re-direct examination defendant further testified that to his knowledge \$20,000 was never passed to his credit in the bank upon his application, or afterwards deducted from that credit. Being asked if he had ever made an application to the bank for a loan of \$20,000, he replied: "I don't remember it; I couldn't." He further testified that when the note was renewed he had a conversation with Flower; that he told Flower that he "did not care to put the note in again" and that he wanted the old note back; but that Flower said "it will only take a couple more weeks until we get the bonds back, and that will settle it and then you will get your note back." The witness then was asked if "he understood it was for the same purpose the original note was given, - to be used as a temporary showing of assets during the absence of the bonds from the bank," and he replied: "Yes, Flower said the lawyer did not bring the bonds back and as soon as he brings the bonds back he will return the note to me."

On re-cross examination defendant further testified that "I asked Flower a dozen times to give me my note back and he said 'My bonds isn't back yet'; that he (the witness) did not know whose bonds they were; but that he "guessed" they were Flower's. He then corrected this statement and testified that the bonds were "the bank's bonds." He further testified in substance that he had never received through the mail a letter, dated March 26, 1929, addressed to him at 345 East 35th street, Chicago, and signed by Pritzker & Pritzker, attorneys, concerning certain Argyle Bonds of the face value of \$20,000; but he first saw this letter when Flower showed it to him about September 15, 1930, after the bank had been closed and about three weeks before the judgment was confessed; that the letter was a receipt for \$20,000 of the bonds and also concerned a foreclosure suit on said bonds; that he did not know whether or not the foreclosure suit had been started in his name; that he never authorized anyone to use his name as complainant in such foreclosure suit;

On re-examination defendant further testified that to his knowledge \$20,000 was never passed to his credit in the bank upon his application, or afterwards deducted from that credit. Being asked if he had ever made an application to the bank for a loan of \$20,000, he replied: "I don't remember it; I couldn't". He further testified that when the note was renewed he had a conversation with Flower; that he told Flower that he "did not care to put the note in again" and that he wanted the old note back; but that Flower said "it will only take a couple more weeks until we get the bonds back, and that will settle it and then you will get your note back". The witness then was asked if he understood it was for the same purpose the original note was given, - to be used as a pledge in securing of money from the proceeds of the bonds from the bank," and he replied: "Yes, Flower said the lawyer did not bring the bonds back and as soon as he brings the bonds back he will return the note to me." On re-examination defendant further testified that "I asked Flower a dozen times to give me my note back and he said 'My bonds isn't back yet'; that he (the witness) did not know where the bonds were; but that he 'guessed' they were Flower's. He then corrected this statement and testified that the bonds were 'the bank's bonds'. He further testified in substance that he had never received through the mail a letter, dated March 26, 1930, addressed to him at 344 East 30th Street, Chicago, and signed by William A. Tricker, attorney, concerning certain U.S. bonds of the face value of \$20,000; but he first saw this letter when Flower showed it to him about September 15, 1930, after the bank had been closed and about three weeks before the judgment was returned; that the letter was a request for \$20,000 of the bonds and also concerned a love letter's only on said bonds; that he did not know whether or not the love letter's only had been started in his name; that he never authorized anyone to use his name as complainant in such love letter's only;

that he never hired Fritaker & Pritzker for such purpose, and never saw them; that he signed the note for \$20,000, and the renewal note or notes, without making any effort to learn whether or not the bonds were owned by the bank or where they were, and that he relied in the transaction upon Flower, and "took his word for it."

Alexander Flower testified on direct examination that he was president of the Roosevelt State Bank prior to the consolidation and thereafter chairman of the board of the Roosevelt-Bankers State Bank; that he has known defendant for about ten years; that as defendant was a director of the bank we "naturally discussed different things that came up in the bank;" that among the bank's assets were \$20,000 worth of Argyle bonds which had been in the bank a couple of years; that these bonds "became defaulted on account of the foreclosure of the Argyle building" and Pritzker & Pritzker called him up and said they wanted the bonds to prove them up in the foreclosure proceeding; that he "couldn't say" when this request was made "with reference to the signing of the first note of which the note sued upon is a renewal;" that he spoke to different directors, among them defendant, about the matter; that he "suggested to Alexander (defendant) that he put in his note to cover the \$20,000 worth of bonds, that he would then give the bonds to Pritzker & Pritzker to deliver to the master in chancery, and that as soon as they proved them up the bonds would be returned to the bank and Alexander's note would be given back to him;" that "of course, after that, the bank closed and we did not have the bonds to do that;" that the purpose of taking the renewal note sued upon "was just to off-set the \$20,000 worth of bonds that belonged in the bank," and the note "was to take the place of the bonds that were removed;" that "there was no consideration passing from the bank to Alexander for the execution of the note sued upon;" that when the bank became insolvent the bonds had not been returned; and that "the note was not returned to Alexander because we had only promised

that he never liked Alexander & Ritchie for such purposes, and
never saw them; that he signed the note for \$20,000, and the company
made no notes, without making any effort to learn whether or not the
funds were owned by the bank or where they went, and that he relied
in the transaction upon Trower, and "took his word for it."
Alexander Trower testified on direct examination that he
was president of the Pennsylvania State Bank prior to the consolidation
and thereafter chairman of the board of the Pennsylvania-Bankers State
Bank; that he has known defendant for about ten years; that on August-
first was a director of the bank as "financially disinterested directors"
change that came up in the hands; that among the bank's assets were
\$20,000 worth of Apple bonds which had been in the bank a couple of
years; that those bonds "became delinquent on account of the fore-
closure of the Apple building," and Trower & Ritchie called him up
and said they wanted the bonds to prove them up in the foreclosure;
testified that he "couldn't say" when this request was made "with
reference to the signing of the first note of which the note sued
upon is a renewal;" that he spoke to different lawyers, some from
defendant, about the matter; that he "remembered to consult defendant";
that he did in the office to get the \$20,000 note signed, and he
will then give the bonds to Trower & Ritchie to deliver to the
lender in capacity, and that as soon as they proved them up the bonds
will be returned to the bank and Alexander's note would be given back
to him; that "of course, after that, the bank closed and we did not
see the bonds to do that;" that the purpose of taking the renewal
note and upon "the fact to collect the \$20,000 note of bond that
belonged to the bank," and the note "was in fact the story of the money
that was removed;" that "there was no consideration passing from the
bank to Alexander for the execution of the note sued upon;" that when
the bank became insolvent the bonds had not been returned; and that
the note was not returned to Alexander because we had only promised

him that when the bonds were returned to the bank his note would be given back to him."

Flower further testified on cross-examination that the first \$20,000 note given by Alexander, of which the note sued upon was a renewal, "was given about the middle of 1923;" that the bank had \$20,000 worth of Argyle Bonds which "were in default just about that time;" that the bonds were worth par when they first came into the bank, but were not worth that much after the default; that the bank, however, expected to realize the whole \$20,000 on the foreclosure; that he "couldn't state the date that the bonds were delivered to Pritzker & Pritzker for foreclosure;" that he talked with them about foreclosing the bonds, but that he "cannot remember if it was before or after we got the first note from Alexander;" that he "told Alexander he was going to send these bonds to Pritzker & Pritzker;" that he "represented to Pritzker & Pritzker that part of the bonds belonged to Alexander," and that he (the witness) "owned some other Argyle bonds, personally;" that they (P & P) "proved my bonds up in my name and were supposed to prove up the \$20,000 bonds in Alexander's name;" that when Alexander signed the note sued upon, or any of its predecessors, he "got no money direct; it was through bookkeeping;" that in his banking experience as head of the Roosevelt State Bank he had occasion to take securities from the vaults of the bank and place them with a lawyer for litigation and that the practice was, when this was done, to take "a safe-keeping receipt" from the lawyer; that this was not done in the present case; that it was "not necessary to have a judgment note executed by a director of the bank," as was done in this case; that "the reason it was done that way was that when the bonds left the bank I wanted something to off-set them and we did this with Alexander's note;" that "a trust receipt from Alexander would probably have satisfied the State Bank Examiner, but we did not handle it that way;" that he (the witness) "knew that the

State bank examiner would not have approved carrying defaulted bonds as an asset of the bank;" that he considered "charging them off," but he did not do so, and that he "could not say" that this was one of the reasons why it occurred to him to have Alexander execute the note; that when an officer or director of the bank desired to borrow money from it he was required to file an application in writing; that an application was taken because Alexander, interested in the Calumet Market Co., was a director of the bank; that the application was placed in the "Calumet Market Co. file" in the bank, and the "State Auditor had access to it when he was checking up on the loans;" that the bank required renewals of demand notes for loans "every six months;" that he "doesn't know" whether the note first given by Alexander in July, 1928, was first renewed in January, 1929, or not; that when Alexander signed the note and any of the renewals he (Flower) "gave to him my word that he would never have to pay the note;" that he promised this "in writing" (no such writing was produced); that he gave to Alexander "my personal guaranty, signed by me personally," to that effect; and that he does not know where that paper is, but thinks a copy of it may be at his home.

On his attention being directed to "Plaintiff's Exhibit 3" (ledger sheet), he further testified on cross-examination that it is the bank's account with the Calumet Market Co. between the dates mentioned therein; that the entry of a deposit of \$20,000 on July 30, 1928, to the credit of the Market Co. "is correct"; that the entry of the same date showing a withdrawal of \$20,000 by check "also appears on the sheet and is correct;" that, however, "no money passed in that transaction; it was for the purpose of bookkeeping;" that he supposes that Alexander "handled it that way with the cashier." On being asked if the books did not show that Alexander "bought the bonds" from the bank, he replied that he was not positive how the cashier handled the transaction, "but that it seems that he put the \$20,000 to his credit."

state bank examiner would not have approved carrying delinquent bonds
as an asset of the bank; that he considered "charging them off."
but he did not do so, and that he "could not say" that this was one
of the reasons why it occurred to him to have Alexander execute the
note; that when an officer or director of the bank desired to borrow
money from it he was required to file an application in writing; that
an application was taken because Alexander, interested in the Capital
Market Co., was a director of the bank; that the application was
placed in the "Colonial Market Co. file" in the bank, and the "State
Application" was to it when he was checking up on the loan; that
the bank required removal of demand notes for loans "every six
months"; that he "didn't know" whether the note filed given by
Alexander in July, 1935, was first renewed in January, 1936, or not;
that when Alexander signed the note and any of the renewals he (Towner)
"gave to him my word that he would never have to pay the note"; that he
understood this "in writing" (he said writing was produced); that he gave
to Alexander "my personal guarantee, signed by me personally," so that
Towner, and that he does not know where that paper is, but thinks a copy
of it may be at his home.
On his attention being directed to "Towner's Exhibit 2"
(Ladner sheet), he further testified on cross-examination that it is
the bank's account with the Capital Market Co. between the dates
mentioned therein; that the entry of a deposit of \$75,000 on July 10,
1935, to the credit of the Capital Co. "is correct"; that the entry
of the same date showing a withdrawal of \$25,000 by check "also appears
on the sheet and is correct"; that, however, "no money passed in that
transaction; it was for the purpose of bookkeeping"; that he supposed
that Alexander "handed it that way with the cashier". On being asked
if the books did not show that Alexander "passed the bonds" from the
bank, he replied that he was not positive how the cashier handled the
transaction, but that it seems that he got the \$25,000 to his credit

and gave the \$20,000 back to the bank for the \$20,000 worth of bonds, the way that is there;" that the books "do not show that Alexander's^{note} was an accommodation note," or that "Alexander gave his note as a safe-keeping or trust receipt for those bonds, and that the note represents \$20,000;" that the foreclosure suit is "still going on, and the receiver is still in charge of the property;" and that the note sued upon "was among the assets of the Roosevelt-Bankers State Bank when it opened for business on June 16, 1930," was "carried as one of its assets up to the time of the appointment of the receiver," and "was among the assets at the time that the State Auditor approved the opening of the new bank."

After a careful review of the present transcript we are of the opinion that defendant's sole defense (that the note sued upon was an accommodation note and without any consideration) was not sustained by the evidence and that the court's finding and judgment were fully warranted. Furthermore, we think that the evidence discloses such a state of facts as should estop defendant from claiming that the note was an accommodation note, without consideration. In Golden v. Gervenka, 278 Ill. 409, 427, it is said: "Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped, upon the insolvency of the bank, to allege want of consideration." And, in this connection, we think that the decision and holdings in Niblack, Receiver, v. Farley, 286 Ill. 636, are in point. In that case the receiver of the LaSalle Street Trust & Savings Bank recovered a judgment against Farley in the circuit court on his demand note. The appellate court (211 Ill. App. 441) reversed the judgment, with a finding of fact that there was "no con-

and now the bank has the bank for the \$100,000 worth of bonds.

NOTE

The way that is shown is that the bank "do not show that Alexander's

was an accommodation note," or that "Alexander gave his note as a

note-making or bank receipt for these bonds, and that the note

"represents \$100,000," and the testimony is that "still going on,

and the receiver is still in charge of the property," and that the note

was given "and among the assets of the Receiver-Manager State Bank

when it opened for business on June 15, 1930," was "issued as one of

the assets up to the time of the appointment of the receiver," and

"not among the assets at the time that the State Auditor approved the

opening of the new bank."

After a careful review of the present transcript we are

of the opinion that defendant's case depends (and the note used upon

was an accommodation note and without any consideration) was not sus-

tained by the evidence and that the court's finding and judgment were

fully warranted. We think that the evidence disclosed

such a state of facts as should easily defendant from claiming that the

note was an accommodation note, without consideration. In Wilder v.

Receiver 278 Ill. 404, 407, it is said: "where notes on other

parties have been presented to a bank for the purpose of making an

inventory of assets, so as to devote the examiner and enable the bank

to continue business, although the circumstances may have been such that

the bank itself could not have collected the securities, it has been

held that the receiver, representing the creditors, could maintain the

action, and the notes were assigned, upon the receiver of the bank,

to allege want of consideration." And, in this connection, we think

that the decision and holding in Wilder v. Receiver, 278 Ill.

404, are in point. In that case the receiver of the Illinois Street

Trust & Savings Bank recovered a judgment against Wilder in the circuit

court on his demand note. The appellate court (271 Ill. App. 441)

reversed the judgment, with a finding of fact that there was no con-

sideration for the promissory note in suit," etc. On certiorari, however, our Supreme Court affirmed the judgment of the circuit court and reversed that of the appellate court, saying (p. 539): "The proof showed that it (the note) was so used and treated as an asset of the bank. If this be accepted as true, the question then arises whether, after the note had passed with the other assets of the bank to the receiver, who is winding up its affairs for the benefit of its creditors, defendant is estopped to deny liability on the ground that there was no consideration for the note." And the Court, after referring to the Golden case, supra, further said (p. 540): "It (the note) was placed among the bank's assets as an obligation of defendant and was so considered by the bank examiner who examined the assets of the bank. The suit is brought on the note by the receiver, who is collecting the bank's assets and winding up its affairs for the benefit of its creditors. It would be contrary to public policy and good morals to permit defendant to take advantage of the fraudulent agreement with the bank as against the rights of creditors."

It is also contended by counsel for defendant in substance that, inasmuch as there was some evidence that the Calumet Market Co. was not defendant's individual business and that he had a partner therein, named Janowitz, the judgment was erroneous. It is a sufficient answer to the contention that the point was not raised in the trial court and it cannot be raised here for the first time. (Springer v. Simpson, 175 Ill. App. 631, 633; Uhlendorf v. Kaufman, 41 Ill. App. 373, 375.) and we do not think, in view of the testimony given by defendant and his witness, Flower, that the court erred in admitting Exhibits 1, 2 and 3, offered by plaintiff.

The judgment of the superior court is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

...for the preliminary note in this, etc. On examination
However, our witnesses have obtained the judgment of the circuit
court and reversed that of the appellate court, saying (p. 225):
"The proof showed that it (the note) was so made and treated as an
asset of the bank. It was so accepted as such, the question then
arises whether, after the note had passed with the other assets of
the bank to the receiver, who is winding up its affairs for the
benefit of its creditors, defendant is entitled to deny liability on
the ground that there was no consideration for the note." And the
court, after referring to the Golden rule, Waller, further said (p.
226): "It (the note) was placed among the bank's assets as an oblig-
ation of defendant and was so considered by the bank examiner who
examined the assets of the bank. The note is brought on the note by
the receiver, who is collecting the bank's assets and winding up its
affairs for the benefit of its creditors. It would be contrary to
public policy and good morals to permit defendant to take advantage of
the fraudulent agreement with the bank as against the rights of
creditors."
It is also contended by counsel for defendant in sub-
stantive that, inasmuch as there was some evidence that the defendant
acted as, was not defendant's individual business and that he had
a partner therein, namely, James, the judgment was erroneous. It
is a sufficient answer to the contention that the point was not
raised in the trial court and it cannot be raised here for the first
time. (Reichman v. Reichman, 178 Ill. App. 621, 622; Windsor v.
Windsor, 21 Ill. App. 273, 275.) And we do not think, in view of the
testimony given by defendant and his witness, Flower, that the court
erred in admitting Exhibits A, B and C, offered by plaintiff.
The judgment of the superior court is affirmed.
Affirmed.

Reichman and Reichman, vs., executor.

34877

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. FRANK A. COUNTRYMAN,
Petitioner and Appellee,

v.

SOUTH PARK COMMISSIONERS, a
municipal corporation, et al.,
Respondents and Appellants.

94 7
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 645⁴

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On February 25, 1930, the relator filed a petition for mandamus against the South Park Commissioners, a municipal corporation, the members of its board and certain of its officials, to compel them to reinstate him as a sergeant of police in the classified service of its police department, and to pay him certain back salary. Respondents' demurrer to the petition was overruled and they filed an answer. On November 22, 1930, the cause was called for hearing and the relator demurred ore tenus to the answer. The court sustained the demurrer and, upon respondents electing to stand by their answer, entered a further order in which, after making certain findings and conclusions, adjudged that a writ of mandamus issue commanding respondents to "forthwith place the name of the relator upon the roster and payroll, as sergeant of police, in the classified service of the police force of the South Park Commissioners and to forthwith reassign him to duty as such in said service," * * to the end that he "may at once enter upon the performance of his duties, * * with the same right to continue in their performance and to receive salary therefor," as he had "prior to his unlawful demotion etc.; and further commanding respondents to pay or cause to be paid to him "the difference in salary from that of sergeant of police in said service and that of patrolman, in the amount of \$33.33 per month,

STATE OF ILLINOIS
JAMES A. COCHRAN,
Petitioner and Appellee.

APPEAL FROM JUDICIAL
COURT, COOK COUNTY.

Respondents and Appellants.
Municipal Corporation, et al.,
Respondents and Appellants.

SEC. I. A. 645

THE PETITIONER REQUESTS THE COURT TO REVERSE THE DECISION OF THE COURT.

ON FEBRUARY 20, 1920, the petitioner filed a petition for

reconsideration of the order of the Board of Police Commissioners, a municipal corporation,

the members of the board and certain of the officials,

to compel them to reimburse him as a sergeant of police in the

classified service of the police department, and to pay him certain

back salary. Respondents' answer to the petition was overruled.

On November 22, 1920, the same was

referred for hearing and the matter continued until the answer.

The court sustained the answer and, upon respondents' motion to

set aside its answer, entered a further order in which, after making

certain findings and conclusions, adjudged that a writ of mandamus

issue to compel respondents to "forthwith place the name of the

petitioner upon the roster and payroll, as sergeant of police, in the

classified service of the police force of the Cook County Commissioners

and to forthwith reimburse him as such in said service."

to the end that he "may at once enter upon the performance of his

duties." With this writ to continue in their performance and

to receive salary thereon, as he had "prior to his unlawful removal

and the further mandamus respondents to pay or cause to be paid

to him "the difference in salary from that of sergeant of police in

his service and that of policeman, in the amount of \$2.25 per month.

from December 18, 1928, to the date of his reinstatement, within thirty (30) days from the date of the entry of this order;" and that relator recover his costs, etc. Respondents have appealed.

In said further order the court's findings (apparently based upon certain allegations of the petition, some of which, though not all, were admitted in said answer) are in substance that the relator has been a resident of Chicago for more than 36 years; that by statute of Illinois the district known as South Park was created a park district; that the South Park Commissioners (hereinafter called the Commissioners) is a body corporate, and prior to July 1, 1911, was authorized to appoint and support a police force; that under "an Act relating to the civil service in park systems," in force July 1, 1911, and as amended in June, 1913, it was provided that all offices and places of employment, with certain exceptions, were to be classified and filled in the manner provided for in said Act; that under section 3 thereof the Civil Service Board of the Commissioners, at a meeting on December 9, 1913, ratified and approved the classification of all offices and places of employment in said district and adopted rules to take effect January 1, 1914, and classified all offices, etc., with reference to the duties thereof and for the purpose of establishing grades and of fixing and maintaining standards of examination; that under a certain schedule, in effect April 16, 1928, said Civil Service Board classified, among other positions or places of employment, those of Sergeant of Police (maximum \$241.66 per month) and Patrolmen (maximum \$208.33 per month); that in another schedule were fixed the lines of promotion, in which a patrolman's position was lower in line to that of a sergeant of police; that the relator, upon examination taken and passed, was certified to the position of patrolman and thereafter served as such until he was duly certified and appointed to the position of sergeant of police; that he served as sergeant until December 18, 1928; that on November 20, 1928, charges were preferred against him and he

from December 18, 1938, to the date of his reinstatement, within thirty (30) days from the date of the entry of this order; and that relator recover his costs, etc. Defendants have appeared. In said further order the court's findings (apparently based upon certain allegations of the petition, some of which, though not all, were admitted in said answer) are in substance that the relator has been a resident of Chicago for more than 30 years; that by statute of Illinois the district known as South Park was created a park district; that the South Park Commissioners (hereinafter called the Commissioners) is a body corporate, and prior to July 1, 1911, was authorized to appoint and employ a police force; that under the act relating to the civil service in park systems, in force July 1, 1911, and as amended in 1912, it was provided that all officers and places of employment, with certain exceptions, were to be classified and filled in the manner provided for in said act; that under Section 3 thereof the Civil Service Board of the Commissioners, at a meeting on December 7, 1912, ratified and approved the classification of all officers and places of employment in said district and accepted same to take effect January 1, 1914, and classified all officers, etc.; that reference to the duties thereof and for the purpose of establishing grades and of fixing and maintaining standards of examination; that under a certain schedule, in effect April 15, 1938, said Civil Service Board classified, among other positions or places of employment, those of Sergeant of Police (maximum \$241.00 per month) and Patrolman (maximum \$187.00 per month); that in another schedule was fixed the line of promotion, in which a patrolman's position was lower in time to that of a sergeant of police; that the relator, upon examination taken and passed, was entitled to the position of patrolman and thereafter served in said position until he was duly certified and appointed to the position of sergeant of police; that he served as sergeant until December 18, 1938; that on November 20, 1938, charges were preferred against him and he

was suspended without pay, beginning November 21st and until December 18th, 1928; that he was charged with "a violation of paragraph 20 of section 3 of Rule VII" of said Civil Service Board, in that he "failed to pay rent for the months of September and October, 1928, and thereby caused Anna McHugh to institute legal means of collecting same, which has resulted in a judgment in her favor for \$105 for rent due, and for court costs," and in that he has failed on several other and prior occasions to meet his just debts, "thereby causing annoyance to his superior officers, and his service being a discredit to the police department and the Commissioners;" that on December 17, 1928, the secretary of said Civil Service Board addressed a letter to the general superintendent of the Commissioners (letter, dated December 17th, set forth in full); that the letter is to the effect that said Civil Service Board at a meeting held on that day took certain action as to written charges which had been filed against Sergeant Frank Countryman (relator), that hearings on the charge were held on November 27th and December 6th, that due notice of the hearings together with a copy of the charges had been given to him, that evidence was taken, that he was present at the hearings, that the evidence established the charges (as above stated in this order), that it was decided by the Civil Service Board that he (relator) "be demoted from the position of sergeant of police * * to that of patrolman * * and be transferred to the position of patrolman * * in the classified service of the park district, under authority of sections 10a and 12 of the Civil Service Law (relating to Park Systems), with pay at the rate of \$208.33 per month," and that it was further decided that "his suspension be approved dating from November 21st to December 18th, 1928," and that "his pay be restored during period of suspension;" and that thereafter, on the same day, the relator was notified in a letter addressed to him by said general superintendent, dated December 17, 1928, in part as follows:

[illegible]

"I am enclosing herewith copy of the action of the Civil Service Board on its findings in the hearing of charges against you held on November 27th and December 6th, 1928.

The Civil Service Board has ordered that you be demoted from the position of sergeant of police * * to that of patrolman * * and that you be transferred to the position of patrolman * * under authority of sections 10 a and 12 of the Civil Service Law with pay at the rate of \$208.33 per month. The Civil Service Board also approved your suspension dating from November 21st to December 18th, 1928. Your salary is to be \$208.33 per month.

At the expiration of your suspension you will please report to the Captain of Police for duty."

And in said order the court's conclusions are that "the facts set forth in said charges, preferred against the relator herein, do not constitute 'cause' for removal;" that said Civil Service Board "had no jurisdiction to try the relator on said charges;" and that respondents "had no warrant or authority under the statutes, and the rules of the Civil Service Board of the South Park Commissioners, to demote the relator from his position of sergeant of police * * to that of patrolman * * with a reduction in salary of \$33.33 per month."

In the answer of the respondents it is alleged that in paragraph 20 of section 3 of Rule VII of the rules of said Civil Service Board, it is provided that "an employee may be removed, discharged or suspended if such employee has * * (Par. 20) 'failed to pay or to make reasonable provision for the future payment of his just debts due or owing by him, causing thereby annoyance to his superior officers or scandal to the service.'" The fact that there was such a rule of said Board is admitted by the demurrer to be true. And it is further alleged in the answer that the evidence presented to said Board on said hearing "was sufficient to justify said Board in discharging the relator from the police department of said Commissioners and every branch and grade thereof, but that these respondents, out of consideration and regard for the military services rendered by the relator * *, were disposed to and did show to him the fullest measure of leniency, and determined upon a reduction in rank as the proper penalty to impose upon him;" that "the order demoting him from the rank of sergeant to the rank of patrolman was entered in

"I am enclosing herewith copy of the action of the Civil Service Board on its findings in the hearing of charges against you held on November 27th and December 6th, 1928. The Civil Service Board has ordered that you be demoted from the position of sergeant of police to that of patrolman * * and that you be transferred to the position of patrolman * * under authority of section 10 and 12 of the Civil Service Law with pay at the rate of \$208.33 per month. The Civil Service Board also approved your suspension dating from November 21st to December 18th, 1928. Your salary is to be \$208.33 per month. At the expiration of your suspension you will please report to the Captain of Police for duty."

And in said order the court's conclusions are that "the facts set forth in said charges, preferred against the relator herein, do not constitute 'cause' for removal;" that said Civil Service Board "had no jurisdiction to try the relator on said charges;" and that respondents "had no warrant or authority under the statutes, and the rules of the Civil Service Board of the South West Commission, to demote the relator from his position of sergeant of police * * to that of patrolman * * with a reduction in salary of \$87.33 per month."

In the answer of the respondents it is alleged that in paragraph 20 of section 5 of Rule VII of the rules of said Civil Service Board, it is provided that "an employee may be removed, discharged or suspended if such employee has * * (b) failed to pay or to make reasonable provision for the future payment of his just debts due or owing by him, causing thereby annoyance to his superior officers or members of the service." The fact that there was such a rule of said Board is admitted by the demurrer to be true, and it is further alleged in the answer that the evidence presented to said Board on said hearing "was sufficient to justify said Board in discharging the relator from the police department of said Commission, and every branch and grade thereof, but that these respondents, out of consideration and regard for the military services rendered by the relator * * , were disposed to and did show to him the fullest measure of leniency, and determined upon a reduction in rank as the proper penalty to impose upon him; that the order demoting him from the rank of sergeant to the rank of patrolman was entered in

December, 1928;" and that he "acquiesced in the decision of said Civil Service Board and of the Commissioners, and accepted the judgment of the Commissioners in that regard and assumed the duties and responsibilities of police patrolman in said classified service at a salary of \$208.33 per month, and so continued to acquiesce * * until February, 1930, without protest or complaint, * * during which time he accepted the salary of the position to which he was demoted." And it is further alleged in the answer that by reason of the order of the Board a vacancy was created in the position of sergeant of police; that one Janik, a patrolman, was the first on the eligible list for promotion to that of sergeant; and that he was duly appointed to fill said vacancy and has since December, 1928, continuously acted as sergeant and been paid the salary therefor.

After reviewing the present transcript we are of the opinion that the court erred in sustaining the demurrer to respondents' answer to the relator's petition and in entering the judgment awarding the writ. We do not think that the fact that the Civil Service Board, with the approval of the Commissioners demoted the relator, instead of removing or discharging him as provided in section 3 of said Rule VII, is a matter of which he is in any position to complain. Furthermore, it sufficiently appears from respondent's answer that the relator for over a year acquiesced in his demotion and accepted without objection the position of patrolman and was paid and received the lesser salary, and that he has been guilty of laches. (Kenneally v. City of Chicago, 220 Ill. 485, 503; People v. Board of Education, 99 N. Y. Supp. 737, 739; People v. Board of Health, 106 N. Y. Supp. 923, 924-5.) In the Kenneally case (pp. 502-4) it is said:

"In addition to what has been said, it is clear that the appellant has been guilty of laches in not sooner presenting his application for restoration to the position, which he claims * * . It has been said that 'the writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied.' * * It has also been held that the writ of mandamus,

...and that he "suggested" in the decision of said
Civil Service Board and of the Commissioner, and accepted the
advice of the Commissioner in that regard and assumed the duties
and responsibilities of police position in said classified service
at a salary of \$100.00 per month, and so continued to perform
until February, 1930, without protest or complaint, "during which
time he accepted the salary of the position as which he was promoted."
It is further alleged in the report that by reason of the order of
the board a vacancy was created in the position of sergeant of police;
and one Janak, a patrolman, was the first on the eligible list for
promotion to that of sergeant; and that he was duly appointed to fill
said vacancy and has since December, 1928, continuously acted as ser-
geant and been paid the salary thereof.
After reviewing the present transcript we are of the opinion
that the court erred in sustaining the demurrer to respondent's answer
on the relator's position and in entering the judgment awarding the
relator to be not liable for the fact that the Civil Service Board,
with the approval of the Commissioner, promoted the relator, instead
of promoting or discharging him as provided in section 5 of said Civil
Service Law, is a matter of which he is in any position to complain. Further-
more, it sufficiently appears from respondent's answer that the relator
for over a year succeeded in his promotion and accepted without objec-
tion the position of patrolman and was paid and received the lesser
salary, and that he has been guilty of fraud.
Kennedy v. City of New York (1928).
1928, 220 N.Y. 485, 902; People v. Board of Education, 92 N.Y.
497, 737, 738; People v. Board of Health, 100 N.Y. 497, 923, 924-
(1902). In the latter case (pp. 902-4) it is said:
"In addition to what has been said, it is clear that the
relator has been guilty of fraud in not sooner presenting his
application for promotion to the position, which he claims."
It has been said that the writ is not granted as a matter of absolute
right, and where it can be shown that it cannot accomplish any good
purpose, or that it will have a beneficial effect, it will
be denied." It has also been held that the writ of mandamus

being a discretionary writ, will only issue in a case where it appears by law that it ought to issue, and the court will not order it in doubtful cases. * * It has been held that the writ will be refused where the granting of it will disarrange the public service. * * In People, ex rel. v. Collis, 39 N. Y. Supp. 698, it is said: 'Without considering or determining the other questions raised upon this appeal, it seems to us the order appealed from should not have been made by reason of the delay and laches on the part of the relator in demanding reinstatement in the office, from which he had been discharged, and in applying for a mandamus to compel such reinstatement. * * It is manifestly unfair, where there is disagreement as to the propriety or legality of the discharge, that the relator should lie still, and allow another person to occupy the position from which he has been removed, and draw pay for his services therein, and, after more than four months has elapsed, that he should be allowed to have this remedy by mandamus to be reinstated in office, and recover compensation for services therein, which he has not performed, and which he has for a long time, without objection, permitted another person to perform and be paid for.' (See, also, City of Chicago v. Condell, 224 Ill. 595, 598.)

The judgment of the superior court of November 22, 1930, sustaining the demurrer to respondents' answer and awarding the writ against them, is reversed, and the cause is remanded.

REVERSED AND REMANDED.

Kerner and Seanlan, JJ., concur.

being a discretionary writ, will issue in a case where it appears by law that it ought to issue, and the court will not order it in doubtful cases. * * * It has been held that the writ will be refused where the granting of it will disavow the public service. * * * In Levin v. Y. Coll., 22 N. Y. App. Div. 2d 101, 102, it is said: "Although considering or determining the questions raised upon this appeal, it seems to us the order appealed from should not have been made by reason of the delay and failure on the part of the relator in demanding reinstatement in the office, from which he had been discharged, and in applying for a reinstatement to compel such reinstatement. * * * It is manifestly unfair, where there is a determination as to the propriety or legitimacy of the discharge, that the relator should file a bill, and allow another person to occupy the position from which he has been removed, and then pay for his services thereafter, and, after more than four months has elapsed, that he should be allowed to have this remedy by mandamus to be reinstated in office, and receive compensation for services therein, which he has not performed, and which he has for a long time, without explanation, permitted another person to perform and be paid for." (See, also, Ex. of Wilson v. Campbell, 224 Ill. 588, 593.)

The statement of the petition filed at November 25, 1922, maintaining the demand to restore the relator and ordering the writ against them, is reversed, and the same is remanded.

REVEREND AND HONORABLE:

FORWARD AND REVERSE, 17.. 1922.

34890

AMERICAN CABINET COMPANY,
a corporation,
Appellee,

v.

CONSTANTINE GIOVAN and
PETER GIOVAN,
Appellants.

957
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 L.A. 645⁵

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 13, 1930, plaintiff commenced an action of the 4th class in replevin to recover of defendants the possession of certain enumerated store fixtures, which the bailiff, according to his return, was unable to find. On September 20th, defendants having entered their appearance, plaintiffs by leave of court filed a statement of claim in trover, charging defendants with unlawfully converting to their own use the fixtures, of the value of \$800. A trial was had without a jury on November 7, 1930, resulting in the court finding defendants "guilty of maliciously converting the property described in the statement of claim" and assessing plaintiff's damages at the sum of \$668.32. Judgment in that sum was entered against defendants, and they have appealed.

On the trial both defendants were called as witnesses for plaintiff under section 33 of the municipal court act and each gave testimony. Plaintiff's other witnesses were Steve Stephanos, Irving Edelson, and Matthew A. Mueller, secretary of plaintiff. A certain chattel mortgage on the fixtures, given by Stephanos to plaintiff, dated and acknowledged on July 7, 1930, and duly recorded, as well as other writings, were introduced by plaintiff. Both defendants testified in their own behalf and they called two other witnesses.

The following facts in substance were disclosed: Stephanos

AMERICAN CREDIT COMPANY,
a corporation,
and
as
of
and
of
of
of

AMERICAN CREDIT COMPANY,
a corporation,
and
as
of
and
of
of

8651 A 045

On September 18, 1930, Plaintiff requested an order of

the 4th class in respect to recovery of damages the possession
of certain encumbered state fixtures, which the Plaintiff, a company
to his return, was unable to find. On September 20th, defendants

having entered their appearance, Plaintiff by leave of court filed
a statement of claim in answer, charging defendants with unlawfully
converting to their own use the fixtures, of the value of \$200. A
trial was had without a jury on November 7, 1930, resulting in the

court finding defendants "guilty of maliciously converting the
property described in the statement of claim" and assessing plain-
tiff's damages at the sum of \$200. Judgment in that sum was
entered against defendants, and they have appealed.

On the trial both defendants were called as witnesses for
Plaintiff under section 33 of the municipal court act and each gave
testimony. Plaintiff's other witnesses were some neighbors, living
Johnson, and Matthew A. Mueller, secretary of Plaintiff. A certain

mortgage on the fixtures, given by defendants to Plaintiff,
dated and acknowledged on July 7, 1930, and duly recorded, as well
as other writings, were introduced by Plaintiff. Both defendants
testified in their own behalf and they called two other witnesses.

The following facts in substance were disclosed: Stephen

had been employed as a salesman of plaintiff. He determined to engage individually in a confectionery business at a store at 3701 Fullerton avenue, Chicago. He rented the store and commenced business on June 29, 1930, under his trade name, "Liberty Candy & Confectionary S. S. Stephanos, Prop." Prior thereto defendants had sold to him on credit certain old store fixtures and had delivered them to said store. Stephanos did not thereafter pay to defendants the agreed purchase price of them. After they had been delivered at the store Stephanos desired that they be remodeled and repaired, and at his request plaintiff called for them and took them to its factory where extensive remodelling and repair work was done and the fixtures, as repaired, were returned to and installed in the store. For this work Stephanos paid to plaintiff certain cash and delivered to them certain notes, dated July 7, 1930, aggregating \$655.28, and signed by him, individually, under said trade name. To secure these notes he executed and delivered to plaintiff said chattel mortgage on the fixtures. On July 29, 1930, Stephanos caused his business to be incorporated and he conveyed the fixtures to the corporation without the knowledge or consent of plaintiff. During the latter part of August, 1930, and about four months after defendants had sold said old fixtures to Stephanos, defendants instituted a replevin action against him in the circuit court, and the sheriff under the writ and by their direction took certain fixtures, including said old fixtures as repaired and installed, and delivered them to defendants. At this time they had no chattel mortgage or other lien on them. Prior to the commencement of the present action plaintiff, by an agent, notified both defendants that it had a chattel mortgage on the fixtures which they had so replevied, and demanded their return. There was evidence that the fixtures which defendants obtained possession of through said replevin suit were worth \$900 at that time. The amount of the court's judgment herein (\$668.32) was the face value of all of the unpaid notes of

had been employed as a salesman of plaintiff. He determined to
engage individually in a commissionary business at a store at 3701
Lafayette Avenue, Chicago. He rented the store and commenced business
on June 25, 1930, under his true name, "Liberty Candy & Confectionery."
J. J. Stephenson, "Jug," prior Chicago defendant had sold to him
on credit certain of said fixtures and had delivered same to said
store. Stephenson did not thereafter pay to defendant the agreed
purchase price of same. After they had been delivered at the store
plaintiff realized that they be removed and repaired, and at his
request plaintiff called for them and took them to its factory where
extensive remodeling and repair work was done and the fixtures, as
repaired, were returned to and installed in the store. For this work
Stephenson paid to plaintiff certain cash and delivered to them certain
notes dated July 7, 1930, aggregating \$488.25, and signed by him.
In addition, under said cash notes he executed
and delivered to plaintiff such chattel mortgages on the fixtures. On
July 20, 1930, Stephenson caused the business to be incorporated and in-
corporated the fixtures to the corporation without the knowledge or con-
sent of plaintiff. During the latter part of August, 1930, and about
two months after defendant had sold said fixtures to Stephenson,
Stephenson instituted a receiver's action against him in the circuit
court, and the court under the writ and by final decision took
certain fixtures, including said old fixtures as repaired and instal-
led, and delivered them to defendant. At this time they had no
market value or other lien on them. Prior to the commencement of
the present action plaintiff, by an agent, notified both defendant
that it had a chattel mortgage on the fixtures which they had so
repaired, and demanded their return. There was evidence that the
plaintiff which defendant obtained possession of through said receiver
and was sold at that time. The amount of the court's judgment
against (both) will be paid out of all of the assets of

Stephanos, which plaintiff held, plus accrued interest to the date of the judgment.

The contentions of defendants' counsel are in substance that the court erred in entering the judgment for the reasons: (a) The chattel mortgage is invalid on account of certain informalities in the wording thereof and because when it was executed and recorded the relation of debtor and creditor did not exist between Stephanos and plaintiff; (b) it was not executed by the party having possession of and title to the fixtures at the time; (c) plaintiff had notice when it accepted the notes and mortgage that Stephanos did not have good title to the fixtures; (d) there is a material variance between the fixtures described in the mortgage and those taken by defendants in replevin; (e) there was no sufficient evidence to show the value of the fixtures which were so taken by defendants; (f) there was no sufficient evidence that, after defendants had taken possession of the fixtures by replevin and after demand had been made upon them for the return thereof, they had refused to comply with the demand; and (g) when Stephanos conveyed the fixtures to the corporation, which he had organized, plaintiff knew of the conveyance and consented thereto, - thereby rendering the chattel mortgage invalid as to defendants' rights. We have considered these several contentions and are of the opinion that each and all are without substantial merit in view of the facts as disclosed by the entire evidence.

After defendants' reply brief had here been filed plaintiff, by its counsel, moved that said brief be stricken from the files. The motion was reserved to the hearing. It will now be denied.

The judgment of the municipal court, appealed from, should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

...which plaintiff ... also retained interest in the

date of the judgment.

The contention of defendant's counsel was in substance

that the court erred in entering the judgment for the plaintiff (K).

The plaintiff's mortgage is invalid on account of certain irregularities

in the writing thereof and because when it was executed and recorded

the relation of debtor and creditor did not exist between defendant

and plaintiff; (b) it was not executed by the party having possession

at and prior to the time of the time (a) plaintiff had notice

when it accepted the note and mortgage that defendant did not have

good title to the premises; (c) there is a material variance between

the fixtures described in the mortgage and those shown by defendant's

deed; (d) there was no sufficient evidence to show the value

of the fixtures which were so listed by defendant; (e) there was no

sufficient evidence to show that defendant had taken possession of

the fixtures by title and after demand had been made upon them for

the same interest, they had belonged to plaintiff since the time and

(g) when defendant conveyed the fixtures to the defendant, which he

had acquired, plaintiff knew of the conveyance and demanded delivery

thereby creating the plaintiff's mortgage in the defendant's name.

It was contended that several irregularities and one of the regularities

in the mortgage were of no effect and that the mortgage was valid.

Plaintiff's evidence was:

After defendant's reply, plaintiff had been filed plaintiff's

of the mortgage, which was filed with the clerk of the court. The

action was removed to the district court. It will now be denied.

The judgment of the district court is affirmed.

There is no error and it is so ordered.

WITNESSES.

Plaintiff and defendant, by their counsel.

34789

MARGARET ASQUITH,
(Complainant),
Appellant,

v.

ROBERT L. ASQUITH,
(Defendant),
Appellee.

96 7
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

262 I.A. 646

MR. JUSTICE KORMER DELIVERED THE OPINION OF THE COURT.

Margaret Asquith filed her bill for divorce and on March 31, 1928, a decree of divorce was entered against Robert L. Asquith. By the provisions of the decree the defendant was ordered to pay the complainant \$85 a month as alimony. June 11, 1930, the defendant filed his petition alleging that on October 19, 1929, he remarried and is still living with his second wife, and that he is helping to support his aged mother by paying her approximately \$50 a month; that he is earning \$5,000 a year and that complainant is employed and is earning \$50 a week, and in the petition he prayed that the decree of March 31, 1928, be modified. A hearing was had on the petition in support of which defendant testified that he is employed by the Buick Motor Company and is earning \$5,000 a year; that he is supporting his aged mother with \$50 a month; that since the entry of the divorce^{decree} he has remarried and that he is living with his second wife; that on the date of the entry of the decree of divorce he was earning \$5,000 a year and was supporting his mother. The complainant testified that at the time the decree of divorce was entered she was earning \$40 a week, and at the date of the hearing she was earning \$30 a week and had no other income; that she had living with her her fourteen year old daughter by a former marriage. July 11, 1930, the chancellor

MARGARET A. WILSON
(Complainant)

Defendant

v.

ROBERT L. WILSON
(Defendant)

Plaintiff

COOK COUNTY

262 I.A. 648

THE JUSTICE OF THE PEACE OF THE COUNTY

Margaret A. Wilson filed her bill for divorce and on March 11, 1928, a decree of divorce was entered against Robert L. Wilson. By the provisions of the decree the defendant was ordered to pay the complainant \$85 a month as alimony. June 11, 1928, the defendant filed his petition alleging that on October 10, 1927, he remarried and is still living with his second wife, and that he is helping to support his aged mother by paying her approximately \$80 a month; that he is earning \$2,000 a year and that complainant is employed and is earning \$25 a week, and in the petition he prayed that the decree of March 11, 1928, be modified. A hearing was had on the petition in support of which defendant testified that he is employed by the Lake Shore Company and is earning \$2,000 a year; that he is supporting his aged mother with \$80 a month; that since the entry of the divorce he has remarried and that he is living with his second wife; that the date of the entry of the decree of divorce he was earning \$2,000 a year and was supporting his mother. The complainant testified that at the time the decree of divorce was entered she was earning \$25 a week, and at the time of the hearing she was earning \$25 a week and had no other income; that she was living with her first husband's old father by a former marriage. July 11, 1928, the complainant

ordered that the decree of March 31, 1928, be modified and the alimony to be paid the complainant was reduced to \$65 a month, and the court denied complainant's motion to allow the complainant solicitor's fees for services rendered for resisting defendant's motion to reduce the alimony. The complainant prayed an appeal from this order of modification.

Complainant contends that the chancellor was without power to modify the decree of March 31, 1928. We cannot agree with this contention for the reason that under the provisions of Section 18 of our Statute on Divorce (Cahill's Stat. Ch. 40, Par. 19), the court in the divorce proceedings may from time to time make such alterations in the allowance of such alimony, as shall appear reasonable and proper. It has always been the law in this State that a decree for alimony is subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties. (Melty v. Melty, 195 Ill. 335; Stillman v. Stillman, 99 id. 196.) In Cole v. Cole, 142 Ill. 19, 23, the court said:

"The power over the subject matter of alimony is not exhausted by the entry of the original order, but is, under the statute, continuing, for the purpose, at any time, of making such alterations thereof as shall appear to the chancellor, in the exercise of a judicial discretion, reasonable and proper. * * *

"The application for an alteration or modification of the decree is always addressed to the judicial discretion of the chancellor, and, * * * the inquiry is, in all cases, whether sufficient cause has intervened since the decree to authorize or require the court, applying equitable rules and principles, to change the allowance."

See also Farren v. Farren, 101 Ill. App. 308; Craig v. Craig, 163 Ill. 176; Herrick v. Herrick, 319 id. 146; Maginnis v. Maginnis, 323 id. 113. The application for change is founded upon new facts which have occurred since the decree was originally made. (Cole v. Cole, supra.)

The question presented in the instant case is whether the

ordered that the decree of March 21, 1928, be modified and the alimony to be paid the complainant was reduced to \$40 a month, and the court denied complainant's motion to allow the complainant's attorney's fees for services rendered for testing defendant's motion to reduce the alimony. The complainant prayed an appeal from this order of modification.

Complainant contends that the amendment was without power to modify the decree of March 21, 1928. It cannot arise with this contention for the reason that under the provisions of Section 15 of our Statute on Divorce (Smith's Stat. Ch. 40, Sec. 15), the court in the divorce proceedings may from time to time make such alterations in the allowance of such alimony, as shall appear reasonable and proper. It has always been the law in this State that a decree for alimony is subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties. (Smith v. Smith, 122 Ill. 122; Smith v. Smith, 122 Ill. 122.) In Smith v. Smith, 122 Ill. 122, the court said:

"The power over the subject matter of alimony is not exhausted by the entry of the original order, but is, under the statute, continuing, for the purpose, at any time, of making such alterations therein as shall appear to the court, in the exercise of a judicial discretion, reasonable and proper."

"The application for an alteration or modification of the decree is also subject to the judicial discretion of the court, and, as the law is, in all cases, whether the original decree has been entered or the decree is subject to be altered by the court, subject to the same rule."

See also Smith v. Smith, 122 Ill. 122, where the court said: "The application for change is founded upon new facts which have occurred since the decree was originally made." (See v. Smith.)

The question presented in this case is whether the

subsequent remarriage of the defendant will authorize the interposition of the court to modify the decree for alimony. Our attention has not been called to any case in which this identical question has been determined. The statute fails to specify the causes for which a divorced husband may be relieved from the payment of alimony. In the absence of legislation on the subject the question must be determined by the courts. (Maginnis v. Maginnis, supra.)

It is the duty of the husband to support his wife, and by the remarriage of the defendant the circumstances of the parties since the entry of the original decree have changed and the application was founded upon new facts which had occurred since the decree was originally entered, and the question is, did the chancellor in so modifying the decree exercise judicial discretion? A court of review will not disturb a decree disposing of a matter of alimony unless it is manifest that injustice and injury have been done.

(Graig v. Graig, 163 Ill. 176, 183.) It is well settled that where a chancellor hears and sees all of the witnesses his decree will not be reversed unless it is clearly apparent that there is palpable error and the evidence manifestly preponderates in favor of the defeated party. (Boyle v. Boyle, 268 Ill. 96.) The chancellor in the instant case was of the opinion that the remarriage of the defendant so changed the relations of the parties as to make it reasonable and proper to reduce the alimony granted by the original decree and so decreed. We cannot say that the chancellor has abused the judicial discretion vested in him and that a manifest injustice has been done to complainant.

At the time defendant's motion to modify the decree was being heard by the chancellor, complainant moved the court to allow her solicitor's fees for services rendered for resisting the ^{to reduce} motion / the alimony, which was denied and she urges now this action of the chancellor as erroneous; and Stillman v. Stillman, 99 Ill. 197,

...of the court in making the decree for alimony. The
...has not been called in any case in which this judicial
...has been determined. The courts will in general the
...for which a divorced husband may be relieved from the pay-
...of alimony. In the absence of legislation on the subject
...the question must be determined by the courts. (Williams v. Williams)

It is the duty of the husband to support his wife, and
...of the husband at the time of the divorce. The circumstances of the parties
...the entry of the original decree have changed and the
...has been founded upon facts which had occurred since the
...was originally entered, and the question is, has the chancellor
...the decree entered judicial discretion? A court
...will not disturb a decree disposing of a matter of alimony
...it is manifest that injustice and injury have been done.
(Gray v. Gray, 125 Ill. 170, 181.) It is well settled that where
...the chancellor has not done all that the law requires the decree will not
...be reversed unless it is clearly apparent that error in principle exists
...and the evidence manifestly preponderates in favor of the defendant.
(Gray v. Gray, 125 Ill. 170, 181.) The chancellor in the instant
...of the evidence and the testimony of the witnesses is changed
...the relation of the parties is as it was at the time the decree was
...the alimony granted at the original decree and is correct.
...cannot say that the chancellor has abused the judicial discretion
...in his mind that a manifest injustice has been done to some
...alimony.

...the same defendant's claim to modify the decree and
...being made by the chancellor, defendant moved the court to allow
...to reduce
...the alimony, which was denied and the decree was affirmed of the
...chancellor as affirmed; and Williams v. Williams, 99 Ill. 187,

Czarra v. Czarra, 128 Ill. 430, are cited in support of the proposition that the allowance of an attorney's fee to the divorced wife for resisting a motion to reduce her alimony is within the power conferred by the statute. To this the defendant replies that an order for solicitor's fees is based primarily on the relation of husband and wife and that the decree of divorce severs that relationship and that, therefore, there is no basis upon which such an order may rest. In the case of Gerson v. Mathes, 252 Ill. App. 607, 610, quoting from Smith v. Smith, 249 Ill. 633, in which was involved the question of whether a court of chancery had power to enter an order compelling a divorced husband to pay solicitors' fees towards defraying the expenses of a wife who had petitioned to have the alimony allowed to her by the decree increased, was considered. There the chancellor entered a decree increasing the alimony and disallowing the solicitors' fees. The defendant husband appealed and the wife assigned cross-errors, and we there said:

"That there has been conflicting language in the opinions of courts of review of this state in passing upon the question may be conceded. However, it is settled that in the absence of specific statutory authority a court may not require one party to pay the solicitor's fees of another. Section 13 of the Divorce act makes such specific provision for the wife in suits for divorce. This is not a suit for divorce. That suit was terminated by the original decree, and the status of husband and wife was severed by that decree which stands unmodified. Both on principle and authority, we think solicitor's fees should not be allowed. Lake v. Lake, 194 N. Y. 179; Lehmann v. Lehmann, 225 Ill. App. 513; Moulien v. Moulien, 61 How. Pr. (N. Y.) 290."

Moreover, solicitors' fees could not be allowed in the instant case for the reason announced in Schlback v. Schlback, 219 Ill. App. 503, in which the court said:

"The rule of law is that the value of such services must be established by proof and that such proof must be preserved in the record, or the decree must show that such evidence was in fact introduced."

There is neither evidence in this record nor finding in the order, of what the services were that it is claimed were rendered.

Finding no reversible error the order of July 11, 1930, is affirmed.

AFFIRMED.

Gridley, P.J., and Scanlan, J., concur.

34819

ROY CUMM,
Appellee.

vs.

HOGAN & FARWELL, INC.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 646²

MR. JUSTICE KEMMER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Roy Cumm, sued Hogan & Farwell, Inc., a Corporation, to recover wages claimed to be due. Case tried without a jury and plaintiff obtained judgment for \$70, from which defendant appealed.

The statement of claim sets forth that the claim is for money due and owing to him as wages under monthly contract of employment at the rate of \$110 per month, said wages being paid bi-monthly, and that there is due and owing to him for the period from June 16 to June 30, 1930, \$55; that prior to bringing suit he caused a demand in writing to be served on defendant, demanding said wages and notified defendant that if the \$55 were not paid within three days that suit would be started to recover said amount with reasonable attorney's fees.

The evidence discloses that on January 20, 1930, plaintiff commenced to work for defendant and continued in its employ until June 21, 1930, as an assistant janitor, at a monthly wage of \$110 payable semi-monthly; that on June 21, 1930, an employee of the defendant told plaintiff that he would be informed when he was to return to work; that he was not again called or requested to come to work; that he expected a call and was waiting to go back to work; plaintiff was tendered \$14.68 before any written demand was made on defendant, for the time he worked during the latter part of June, 1930. He was paid semi-monthly on the 5th and 20th of each month. Plaintiff testified that he

14412

ROY COOK,
Plaintiff,

vs.
HOGAN & TAYLOR, INC.,
Defendant.

VERNAL HUGH MUNICIPAL COURT

OF CHICAGO.

SEC. I. A. 616

MR. JUSTICE KENNEDY WILL STATE THE OPINION OF THE COURT.

Plaintiff, Roy Cook, sued Hogan & Taylor, Inc., a corporation, to recover wages claimed to be due. Case tried with out a jury and plaintiff obtained judgment for \$70, from which defendant appealed.

The statement of claim sets forth that the claim is for money due and owing to him as wages under monthly contract of employment at the rate of \$110 per month, said wages being paid bi-monthly, and that there is due and owing to him for the period from June 10 to June 30, 1930, \$220; that he is bringing suit to recover a balance in which he is owed an additional \$40 making said wages and unpaid balance \$260; that he has been paid within this time said wages and said balance as recovered and amount with reasonable attorney's fees.

The evidence discloses that on January 30, 1930, plaintiff commenced to work for defendant and continued in the employment until June 30, 1930, as an assistant janitor, at a monthly wage of \$110 payable semi-monthly; that on June 30, 1930, an employee of the defendant said plaintiff had no work to perform when he was to return to work, that he was not again called on requested to work to date; that he contacted a call was not coming to be back to work; plaintiff was contacted 11.33 before any written demand was made on defendant, for the time he worked during the latter part of June, 1930. He was paid semi-monthly on the 30th and 30th of each month. Plaintiff testified that he

was not hired for any definite period; that he was not told that defendant would keep him for a year or for two months.

Ralph C. Driscoll, a witness for the defendant, testified that at the time he hired plaintiff no time was specified; that he did not hire him for any definite period; that plaintiff worked June 16th, 17th and 18th and was told that he would be called when to return to work.

Plaintiff contends that the proof showed a hiring by the month and the trial court so held. In this we are of the opinion the court was in error. The fact that plaintiff was hired at a monthly wage of \$110, payable semi-monthly, was proof only of the fact that the rate of compensation was fixed at that amount. It was not an undertaking on the part of defendant to retain plaintiff for any definite period. The burden of proof that he was employed for a fixed period was on the plaintiff (Odell v. Chicago Great Western R. Co., 212 Ill. App. 616; Fuchs v. Weibert, 233 Ill. 536), and no presumption arises merely for the fixing of a rate of compensation. On the contrary, an employment upon an annual salary, if no period is otherwise stated or approved for its continuance, is presumed to be a hiring at will, which either party may at any time terminate. (Pfund v. Zimmerman, 29 Ill. 269, and Orr v. Ward, 73 Ill. 313.) In Chadwick v. Morris & Co., 170 Ill. App. 569, at p. 570, the court said:

"The plaintiff testified: 'I told him (Bordere) that the least I would go for was fifteen hundred a year; and he said "all right".' This can in no way be construed into a definite hiring for one year."

In the case of Martin v. New York Life Ins. Co., 42 N. E. 416, at p. 417, the court said:

was not hired for any definite period; that he was not told that defendant would keep him for a year or for two months. Defendant's father, O. B. Bessie, a witness for the defendant, testified that at the time he hired plaintiff he was specifically told that he did not hire him for any definite period; that plaintiff worked June 1935, 1936 and 1937 and was told that he would be called when he was to work.

Plaintiff contends that the proof showed a killing by the agent and the trial court so held. In this we are of the opinion the court was in error. The fact that plaintiff was hired at a monthly wage of \$110, payable semi-monthly, was proof only of the fact that the rate of compensation was fixed at that amount. It was not an undertaking on the part of defendant to retain plaintiff for any definite period. The burden of proof

Y. Morris & Co., 120 1st. app. 1933, at p. 270, the court said:
Exemption, 33 Ill. 2d, and 271 Ill. 2d, 73 Ill. 2d. In Quelch
all, this court said at any time commencing. (1933)
 or approved for his appointment, is presumed to be a hiring of
 placement upon an equal basis. It is noted in the opinion cited
 the filing of a writ of habeas corpus. On the contrary, an em-
 V. Morris, 33 Ill. 2d, 73 Ill. 2d, 73 Ill. 2d, 73 Ill. 2d, 73 Ill. 2d,
 1933, at p. 270, the court said:
 (1933) was employed for a fixed period was on the plaintiff

"The plaintiff testified: 'I told him (Lester) that I
 would I would go for one fifteen hundred a year; and he said
 "All right." "All right." "All right." "All right." "All right."
 "All right for one year."
 In the case of Lester v. The First National Bank, No. 10,000, at
 p. 117, the court said:
 "Lester v. The First National Bank, No. 10,000, at p. 117."

"With us, the rule is inflexible that a general or indefinite hiring is, prima facie, a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."

A contract for service, at a salary of \$2500 per annum is not a contract for any definite time and at a fixed price the complete performance of which is a condition precedent to a right of compensation. It is but a stipulation of the rate at which the employee is to be compensated for the services performed. (Haney v. Caldwell, 35 Ark. 156. See also Stein v. Kooperstein, 102 N. W. Sup. 578, and The Pokanocket, 156 Fed. 241.) It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.

For the reasons indicated the judgment of the Municipal court of Chicago is reversed and judgment will be entered here in favor of plaintiff, Roy Cumm, and against defendant, Hogan & Farwell, Inc., a Corporation, in the sum of \$14.68, plaintiff to pay all costs in this court.

REVERSED AND JUDGMENT HERE AGAINST
DEFENDANT FOR \$14.68.

Gridley, P. J., and Scanlan, J., concur.

...with me, the wife is interested in a general or indirect
also living in, living in, a living at all; and if the wife
...to make it out a yearly living, the husband is upon
him to establish it by proof. A living of so much a day, week,
month, or year, no time being specified, is an indefinite living,
and no presumption attaches that it was for a day even, but only
at the rate fixed for whatever time the party may serve.

A contract for service, at a salary of \$2500 per annum is not a
contract for any definite time and as a fixed price the employee
...of which is a condition precedent to a right of com-
pensation. It is not a stipulation of the rate at which the em-
ployee is to be compensated for the services performed. (HARRY E.

... 25 APR. 1911. See also WILLIAM V. KENDRICK, 103 N. W.
... 1911. See also WILLIAM V. KENDRICK, 103 N. W.
... 1911. See also WILLIAM V. KENDRICK, 103 N. W.
... 1911. See also WILLIAM V. KENDRICK, 103 N. W.
... 1911. See also WILLIAM V. KENDRICK, 103 N. W.

... For the reasons indicated the judgment of the Michigan
Court of Appeals is reversed and judgment will be entered here in
favor of plaintiff, May Green, and against defendant, James A.
Wickell, Inc., a corporation, in the sum of \$14.98, plaintiff to
pay all costs in this cause.

... REVEREND AND JUDICIAL NOTICE AGAINST
... REVEREND AND JUDICIAL NOTICE AGAINST

Gridley, J., and Manning, J., concur.

34831

STEEL TANK AND PRODUCTS
CORPORATION, a corporation,
(plaintiff),
Appellant,

v.

SYLVESTER HUSSAR, trading as
North Shore Tank Installation
Company, (defendant),
Appellee.

987
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 846³

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff, Steel Tank and Products Corporation, against defendant, Sylvester Hussar, to recover a balance of \$851.80 due for goods sold and delivered. Heard before the court without a jury, issues found in favor of defendant. Judgment on the finding, from which plaintiff appealed.

The affidavit of merits filed by defendant did not deny he owed the plaintiff \$851.80, but it recited that at the time of the sale and delivery of the merchandise, he was engaged in the business of purchasing gasoline tanks from manufacturers and selling them to and installing them for his customers; that plaintiff had notice and was aware of the nature of defendant's business; that the merchandise sold by plaintiff to defendant consisted of gasoline tanks; that at the time of the sale and delivery of said tanks, plaintiff warranted to the defendant that the tanks were in a perfect condition, free from internal holes and defects, and proper and suitable for the storage of gasoline; that relying on this warranty defendant purchased the tanks from the plaintiff and sold one to the Chicago Motor Coach Company and one to the Zoo Gardens Service Station, installing them both; that shortly after the installation

of these tanks, both began to leak and the gasoline contained therein to flow into the ground; that at the demand of his customers, defendant was forced to excavate both of said tanks, and upon such excavation discovered that there were holes and perforations in the interior of said tanks, and that the same were not proper and suitable for the storage of gasoline; that defendant was forced to and did expend the sum of \$860.71 to reimburse his customers for gasoline which had leaked from the tanks into the ground, and for labor and materials in excavating said defective tanks, and that by reason thereof the defendant was not indebted to the plaintiff in any sum.

The material facts are that plaintiff is a manufacturer of storage tanks; that for more than twenty years defendant was engaged in the business of purchasing gasoline tanks from manufacturers and selling them to and installing them for his customers; that he purchased tanks from the plaintiff in October, November and December, 1928, and in January of 1929, and prior thereto. In October, 1928, he installed a 550 gallon gasoline tank for Zoo Gardens Service Station at Brookfield, Illinois. This tank was manufactured by the plaintiff and sold to defendant; it was taken by the defendant in his truck to Brookfield and there immediately installed by digging a hole in the ground. The tank was not dropped nor did it fall to the ground while being installed. The defendant did not inspect the tank prior to its installation. The employees of the defendant who performed the work in installing this tank testified that they did not notice any defects in the tank. An employee of plaintiff testified that he had supervision of the testing of all tanks and knew that this tank had been tested the day before the defendant took it from plaintiff's yard and that there was no cut or defect in it when it was delivered to defendant. About one month after the installation of

of these tanks, each being to look and the gasoline contained therein to flow into the ground; that at the demand of his testimony, defendant was forced to excavate both of said tanks, and upon such excavation discovered that there were holes and perforations in the interior of said tanks, and that the same were not proper and suitable for the storage of gasoline; that defendant was forced to and did expend the sum of \$500.00 to reimburse his customers for gasoline which had leaked from the tanks into the ground, and for labor and materials in excavating said defective tanks, and that by reason thereof the defendant was not indebted to the plaintiff in any sum.

The material facts are that plaintiff is a manufacturer of storage tanks; that for more than twenty years defendant was engaged in the business of purchasing gasoline tanks from manufacturers and selling them to and installing them for his customers; that he purchased tanks from the plaintiff in October, November and December, 1922, and in January of 1923, and prior thereto, in October, 1921. He installed a 500 gallon gasoline tank for the Eastern Service Station at Brookfield, Illinois. This tank was manufactured by the plaintiff and sold to defendant; it was taken by the defendant in his truck to Brookfield and there immediately installed by digging a hole in the ground. The tank was not checked nor did it leak to the ground while being installed. The defendant did not inspect the tank prior to its installation. The employee of the defendant who performed the work in installing this tank testified that they did not notice any defects in the tank. An employee of plaintiff testified that he had supervision of the setting of all tanks and knew that this tank had been tested the day before the defendant took it from plaintiff's yard and that there was no cut or defect in it when it was delivered to defendant. About one month after the installation of

this tank it was claimed that the tank was leaking and the tank was removed; it showed a small slit two inches long in the bottom of the tank which was caused by some defect in the manufacturing process, which could not have been detected by an ordinary visual inspection, since the tank had been freshly painted. Plaintiff was notified of the defect and it furnished another tank. Four hundred gallons of gasoline had escaped into the ground for which defendant paid to the Zoo Gardens Service Station \$60, and the defendant expended \$55 for labor in excavating the defective tank and installing the new one.

December 12, 1928, the plaintiff delivered to defendant a 5,000 gallon gasoline tank at 1734 North Kostner avenue, Chicago, for the Chicago Motor Coach Company. This tank was also manufactured by the plaintiff at its plant at Aurora, Illinois. Before it left plaintiff's plant it was tested by one of its employees who testified the test showed it to be without leaks. The test consisted of filling the tank with compressed air. After the tank had been tested it was "picked up with an electric crane and set down easy on a truck," and delivered to 1734 North Kostner avenue and there unloaded from the rear end of the truck and pushed off on rollers. The tank remained at these premises from December 12, 1928, until the latter part of December, 1928, or the early part of January, 1929, when it was installed. The installation consisted of depositing it in an excavation large enough to hold the tank. The tank was 24 feet long and 6 feet in diameter and weighed from two and one-half to three tons. The excavation in which it was deposited was 9 feet deep. The tank was not dropped nor did it fall at any time while being lowered into the ground. No test was made by the defendant before it was installed and defendant's employees did not notice any defects in the tank. The tank was filled with gasoline. About six

This tank it was claimed that the tank was leaking and the tank was removed; it showed a small slit five inches long in the bottom of the tank which was caused by some defect in the manufacturing process, which could not have been detected by an ordinary visual inspection, since the tank had been freshly painted. Plaintiff was notified of the defect and it furnished another tank. Four hundred gallons of gasoline had seeped into the ground for which defendant paid to the New Orleans Drydock Station \$60, and the defendant expended \$25 for labor in excavating the defective tank and installing the new one.

December 12, 1935, the plaintiff delivered to defendant a 5,000 gallon gasoline tank at 1734 North Eastern Avenue, Chicago, for the Chicago Motor Coach Company. This tank was also manufactured by the plaintiff at its plant at Aurora, Illinois. Before it left plaintiff's plant it was tested by one of its employees who testified the test showed it to be without leaks. The test consisted of filling the tank with compressed air. After the tank had been tested it was "plugged up with an electric crane and not down any on a truck." and delivered to 1734 North Eastern Avenue and there unloaded from the rear end of the truck and pushed off on rollers. The tank remained at these premises from December 12, 1935, until the latter part of November, 1936, or the early part of January, 1937, when it was installed. The installation consisted of depositing it in an excavation large enough to hold the tank. The tank was 4 feet long and 3 feet in diameter and weighed from two and one-half to three tons. The excavation in which it was deposited was 3 feet deep. The tank was not dropped nor did it fall at any time while being lowered into the ground. No test was made by the defendant before it was installed and defendant's employees did not notice any defects in the tank. The tank was filled with gasoline. About six

weeks later it was discovered that the tank leaked and that 3,000 gallons of gasoline had escaped into the ground. Upon being notified by the Chicago Motor Coach Company, defendant removed the soil and the tank showed a crack about six inches long in the center seam about one to four feet from the bottom of the tank and running at an angle of about 45 degrees. This crack was caused by defective welding and could not have been detected by ordinary visual inspection. Plaintiff furnished defendant with a new tank, but made no adjustment of the gasoline and labor expenses. Defendant paid the Chicago Motor Coach Company \$385.21 for the gasoline and expended \$360.20 for labor in removing the defective tank and installing the new one.

It is the contention of the plaintiff that Par. 3, Sec. 15, Ch. 121a, Cahill's Rev. Stats. of 1929, states the law applicable to the case which is to the effect: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." Defendant, however, contends that Par. 1 of the same section and chapter applies, which provides that: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." A tank is a receptacle for liquid. An order given for a tank makes known to the manufacturer the purpose for which it is required - storage of liquid. The evidence conclusively proves that plaintiff knew the use to which the tanks were to be put by defendant. In these circumstances, the principle applies that when a manufacturer of goods sells them for a specific purpose, the law implies a warranty upon the part of the manufacturer - seller, that such goods are reasonably fit for the use for which they are intended. Lidgerwood Mfg. Co. v.

...later it was discovered that the tank leaked and that it was
...of gasoline had leaked into the ground. Upon being
...by the Chicago River Coach Company, defendant removed the
...and the tank showed a crack about six inches long in the center
...about one to four feet from the bottom of the tank and running
...at an angle of about 45 degrees. This crack was caused by defective
...and could not have been detected by ordinary visual inspection.
...plaintiff furnished defendant with a new tank, but made no adjustment
...of the gasoline and labor expenses. Defendant paid the Chicago River
...Coach Company \$385.21 for the gasoline and expended \$380.30 for labor
...in removing the defective tank and installing the new one.
...It is the contention of the plaintiff that Par. 2, Chap. 110,
...Ill. Stat., which is the law applicable
...to the case which is in effect: "If the buyer has examined the
...goods, there is no implied warranty as regards defects which even
...examination ought to have revealed." Defendant, however, contends
...that Par. 2 of the same section and chapter applies, which provides
...that "where the buyer, expressly or by implication, makes known to
...the seller the particular purpose for which the goods are required,
...and it appears that the buyer relies on the seller's skill or judgment
...that he be the grower or manufacturer or not, there is an implied
...warranty that the goods shall be reasonably fit for such purpose." A
...that is a warranty for implied. An order given for a tank known
...known to the manufacturer the purpose for which it is required -
...of implied. The evidence conclusively proves that plaintiff
...the use to which the tanks were to be put by defendant. In these
...circumstances, the principle applies that when a manufacturer of goods
...the tank for a specific purpose, the law implies a warranty upon the
...of the manufacturer - seller, that such goods are reasonably
...for the use for which they are intended. Ill. Stat., Ch. 110, Sec. 2.

Robinson & Sons Cont. Co., 183 Ill. App. 431, 440, in which the court said: "The rule laid down by the authorities seems to be that where a manufacturer undertakes to manufacture and supply goods to a customer that there is an implied contract, at least that the goods so manufactured are made in a workmanlike manner and reasonably adapted to the purpose for which made." In Madsen v. Cordell, 188 Ill. App. 564, it was held that where a manufacturer contracts to supply an article which he manufactures for a particular purpose, so that the purchaser necessarily trusts to the judgment and skill of the manufacturer there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied. See also Fuchs & Lang Manf. Co. v. Kittredge & Co., 242 Ill. 88; Edwards v. Millon, 147 id. 14; Oil-Well Supply Co. v. Watson, 168 Ind. 603; Parkersburg Pig & Reel Co. v. The Freed Oil & Gas Co., 111 Kans. 37.

It is insisted by plaintiff that there was an acceptance by defendant of the tanks; that he saw the tanks after they were delivered to him and had an opportunity to make as thorough an examination as he desired and therefore defendant cannot recoup his damages. We cannot agree with this contention. It appears from the evidence that plaintiff knew the purpose to which the tanks would be put and the facts show that the defendant relied upon the judgment and skill of the plaintiff who, as the manufacturer of the tanks, would naturally be depended upon in these respects. The leaks in the tanks were caused by some defect in the manufacturing process and could not have been detected by a visual inspection. It appears that after the plaintiff was notified of the defects in the tank ~~mark~~ it directed that they be removed and that it would, and did, furnish other tanks. Moreover, the question involved was one of fact for the court and upon this record was not improperly determined in favor of the defendant.

It is next contended that the trial court erred in admitting

...in which the ...
...The rule laid down by the authorities seems to be ...
...where a number of witnesses are available and ...
...a statement that there is an implied contract, at least that the ...
...made as would have been made in a commercial transaction and necessarily ...
...for the purpose for which made." In Robinson v. Ford, 188 ...
...11, App. 286, it was held that where a commercial contract is ...
...on a stipulation which is immaterial for a particular purpose, no ...
...that the purpose necessarily results in the judgment and skill of the ...
...there is an implied warranty that the article shall be ...
...for the purpose to which it is to be applied. See ...
...also Robinson v. Ford, 188 App. 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

certain testimony of the defendant on the ground that such testimony was a direct variance from the defendant's affidavit of merits. The objection of variance cannot be availed of in a court of review if there made for the first time. It must be made specifically in the trial court, otherwise it is cured by verdict. (Richelieu Hotel Co. v. International Mil. Encampment Co., 140 Ill. 248; Flanagan v. Wells Bros. Co., 237 Id. 82.) Plaintiff made no such specific objection.

The next proposition urged upon our attention is that the court erred in permitting the defendant to prove the damages, the sums paid by him to his customers for loss of gasoline and the sums expended by the defendant in excavating the defective tanks and installing new ones. Defendant's counsel urges that we do not consider this contention on the ground that the recoupment was set out and the damages specified in defendant's affidavit of merits and that plaintiff made no motion to strike the same, and at the trial plaintiff offered no objection to the introduction of evidence on the question of recoupment or the amount of damages, the case being tried on the theory that the only question was whether or not an implied warranty and a breach of the same existed. While it is well settled that a party cannot try a case on one theory in the trial court and on another in a court of review (Lewy v. Standard Elevator Co., 296 Ill. 295), we have, nevertheless, considered the contention. It is sufficient for recoupment that the counter-claims arise out of the same subject matter and that they are susceptible of adjustment in one action. (Waterman v. Clark, 76 Ill. 428, 431; Bravo Doyle Co. v. Pulsberger & Sons Co., 197 Ill. App. 547; Par. 6, Sec. 69, Ch. 121a, Cahill's Rev. Stats. of 1929.) It appears from the record in the instant case that the damages claimed by the defendant did arise out of the same transaction which was the subject of plaintiff's claim. It sued for tanks sold and delivered to defendant and the damages claimed were the natural

...of the defendant on the ground that such testimony
was a direct variance from the defendant's affidavit of denial. The
objection of variance cannot be availed of in a court of review if
there was for the first time. It must be made specifically in the
trial court, otherwise it is waived by verdict. Wheeler v. ...
v. International Mill. Improvement Co., 140 Ill. 248; Foxman v. ...
Ill. 287 (4. 22.) Plaintiff made no such specific objection.
The next proposition urged upon our attention is that the
court erred in permitting the defendant to prove the damages; the same
paid by him to his workmen for loss of gasoline and the same expended
by the defendant in excavating the defective tanks and installing new
ones. Defendant's counsel urges that we do not consider this con-
clusion on the ground that the respondent was not out and the damages
specified in defendant's affidavit of denial and that plaintiff made no
motion to strike the same, and at the trial plaintiff offered no
objection to the introduction of evidence on the question of respondent
at the trial of damages, the case being tried on the theory that the
only question was whether or not an implied warranty and a breach of
the same existed. While it is well settled that a party cannot try a
case on one theory in the trial court and on another in a court of
review (West v. Standard Lumber Co., 202 Ill. 431), we have, never-
theless, considered the contention. It is sufficient for respondent
that the counter-claim arose out of the same subject matter and that
they are susceptible of adjustment in one action. (Wheeler v. ...
Ill. 432, 433; ... v. ...
Ill. 247; ... v. ... 202 Ill. 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

consequences of the plaintiff's breach of warranty.

We are of the opinion that the finding and judgment of the trial court accomplished substantial justice under settled rules of law, and finding no error the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

...of the ...
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34855

PETER MATIC,
Plaintiff in Error,

v.

ILIJA MATIC,
Defendant in Error.

MEMORANDUM TO MUNICIPAL COURT
OF CHICAGO.

263 T.A. 846⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On March 8, 1926, plaintiff, Peter Matic, sued Ilija Matic, defendant, in the Municipal Court of Chicago for money loaned. On September 29, 1926, the cause was regularly reached for trial. Both parties were present and evidence was heard and considered by the court, who found the issues in favor of the plaintiff and rendered judgment for \$490 against the defendant. On December 11, 1928, more than 26 months after the rendition of the judgment, a motion was made by the defendant to vacate the judgment of September 29, 1926, which was sustained, and the judgment was vacated and set aside, for a reversal of which this writ of error had been sued out.

Defendant contends that the order from which the writ of error was sued out was not final and appealable. There is no merit in this contention. After the expiration of 30 days from the entry of the judgment of September 29, 1926, the court had no authority to set aside the judgment for any alleged error of law. The defendant's petition in the instant case was intended to allege equitable grounds for vacation of the judgment and the action of the court in vacating the judgment was based upon the assumption that the petition set up such equitable grounds. The law allowed an appeal from the order of December 11, 1928. (Cramer v. The

24882

WILLIAM WILSON, Plaintiff in Error,

v.

WILLIAM WILSON, Defendant in Error.

MR. JUSTICE BREWER delivers the opinion of the court.

On March 8, 1928, plaintiff, Peter Wilson, was ill. He, defendant, in the District Court of Kansas for many years. On September 27, 1928, the same was voluntarily reached for trial. Both parties were present and evidence was heard and submitted by the court, who found the law in favor of the plaintiff and rendered judgment for \$400 against the defendant. On December 11, 1928, more than 20 months after the rendition of the judgment, a motion was made by the defendant to vacate the judgment of September 27, 1928, which was sustained, and the judgment was vacated and set aside, for a reversal of which this writ of error had been sued out. Defendant contends that the order from which the writ of error was sued out was not final and appealable. There is no merit in this contention. After the expiration of 30 days from the entry of the judgment of September 27, 1928, the court had no authority to set aside the judgment for any alleged error of law. The defendant's petition in the instant case was intended to elicit appellate review for vacation of the judgment and the action of the court in vacating the judgment was based upon the assumption that the petition set up such appellate grounds. The law allowed an appeal from the order of December 11, 1928. (Cramer v. The

Illinois Commercial Men's Ass'n, 260 Ill. 516, 520.)

From the petition filed by the defendant in support of his motion, it appears inter alia, that the instant case was commenced on March 8, 1926; that a final hearing was had on September 29, 1926, at which the defendant was present and represented by counsel, and that the court rendered judgment for the plaintiff; that defendant's defense was that the money sued for in the instant case, had been recovered in an action against the defendant in an European court; that defendant in the instant case requested the court for further time with which to procure evidence from Europe which would establish the fact that the debt in the instant case had been satisfied; that notwithstanding this plea the court rendered judgment against defendant; that defendant has now secured certain documents from Europe purporting to show that suit had been commenced in Europe and judgment rendered against defendant and certain property sold to satisfy that judgment, and that, therefore, the judgment in the instant case has been satisfied.

After the expiration of 30 days from the date of the rendition of the judgment the Municipal Court could acquire jurisdiction by motion to vacate the judgment upon proof of errors of fact not appearing of record - which would be in the nature of a writ of error coram nobis at common law, or by petition in the nature of a bill in equity, showing equitable grounds for vacation of the judgment. Such is the provision of Section 21 of the Municipal Court Act, Ch. 37, Cahill's Rev. Stats. of Illinois, 1929. Defendant, in filing his petition of December 11, 1928, for vacation of the judgment, endeavored to bring himself within the exception provided for in section 21 by setting forth grounds "which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." Plaintiff contends that the petition fails to set forth such grounds. The principle of law is well established that a court of equity will not

Illinois Commercial Bank's Assign, No. 111, 112, 113.

From the petition filed by the defendant in support of its motion, it appears that the instant case was commenced on March 8, 1938; that a final hearing was had on September 29, 1938, at which the defendant was present and represented by counsel, and that the court rendered judgment for the plaintiff; that defendant's defense was that the money owed for in the instant case, had been recovered in an action against the defendant in an European court; that defendant in the instant case requested the court to further state with which European country the money which would establish the fact that the money in the instant case had been collected; that notwithstanding this the court rendered judgment against defendant; that defendant has now stated that the money was collected in a court in Europe and judgment rendered against defendant; that certain property sold to satisfy said judgment, and that, therefore, the judgment in the instant case has been satisfied.

After the expiration of 30 days from the date of the rendition of the judgment the Municipal Court again requires justification by motion to vacate the judgment upon proof of error of fact or of record - which would be in the nature of a writ of certiorari or writ of error, or by petition in the nature of a bill in equity, showing equitable grounds for vacation of the judgment. The provision of Section 11 of the Municipal Court Act, Ch. 24, Illinois' Rev. Stat., of Illinois, 1937, defendant, in filing his petition of December 11, 1938, for vacation of the judgment, endeavored to bring himself within the exception provided for in section 11 by stating that grounds "which would be sufficient to cause the case to be vacated, set aside or nullified by a bill in equity." Plaintiff contends that the petition fails to set forth such grounds. The findings of law is well established that a court of equity will not

grant relief against a judgment at law where the defendant has had reasonable time to prepare his defense, but neglected to do so.

(Fuller v. Little, 69 Ill. 229.) In the instant case the record shows that the defendant has been guilty of laches. It appears from the record that the defense of payment was known to the defendant in August, 1924, yet two years later, on September 29, 1926, at the trial of the case he did not have his evidence, and on December 11, 1928, he states that he has secured certain documents from Europe purporting to show payment. What the documents are does not appear. Nor does it appear when he secured the "certain documents." Nowhere in his petition does he explain the delay. Courts of equity will not grant a new trial in an action at law, if the party applying has been guilty of laches, or might by reasonable diligence have procured the proof before the trial. (The Exchange National Bank v. Barrow, 177 Ill. 362; McKeckney v. City of Chicago, 194 Ill. App. 539; Miller v. Barto, 247 Ill. 104; Geolidge v. Rhodes, 199 Ill. 24; French v. Thomas, 252 Ill. 65; and Gramer v. The Illinois Commercial Men's Ass'n, *supra*.) In our opinion the petition is barren of a single statement or allegation of fact which would be sufficient to warrant a court of chancery in entertaining a bill to set aside the judgment. The defendant failed to show diligence, either before or at the trial or up to the filing of his petition, by any effort made to procure evidence tending to show payment of plaintiff's claim.

No legal grounds for vacating the judgment appearing from this record, the order of December 11, 1928, will therefore be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

...which caused a judgment of law where the defendant had had
...time to prepare his defense, but neglected to do so.
...In the instant case the record
...that the defendant has been guilty of laches. It appears from
...that the defendant was known to the plaintiff in
...for two years later, on September 29, 1934, at the trial
...the case he did not have his evidence, and on December 11, 1934, he
...that he has received certain documents from Europe pertaining to
...now payment. That the documents are not yet received. But does it
...appear when he received the "certain documents." However in his position
...he explain the delay. Courts of equity will not grant a new trial
...an action at law, if the party applying has been guilty of laches.
...rights by reasonable diligence have preserved the proof before the
...trial. (The defendant's motion is denied, 177 Ill. 322; Reichman
...City of Chicago, 124 Ill. App. 232; Wilder v. Banta, 227 Ill. 104;
...Wilder v. Banta, 190 Ill. 24; Wilder v. Banta, 190 Ill. 24; and
...Wilder v. Banta, 190 Ill. 24; Wilder v. Banta, 190 Ill. 24; and
...position is based on a claim of laches in violation of that
...and would be entitled to relief as a matter of equity in retaining
...will be set aside the judgment. The defendant failed to show dili-
...ness, either before or at the trial or up to the filing of his petition,
...any effort was to preserve evidence leading to new payment of claim-
...the claim.
...No legal grounds for vacating the judgment appearing from
...the record, the order of December 11, 1934, will therefore be reversed.
...REVEREND.
...and certain, etc., etc.

34869

WALTER CZAJA, a minor, by
JOHN CZAJA, his next friend,
Defendant in Error,

v.

J. A. GURSKY and WALTER GURSKY,
doing business as J. A. GURSKY
BROS., and JOHN WAITKUS and
HELEN WAITKUS,
Plaintiffs in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

262 I.A. 647

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Walter Czaja, a minor, suing by his next friend, brought an action on the case against the defendants, J. A. Gursky and Walter Gursky, doing business as J. A. Gursky Bros., and John Waitkus and Helen Waitkus, to recover for injuries to his right hand, resulting in the amputation of two fingers. Plaintiff filed his declaration on November 21, 1929; the appearance of all the defendants was filed and on January 2, 1930, the defendants, J. A. Gursky and Walter Gursky filed their plea of not guilty. July 12, 1930, it appears from the record the cause was called for trial, plaintiff appearing by his attorney, and the record then states, " * * * it appearing to the Court that the issues herein are joined on motion of plaintiff's attorney this cause is submitted to the Court for trial without a jury, and the Court now here after hearing all the evidence adduced and being fully advised in the premises, finds the defendants guilty and assessed the plaintiff's damages in the sum of fifteen hundred dollars (\$1500.00.)" Judgment was entered upon this finding, for a reversal of which this writ of error has been sued out by John Waitkus and Helen Waitkus.

It is urged that the court erred in trying the case in the absence of all defendants and their attorney without a plea having been filed. The record recites that the case was tried

JOHN CLARK, a minor, by
JOHN CLARK, his next friend,
Defendant in Error.

THE STATE OF NEW YORK
COUNTY, SOUTH COUNTY.

JOHN CLARK, a minor, by
JOHN CLARK, his next friend,
Defendant in Error.

262 I.A. 647

MR. JUSTICE SEYMOUR (SULLIVAN) THE OPINION OF THE COURT.

JOHN CLARK, a minor, being by his next friend, brought
an action on two counts against the defendants, J. A. Gurley and Walter
Gurley, doing business as J. A. Gurley Bros., and John Watkins and
Helen Watkins, to recover for injuries to his right hand, resulting
in the amputation of two fingers. Plaintiff filed his declaration on
November 21, 1930; the appearance of all the defendants was filed
and on January 2, 1931, the defendants, J. A. Gurley and Walter Gurley
filed their plea of not guilty. July 19, 1931, it appears from the
record the case was called for trial. Plaintiff appearing by his
attorney, and the record thus states, " * * * it appearing to the
court that the issues herein are joined on motion of plaintiff's
attorney this cause is submitted to the court for trial without a
jury, and the court now here after hearing all the evidence adduced
and being fully advised in the premises, finds the defendants guilty
and assessed the plaintiff's damages in the sum of fifteen hundred
dollars (\$1500.00)." Judgment was entered upon this finding. The
reversal of which this writ of error has been sued out by John Watkins
and Helen Watkins.

It is urged that the court erred in trying the case in
the absence of all defendants and their attorney without a plea
having been filed. The record reflects that the case was tried

upon issues joined. It has been repeatedly held that the record imports absolute verity and is the sole, conclusive and unimpeachable evidence of the proceedings in the lower court. (Wolf v. Hope, 210 Ill. 50; People v. Kuhn, 291 id. 154.) The record of the court cannot be impeached by the clerk, the recollection or want of recollection of the judge, or by any other evidence. (Central Trust Co. of Illinois v. Hagen, 339 Ill. 384, 390.) The record in the instant case recites that issue was joined and under this recital the judgment cannot be reversed on the ground urged. (Hansberry v. Holloway, 332 id. 334, 336.)

It is next contended that the declaration did not state a cause of action. It alleges in substance that J. A. Gursky and Walter Gursky, as contractors, and John Waitkus and Helen Waitkus, as owners of the premises located at 2700 West 43rd street, Chicago, were engaged in constructing a building and maintained thereon a hoist or derrick operated by cogs and wires; that the defendants negligently permitted the said hoist to be and remain open and unguarded by an enclosure of some character or in some manner; that the defendants knew that said machinery was of such a character that it was liable to attract children of tender age, and would induce them to enter the building; that plaintiff was eleven years old and incapable of exercising care for his own safety; that as the result of the negligence of defendants in permitting the machinery and said cogs and wires to remain open and unguarded, plaintiff was attracted to said machinery and while playing about said machinery his right hand was caught in the cogs and two of his fingers were crushed as to necessitate amputation of said fingers.

The specific objection to the declaration raised by the defendants is that it fails to show the location of the supposed dangerous instrumentality. It is a necessary element of the liability that the thing which causes the injury is tempting to

upon answer joined. It has been repeatedly held that the record
imports absolute verity and is the sole, conclusive and unimpeachable
evidence of the proceedings in the lower court. (Hall v. Board, 210
Ill. 50; People v. Pitt, 201 Ill. 134.) The record of the court
cannot be impeached by the clerk, the recollection or word of
recollection of the judges, or by any other evidence. (People v. Pitt,
201 Ill. 134.) The record in the
instant case recites that there was joined and under this recital
the court cannot be reversed on the ground urged. (Henderson v.
Holliday, 222 Ill. 324, 325.)

It is next contended that the declaration did not state a
cause of action. It alleges in substance that J. J. Murphy and
Walter Gursky, as contractors, and John Wilson and Helen Wilson, as
owners of the premises located at 2700 West 43rd Street, Chicago,
were engaged in constructing a building and maintained between a hoist
or hoist operated by rope and wires that the defendants negligently
permitted the said hoist to be and remain open and unguarded by an
enclosure of some character or in some manner; that the defendants
knew that said machinery was of such a character that it was liable
to attract children of tender age, and would induce them to enter the
building; that plaintiff was eleven years old and incapable of
exercising care for his own safety; that as the result of the neg-
ligence of defendants in permitting the machinery and said rope and
wires to remain open and unguarded, plaintiff was attracted to said
machinery and while playing about said machinery his right hand was
caught in the rope and one of his fingers was crushed as to
necessitate amputation of said finger.

The specific objection to the declaration raised by the
defendants in this case is that it fails to state the location of the
premises involved. It is a necessary element of the
declaration that the thing which causes the injury is something to

children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be. (Mobermott v. Burke, 256 Ill. 401.) The declaration in the instant case did allege that the hoist or derrick was open and unguarded and attractive to children and that it was located on the premises at 2700 West 43rd street, Chicago. A party is not bound to plead his evidence. It was only necessary to plead the ultimate facts (Skala v. Lehon, 253 Ill. ^{App.} 252), and a declaration alleging the ultimate facts to be proven is good after verdict without other averments. (Eleet v. Southern Illinois Coal & Coke Co., 197 Ill. App. 247.) The ultimate facts here pleaded are that the defendants were engaged in erecting a building on the premises at 2700 West 43rd street, Chicago, where they maintained open and unguarded, a hoist, attractive to children of tender age, inducing them to enter the building.

It is also contended by defendants that the declaration does not state that the child was in the exercise of such care as the law requires that he should have exercised. The law is clearly established by great weight of authority, that between the ages of seven and fourteen, the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child. (Maskaliunas v. C. & W. I. R. R. Co., 313 Ill. 142, 150.) It is conceded that the declaration is defective, and that it would have been so held on demurrer, but plaintiff argues that the defect is cured by verdict. Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively

[illegible]

stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, a verdict, such defect or imperfection or omission is cured by verdict. (Margent v. Baublis, 215 Ill. 428, 430.) The expression "cured by verdict" signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted was duly proved at the trial. (Walters v. City of Ottawa, 240 Ill. 259, 265.) In Chicago City Ry. Co. v. Cooney, 196 Ill. 466, the defect in the declaration seems to have been identical with the one in the instant case. It contained no allegation of due care on the part of the plaintiff. It was there held that the failure of the plaintiff to allege due care upon her part amounts to a mere defect in her statement of her cause of action, and did not bar her right to file an amended count, more than two years after the injury, containing such allegation. In Humason v. Michigan Central R. R. Co., 259 Ill. 462, it was held that if the defects and omissions are of such a nature that they could only be available on demurrer, are cured by the verdict and cannot be raised after verdict, for the issues joined on the trial necessarily required proof of the facts defectively stated, without which proof it cannot be presumed that the court would have directed, or the jury would have given, the verdict.

Finding no error in the record we affirm the judgment of the Circuit Court.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

34894

ROBERT McGUIRE,
(plaintiff),
Appellee,

v.

GEORGE N. SELLAS,
(defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

253 LA. 647²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered for \$1174.50 upon a lease dated February 20, 1922, between plaintiff as lessor, and George K. Theodore, George D. Chronos and James K. Molocotronos as lessees of certain premises in Chicago, Illinois, which lease was assigned by said lessees to Louis V. Poletes, and by him to defendant, George N. Sellas, the said George N. Sellas in the assignment to him agreeing to make all payments and perform all the covenants and conditions of the lease. The defendant filed his petition to vacate and set aside the judgment and in his petition alleged that he is not the lessee of the lease; that he never executed the lease and never authorized any attorney to confess judgment in his behalf, and that he did not owe any rent to plaintiff in excess of \$600 which he stood ready to pay. The court overruled defendant's motion and refused to set aside the judgment against the defendant. Thereupon this appeal followed. The plaintiff has not appeared or filed a brief in this court.

The question presented for decision is whether the plaintiff was authorized by the power of attorney contained in the lease to confess judgment for rent against defendant, who had never signed the lease, his only interest in the lease being that of an assignee.

PLAINTIFFS

DEFENDANTS

v.

PLAINTIFFS

DEFENDANTS

COUNT OF CHICAGO

2021.A.647

MR. JUSTICE BREWER, delivering the opinion of the court.

A judgment by confession was entered for \$114.50 upon a lease dated February 28, 1922, between plaintiff as lessor, and George K. Theobald, George D. Chrusan and James K. Kolaczynski as lessees of certain premises in Chicago, Illinois, which lease was assigned by said lessees to Louis V. Peiser, and by him to defendant, George W. Collins, the said George W. Collins in the assignment to him agreeing to make all payments and perform all the covenants and conditions of the lease. The defendant filed his petition to vacate and set aside the judgment and in his petition alleged that he is not the lessee of the leased land; that he never executed the lease and never authorized any attorney to execute judgment in his behalf, and that he did not owe any rent to plaintiff in excess of \$500 which he agreed ready to pay. The court overruled defendant's motion and refused to set aside the judgment against the defendant. Thereupon this appeal followed. The plaintiff has not appeared or filed a brief in this court.

The question presented for decision is whether the plaintiff was authorized by the power of attorney contained in the lease to execute judgment for rent against defendant, who had never signed the lease, his only interest in the lease being that of an assignee.

It is well settled that the authority to confess a judgment without process must be clear and explicit, and must be strictly pursued.

(Weber v. Powers, 213 Ill. 379, 380; Hells v. Hurst Chevrolet Co., 341 id. 108.) In the instant case the lessees named in the lease authorized any attorney of any court of record to enter "their appearance in such court, waive process and service thereof and confess judgment." This warrant of attorney did not confer any authority to confess judgment against the defendant.

We are of the opinion that the Municipal Court erred in denying the motion to vacate the judgment.

Accordingly the judgment entered by confession against the defendant October 16, 1930, is reversed and the cause is remanded with directions to allow the defendant to plead and have a trial on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Oridley, P. J., and Scanlan, J., concur.

34694

LOUIS COHN (Beckie Cohen),
Appellee,

v.

JAMES P. HOBSON and MELLIE
HOBSON, his wife,
Appellants.

1027
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

2621.A. 647³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On the petition of Beckie Cohen, appellee, the Circuit court of Cook county ordered a writ of assistance to the sheriff of Cook county to place Beckie Cohen in possession of certain premises. James P. Hobson and Mellie Hobson, his wife, have appealed from that order.

The original cause was a proceeding in chancery to foreclose a trust deed on certain property located in Cook county, Illinois, in which Louis Cohn was the complainant in the bill and James P. Hobson and Mellie Hobson, his wife, were defendants. The bill alleged that they were the owners of the property in question and were in possession of the same. A decree of foreclosure and sale was rendered, which contained the usual order for deed, the delivering up of the mortgaged premises upon production, to the parties in possession, of such deed, if no redemption should be made, etc. The property was sold by a master in chancery, on June 15, 1928, to Louis Cohn, the complainant. On July 1, 1930, a petition of Louis Cohen for a writ of assistance against the appellants was denied by the court, but leave was granted Beckie Cohen to file her petition for a writ of assistance against the appellants and they were ordered to plead, answer or demur to the petition within five days. The verified petition of Beckie Cohen is as follows:

LOUIS COHN (Hessie Cohn),
Appellee.

v.

JAMES P. HOBSON and MELISSA
HOBSON, His wife,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

262 I.A. 647

MR. JUSTICE SEAMAN DELIVERED THE OPINION OF THE COURT.

On the petition of Hessie Cohn, appellee, the Circuit Court of Cook County ordered a writ of assistance to the sheriff of Cook County to place Hessie Cohn in possession of certain premises. James P. Hobson and Melissa Hobson, his wife, have appealed from that order.

The original cause was a proceeding in ejectment to recover a tract of land on certain property located in Cook County, Illinois, in which Louis Cohn was the complainant in the bill and James P. Hobson and Melissa Hobson, his wife, were defendants. The bill alleged that they were the owners of the property in question and were in possession of the same. A decree of foreclosure and sale was rendered, which contained the usual order for deed, the delivery up of the mortgage premises upon redemption, to the parties in possession, at such time, if no redemption should be made, etc. The property was sold by a master in ejectment, on June 15, 1906, to Louis Cohn, the complainant. On July 1, 1906, a petition of Louis Cohn for a writ of assistance against the appellees was denied by the court, and leave was granted Melissa Cohn to file her petition for a writ of assistance against the appellants and they were ordered to file, answer or demur to the petition within five days. The verified petition of Hessie Cohn is as follows:

"1. Your petitioner, Beekie Cohen, * * * represents that one, Louis Cohn, the husband of your petitioner, did trust deed against James P. Hobson and Mellie Hobson, his wife and certain other defendants, and that on, to-wit, the 30th day of April, A. D. 1938, a decree was entered by this Court in the above entitled cause, foreclosing a certain trust deed executed by the said James P. Hobson and Mellie Hobson, his wife, against the following described real estate:

Lots 13 and 14 in Fulton's Subdivision of Lots 4, 5, 6 and 7 (except parts thereof heretofore taken for streets) in Oakfield Subdivision of Blocks 1, 2, 7 and 8 in Newhall, Larned and Woodbridge's subdivision of Land in the Northwest quarter of Section 13, Township 38 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois;

which said decree of foreclosure provides that upon the failure of the said James P. Hobson and Mellie Hobson to comply with the terms thereof, the real estate hereinabove described should be sold by the Master in Chancery of said Court; that it was further ordered by said decree that upon the execution and delivery to the purchaser of said premises at said Master's sale, of a Master's deed of conveyance of the same, that the purchaser, his or their heirs, successors or assigns, be let into possession of said premises and that any of the parties to said cause who might be in possession thereof, or any person who since the commencement of said suit had come into the possession thereof under them, should, upon the production of said Master's deed, or a certified copy of the order of said court confirming the report of sale, surrender possession thereof to the said purchaser, his or their heirs, successors or assigns. That afterwards, on the 25th day of May, A. D. 1928 the said premises, pursuant to said decree, were sold by the Master in Chancery to the said Louis Cohn and that upon the expiration of the period of redemption provided by said decree and by law, the said Master executed and delivered to the said Louis Cohn a deed of conveyance of said premises.

2. Your petitioner further represents that thereafter, on to-wit, the 2nd day of May, A. D. 1930, the said Louis Cohn, the grantee in the deed issued by the Master in Chancery, as aforesaid, conveyed the real estate hereinabove described to your petitioner by his certain Warranty deed, bearing date the 2nd day of May, 1930, and which was recorded on the 6th day of May, 1930 as document No. 10652842 in book 28171 at page 420, and that your petitioner has at all times since the date of said conveyance, and is still now the owner or record of said real estate and is entitled to the possession of the same, as well as of all improvements thereon situated.

3. That at the time of the filing of said bill of complaint and until the present time, the defendants, James P. Hobson and Mellie Hobson, his wife, were and still are in possession of the apartment located on the first floor of the premises known as 5650 Prairie Ave., Chicago, Illinois. And your petitioner further represents that after the delivery of the said Master's deed to the said Louis Cohn, the said Louis Cohn exhibited the same, together with a certified copy of the order of said court confirming the report of said sale, to the said James P. Hobson and Mellie Hobson, his wife, and demanded of them the possession of the said described premises, but that the said James P. Hobson and Mellie Hobson thereupon refused and still refuse to surrender possession of the same to the said Louis Cohn

1. Your petitioner, Lucille Johnson, wife of James P. Johnson, the husband of your petitioner, did testify that James P. Johnson and Lucille Johnson, his wife and certain other defendants, and that on or about the 20th day of April, A.D. 1935, a decree was entered by this Court in the above entitled cause, for placing a certain tract described by the said James P. Johnson and Lucille Johnson, his wife, against the following described real estate:

Lot 11 and 12 in Block 1, a subdivision of Lots 4, 5, 6 and 7 (excepting certain lots heretofore taken for streets) in Oakfield, a subdivision of Block 1, S. E. 1/4 of Section 16, Township 13, North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois;

which said decree of foreclosure provides that upon the failure of the said James P. Johnson and Lucille Johnson to comply with the terms thereof the real estate heretofore described should be sold by the Master in the order of said Court; that it was further ordered by said Court that upon the execution and delivery to the purchaser of said premises of a deed, of a Master's deed of conveyance of the same, that the purchaser, his or their heirs, successors or assigns, do let into possession of said premises and that any of the parties to said decree who might be in possession thereof, or any person who claims the common law of said land, have leave to vacate the possession thereof under them, should, upon the execution of said Master's deed, or a certified copy of the order of said Court confirming the report of said Master, cause possession thereof to the said purchaser, his or their heirs, successors or assigns, on the 15th day of May, A.D. 1935. The said premises, to be sold by said Court, were sold by the Master in conformity to the said Lucille Johnson and that upon the execution of the deed of redemption provided by said decree and by law, the said premises were executed and delivered to the said Lucille Johnson a deed of conveyance of said premises.

2. Your petitioner further represents that thereafter, on or about the 2nd day of May, A.D. 1935, the said Lucille Johnson, the said James P. Johnson and the said Master in conformity, as aforesaid, executed the real estate heretofore described to your petitioner by his certain attorney at law, bearing date the 2nd day of May, 1935, and which was recorded on the 6th day of May, 1935 as document No. 103824 in Book 2871 of page 420, and that your petitioner has at all times since the date of said conveyance, and is still now the owner or record of said real estate and is entitled to the possession of the same, as well as of all improvements thereon situated.

3. That at the time of the filing of said bill of complaint and until the present time, the defendants, James P. Johnson and Lucille Johnson, his wife, were and still are in possession of the premises located on the first block of the premises known as 600 North Ave., Chicago, Illinois. And your petitioner further represents that after the delivery of the said Master's deed to the said Lucille Johnson, the said Lucille Johnson exhibited the same, together with a certified copy of the order of said Court confirming the report of said sale, to the said James P. Johnson and Lucille Johnson, his wife, and demanded of them the possession of the said described premises, but that the said James P. Johnson and Lucille Johnson thereupon refused and still refuse to surrender possession of the same to the said Lucille Johnson.

or to your petitioner.

4. * * *

5. Your petitioner therefore prays that a writ of assistance may issue," etc.

The verified joint and several answer of the appellants is as follows:

"These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition for writ of assistance contained, for answer thereto, or to so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say that they deny that the petitioner, Beckie Cohen, is the holder of the legal title to the premises for which the writ of assistance is asked, and further deny that at the time of the filing of the said petition for writ of assistance she was the holder of the legal title to said premises.

* * *

These defendants further answering deny that they are in possession of the premises described in the said writ of assistance petition.

These defendants further answering deny that at the time of the filing of the said petition the said Beckie Cohen was entitled to possession of said premises and further deny that she is entitled to have this honorable court enter any order for a writ of assistance.

These defendants further answering deny that any decree was entered on the date mentioned in the petition for writ of assistance, which said date mentioned is April 30th, A. D. 1933.

These defendants further answering deny that the real estate mentioned in the petition for writ of assistance were sold on the 25th day of May, A. D. 1928, as stated in said petition; that said real estate has been granted or conveyed to Louis Cohn is further denied; that document 10652842 in book 28171 at page 420, recorded on the 6th day of May, 1930, does not refer to the real estate stated in the petition for writ of assistance.

These defendants further answering deny that any demand has been made on them for the possession of the premises described in the said petition.

* * *

ALL WHICH MATTERS AND THINGS these defendants are ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained; and specifically pray that the prayer of the petitioner for a writ of assistance be denied."

The certificate of evidence shows that when the cause came on to be

or to your petition.

Your petition operates upon the same basis as the

The various facts and circumstances of the case are as

follows:

"These defendants, now and at all times heretofore having and receiving in consideration all manner of benefits and advantages of exception to the many errors and irregularities in the petition for writ of assistance contained, for answer thereto, as is so much on each point, showed as these defendants are advised in material fact that the petition, besides being in the hands of the court, is the subject of the writ of assistance is ruled, and is not to be taken into consideration at the time of the said petition for writ of assistance and was the subject of the legal title to said

petition.

These defendants further answering deny that they are in possession of the premises described in the said writ of assistance.

These defendants further answering deny that at the time of the filing of the said petition the said Beale Cohen was entitled to possession of said premises and further deny that he is entitled to have this writ of assistance.

These defendants further answering deny that any person was entitled to the title mentioned in the petition for writ of assistance, which title date mentioned in April 1934, A. D. 1934.

These defendants further answering deny that the real estate mentioned in the petition for writ of assistance was sold on the 23rd day of May, A. D. 1934, as stated in said petition; that said real estate was then granted or conveyed to Lewis Cohen in furtherance of the document 10000000 in book 20000 at page 400, recorded on the 23rd day of May, 1934, does not refer to the real estate stated in the petition for writ of assistance.

These defendants further answering deny that any person has been made to them for the possession of the premises described in the said petition.

ALL WITNESSES AND THINGS these defendants are ready to testify, maintain, and prove, as this honorable court shall direct, and finally deny to be hence absolved with their reasonable costs and charges in this behalf most respectfully submitted; and especially deny that the power of the petition for a writ of assistance be

The certificate of evidence above that when the same come on to be

heard before the chancellor the following proceedings occurred:

"CLARK: Cohen v. Hobson.

MR. MURPHY: May it please the court, I am from Mr. Westbrooks office. Mr. Westbrooks is the attorney of record in this case and he is at present before Judge David in the Criminal Court, and if this is passed a few minutes he will come directly here. I have the files in this case, from his office, here now.

MR. KOMPTEL: Your honor, this case has been pending for over two years, and for some reason or another it has been continued from time to time, and they filed several demurrers --

COURT: Does the decree call for a writ of assistance?

MR. KOMPTEL: Yes.

COURT: Why wasn't it issued by the Clerk? Have you got your order prepared?

MR. KOMPTEL: Yes, here it is. (Whereupon the order was handed up to the Judge.)

COURT: All right, I'll enter the order. (Whereupon the court signed the order for writ of assistance.)

MR. MURPHY: I want to save an exception, your honor.

COURT: All right, you may save an exception.

WHICH WAS ALL THE EVIDENCE, TESTIMONY, OFFERED, HEARD, AND TAKEN AND ALL OF THE PROCEEDINGS ON THE MOTION FOR THE ISSUANCE OF A WRIT OF ASSISTANCE, INCLUDING A COPY OF THE ORIGINAL PETITION AND ANSWER."

The order that a writ of assistance issue is as follows:

"This cause coming on to be heard this _____ day of July, A. D. 1930, on motion of Beckie Cohen, petitioner, by Morris Kompel, her solicitor, upon the verified petition of the said Beckie Cohen, praying for a writ of assistance against James P. Hobson and Mellie Hobson, his wife, and the said James P. Hobson and Mellie Hobson having had due notice hereof and the court having read and considered the said petition and having heard the testimony of witnesses sworn in open court, and being fully advised in the premises, finds:

1. That it has jurisdiction of the subject matter and of the parties hereto;

2. That Beckie Cohen is the owner of the premises described in said petition, to-wit: the apartment on the first floor of the building known as 5650 Prairie Avenue, Chicago, Illinois, by virtue of a certain deed of conveyance from Louis Cohn to the said Beckie Cohen, dated the 2nd day of May, A. D. 1930 and recorded on the 6th day of May, 1930, as document No. 10652842, in Book 28171, Page 420.

3. That the said Beckie Cohen is entitled to the possession of the above described premises and that the said James P. Hobson and Mellie Hobson are now occupying said described premises and are unlawfully withholding possession thereof from said Beckie Cohen.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a writ of assistance issue forthwith, commanding the Sheriff of the County of Cook to proceed to put your petitioner, Beckie Cohen, in possession of the said described premises and the appurtenances thereunto belonging, in accordance with the prayer of the petition of the said Beckie Cohen."

The decree in the foreclosure proceedings was dated April 30, 1928, and the property involved therein was described as located in the northwest quarter of section fifteen.

The appellants contend that "before a writ of assistance can lawfully issue, there must be a judicial investigation to ascertain the facts justifying such writ," and that "in the case at bar, the certificate of evidence shows that there was no evidence heard or offered before the entry of the decree; and the Court did not even consider the petition and answer, which had been filed, but only inquired if the decree originally entered provided for a writ of assistance." There is merit in this contention. The chancellor erred in assuming that the clerk had power to issue a writ of assistance. (See Bruce v. Roney, 18 Ill. 67; Smith v. Brittenham, 3 Ill. App. 62, 65; Cook v. Moulton, 68 Ill. App. 430.) "It is commonly declared that the issuance of a writ of assistance rests in the sound discretion of the court, and that it is issued only when the right is clear and free from doubt - when there is no equity or appearance of equity in defendant." (5 C. J. 1317. See also Kerr v. Brawley, 193 Ill. 205, 207.) "While the court of chancery has an undoubted jurisdiction to award the writ of possession in execution of its decrees, this it will not ordinarily do, and never, where there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity." (Flowers v. Brown, 21 Ill. 270, 273.) "Before a writ of assistance can issue, there must be a judicial investigation, ascertaining the facts justifying such writ." (Cook v. Moulton, supra. See also, to the same effect, Bruce v. Roney, supra, and Smith v. Brittenham, supra.) In the instant case

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a writ of assistance issue forthwith, commanding the Sheriff of the County of Cook to proceed to put your petition, Beckie Cohen, in possession of the said described premises and the appurtenances thereto belonging, in accordance with the prayer of the petition of the said Beckie Cohen."

The decree in the foregoing proceedings was dated April 30, 1925, and the property involved therein was described as located in the

Northwest Quarter of Section 11, Township 36 North, Range 10 East, Cook County, Illinois.

The appellee contends that "before a writ of assistance

can lawfully issue, there must be a judicial investigation to ascertain the facts justifying such writ," and that "in the case at bar, the

certification of evidence shows that there was no evidence heard or

offered before the entry of the decree; and the Court did not even consider the petition and answer, which had been filed, but only intimated

if the decree originally entered provided for a writ of assistance."

There is merit in this contention. The Chancellor erred in assuming

that the clerk had power to issue a writ of assistance. (See Hyman v.

Hyman, 13 Ill. 2d 57; Wright v. Birmingham, 3 Ill. 2d 52; Cook v.

Hyman, 13 Ill. 2d 57.) "It is commonly declared that the

language of a writ of assistance rests in the sound discretion of the

court, and that it is issued only when the rights in clear and free from doubt - and there is no right or appearance of right in defendant."

(W. v. Hyman, 13 Ill. 2d 57; Wright v. Birmingham, 3 Ill. 2d 52.) "While

the court of chancery has an undoubted jurisdiction to award the writ

of possession in execution of its decrees, still it will not ordinarily

do, and never, where there is any reasonable prospect that the party

in possession may make a successful defense of his possession, either

at law or by the aid of a writ of equity." (Hyman v. Hyman, 13 Ill.

2d 57.) "Before a writ of assistance can issue, there must be a

judicial investigation, ascertaining the facts justifying such writ."

(Wright v. Birmingham, 3 Ill. 2d 52; Hyman v. Hyman, 13 Ill.

2d 57.) In the instant case

the appellee, Beckie Cohen, who applied for the writ, was not a party to the original proceeding, nor a purchaser pendente lite, nor a purchaser at the judicial sale. In her petition she represents that she purchased the property described therein on May 2, 1930, from Louis Cohn. The legal description of the property described in the petition differs from the legal description of the property described in the decree. The appellants, in their answer to the petition, denied that the petitioner was the holder of the legal title to the premises described in the petition at the time the petition was filed and at the time of the filing of the answer; denied that they were in possession of the premises described in the petition, and denied the petitioner's right of possession to the premises; denied that any decree was entered on April 30, 1933, as alleged in the petition, or that the real estate described in the petition was sold on May 25, 1928, to Louis Cohn, as alleged in the petition, and further denied that any demand had been made on them for possession of the premises described in the petition. The answer of the appellants certainly raised several material issues of fact, and the chancellor should have required the petitioner to prove her right to the writ before entering the order in question. The appellee says that the writ of assistance commands the sheriff to dispossess the appellants only from "the apartment on the first floor of the building known as 5650 Prairie Avenue, Chicago, Illinois," and states that the petitioner was seeking "merely to be put into possession of an apartment in the premises to which she already obtained title by virtue of the foreclosure proceedings." There is nothing in the decree that shows that this apartment was part of the premises foreclosed. In fact, the petition does not allege that this apartment was part of the premises foreclosed or that it was even a part of the premises described in the petition as having been foreclosed.

the applicant. The applicant was called for the trial, and was not a party to the original proceeding, and a judgment was rendered against her a purchaser of the judicial sale. In her petition she represents that she purchased the property described therein on May 2, 1935, from Louis Gohn. The legal description of the property described in the petition differs from the legal description of the property described in the decree. The applicant, in their answer to the petition, denied that the petitioner was the holder of the legal title to the premises described in the petition at the time the petition was filed and at the time of the filing of the answer; denied that they were in possession of the premises described in the petition, and denied the petitioner's right of possession to the premises; denied that any mortgage was entered on April 30, 1935, as alleged in the petition, or that the real estate described in the petition was sold on May 25, 1935, to Louis Gohn, as alleged in the petition, and further denied that any demand had been made on them for possession of the premises described in the petition. The answer of the applicant certainly raised several material issues of fact, and the chancellor should have required the petitioner to prove her right to the writ before entering the order in question. The applicant says that the writ of assistance commands the sheriff to dispossess the applicant only from "the apartment on the first floor of the building known as 8880 Prairie Avenue, Chicago, Illinois," and states that the petitioner was seeking "merely to be put into possession of an apartment in the premises to which she already obtained title by virtue of the foreclosure proceedings." There is nothing in the decree that shows that this apartment was part of the premises foreclosed. In fact, the petition does not allege that this apartment was part of the premises foreclosed or that it was even a part of the premises described in the petition as having been foreclosed.

The appellants claim that the petition of the appellee, Beckie Cohen, shows, at most, that she was merely a grantee of the purchaser at the sale, and that a writ of assistance will not issue in favor of such a party. In support of this contention they cite Vette v. Brown, 334 Ill. 406, 410, and several similar cases. In these cases the Supreme court passed only upon the question as to whom the writ will issue against. It would appear as though the question raised by the instant contention has not been passed upon by the courts of this state, but it has been by the courts of a number of the sister states. In 5 C. J. 1313, the author says: "Primarily the writ issued in favor of a party to a suit, or a receiver or sequestrator, and it has been held that it cannot be regularly issued at the instance of anyone else. It is now well settled, however, that the purchaser under a decree for sale is entitled to the writ even though a stranger to the record, and by the weight of authority it will issue in favor of such purchaser's assignee or grantee, unless it appears that the granting of the writ would do injustice to the party in possession." (Italics ours.) The author cites a number of authorities in support of this italicized portion of his statement of the law.

The appellants further contend that the petitioner has not shown by the allegations of her petition that she was entitled to the benefits of the decree in the foreclosure case. The appellee concedes, as she must, that the petition was very carelessly drawn, but the obvious defects in it may be cured by amendment before the retrial of the cause.

The order of the Circuit court of Cook County of July 29, 1930, is reversed, and the cause is remanded for further proceedings not inconsistent with the opinion in this case.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

The appellants claim that the position of the appellee,
Beckie Cohen, shows, at most, that she was merely a grantee of the
purchaser at the sale, and that a writ of assistance will not issue
in favor of such a party. In support of this contention they cite
Vette v. Brown, 334 Ill. 400, 410, and several similar cases. In
these cases the Supreme Court passed only upon the question as to whom
the writ will issue against. It would appear as though the question
raised by the instant contention has not been passed upon by the courts
of this state, but it has been by the courts of a number of the sister
states. In 3 N. J. 1218, the answer says: "Primarily the writ issued
in favor of a party to a suit, or a receiver or sequestrator, and it
has been held that it cannot be regularly issued at the instance of
anyone else. It is now well settled, however, that the purchaser under
a decree for sale is entitled to the writ even though a stranger to
the record, and by the right of subrogee it will issue in favor of
such purchaser's assignee or transferee, unless it appears that the assign-
ing of the writ was fraudulent to the party in possession." (1218)
The author cites a number of authorities in support of this
limited portion of his statement of the law.
The appellants further contend that the position has not
been by the allegations of her position that she was entitled to the
benefit of the decree in the foreclosure case. The appellee contends,
and the court, that the position was very carefully drawn, but the
court holds that it may be cured by amendment before the verdict of
the jury.
The order of the Circuit Court of Cook County of July 22,
1901, is reversed, and the cause is remanded for further proceedings
to be consistent with the opinion in this case.
REVEREND AND HONORABLE
JUDGES, P. J., and LEONARD, J., concur.

34746

MARGARET HERRICK,
Appellee,

v.

CITY OF CHICAGO, a
Municipal corporation,
Appellant.

137
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262TA.647⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Margaret Herrick, plaintiff, sued City of Chicago, a municipal corporation, and Board of Education, a corporation, in the Municipal Court of Chicago in an action of the fourth class. The suit as to Board of Education was thereafter dismissed, upon motion of the plaintiff. The case was tried by the court and there was a finding against the defendant and the plaintiff's damages were assessed at the sum of \$921.57. Defendant has appealed.

The plaintiff's amended statement of claim alleges (inter alia) that under and in pursuance of the Civil Service laws and rules she made application for the office of stenographer, junior grade, with the defendant, City of Chicago, and that she was duly examined by the Civil Service Commission and was on October 16, 1922, appointed and certified as stenographer, junior grade, for the City, and that she held this position under and by virtue of the Civil Service laws and rules; that she has been fully compensated for all salaries due from ^{the} City up to and including November 30, 1928, but that she has not been compensated for the period from December 1, 1928, to December 12, 1928, inclusive; that from December 1, 1928, to December 13, 1928, inclusive, she was at all times ready, able and willing, and demanded from the City, through its agents, the right to occupy the said position and receive the salary appropriated

THE UNIVERSITY OF CHICAGO PRESS

therefor, but that without any fault on her part the City, by its agents, etc., wrongfully prevented her from occupying the said position, from performing duties in connection therewith, and from receiving the salary appropriated by the City council for the said position, although she has at all times insisted, demanded and requested the right to occupy the said position; that she had never been removed or discharged from her position by the Commission; that she has never had any charges preferred against her; that she has never offered her resignation, nor refused to perform the duties of said position from December 1, 1928, to December 12, 1928, inclusive; that on December 12, 1928, she was assigned to certain clerical work for the Board of Education; that by virtue of said assignment she has been paid only the sum of \$125 per month for her services from that date to the present; that the City council has passed appropriation ordinances, which were duly approved by the mayor of the City, for salaries of stenographers, junior grade, during the period from December 1, 1928, to December 30, 1929, "wherein the respective sums of money for the payment of the salary of the plaintiff, as Stenographer, Junior Grade, was appropriated the sum of \$171.66 for each and every calendar month," "instead of the sum of \$125.00 which sum she has received from time to time, although continuously demanding the further amount due her;" that she became and is now entitled to receive from the City the additional sum of \$46.66 for each and every month from the time of employment "to the date of judgment;" that there became and was due to her, for the period from December 12, 1928, to December 31, 1928, the sum of \$29.55, and in addition thereto there became due and she is entitled to additional compensation from January 1, 1928, to March 31, 1930, inclusive, the sum of \$700, and the further sums of \$68.66 and \$29.55, or a total of \$798.21; that while she was employed under and by virtue of the Civil Service Commission rules and regulations of the City, she was,

therefor, but that without any fault on her part the City, by its agents, etc., wrongfully prevented her from occupying the said position, from performing duties in connection therewith, and from receiving the salary appropriated by the City Council for the said position, although she has at all times insisted, demanded and requested the right to occupy the said position; that she had never been removed or discharged from her position by the Commission; that she has never had any charges preferred against her; that she has never offered her resignation, nor refused to perform the duties of said position from December 1, 1928, to December 12, 1928, inclusive; that on December 12, 1928, she was assigned to certain clerical work for the Board of Education; that by virtue of said assignment she has been paid only the sum of \$125 per month for her services from that date to the present; that the City Council has passed appropriation ordinances, which were duly approved by the Mayor of the City, for salaries of stenographers, bookkeepers, during the period from December 1, 1928, to December 30, 1929, wherein the respective sums of money for the payment of the salary of the plaintiff, Junior Grade, was appropriated the sum of \$171.66 for each and every calendar month, "instead of the sum of \$125.00 which she has received from time to time, although continuously demanding the further amount due her;" that she became and is now entitled to receive from the City the additional sum of \$46.66 for each and every month from the date of employment "to the date of judgment;" that there became due and is due to her, for the period from December 12, 1928, to December 31, 1928, the sum of \$28.80, and in addition thereto there became due and she is entitled to additionally compensation from January 1, 1929, to March 31, 1929, inclusive, the sum of \$750, and the further sums of \$28.80 and \$22.50, or a total of \$799.10; that while she was employed under and by virtue of the Civil Service Commission rules and regulations of the City, she was,

on December 12, 1928, assigned to certain clerical work for the Board of Education; that the Board of Education is a body corporate, under and in pursuance of the laws of this state, and that her pay checks have been paid to her by the Board; that she has made demand upon the Board and also the said City for additional sums of money due her in pursuance of said employment, but both the Board and the City refuse to pay her the said salary so due her. The affidavit of merits of the City avers (inter alia) that the plaintiff was not in the employ of the City from December 1, 1928, to December 12, 1928, and that at no period since the last mentioned date has she been employed by the City; that it does not owe the plaintiff the sums of money set out in the statement of claim; that the Board exercises sole and exclusive control over its employees and the respective salaries paid to them, and that the City, as a matter of law, is not liable for any of the sums of money alleged in the statement of claim to be due and owing the plaintiff from December 14, 1928, to the present time.

The case was tried upon the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts are admitted as evidence in the above entitled clause.

1. On Oct. 16, 1922 Margaret Herrick plaintiff herein was appointed and certified by the Civil Service Commission of the City of Chicago as a stenographer, junior grade on
2. On Sept. 23, 1928 she instituted suit against the City of Chicago in the Municipal Court of Chicago in case #1420145 for salary for a period beginning Sept. 1, 1927 and ending August 31, 1928 and subsequently amended her statement of claim to include the period ending November 30, 1928 for salary at the rate of \$171.66 a month that she was not assigned during the said period by the Civil Service Commission of the City of Chicago to any position but that she was always ready to perform any duties that might be assigned her
3. That the City of Chicago filed its appearance in the said cause and deny the facts therein stated. That a trial was had on the issue and the court made a finding that the said City of Chicago by its City Council had appropriated for such position during the period mentioned a salary of \$171.66 a month and that the said Margaret Herrick was entitled to such a sum during the period sued for and accordingly rendered judgment for the plaintiff in the sum of \$2575.00 said

On December 12, 1935, assigned to certain clerical work for the Board of Education; that the Board of Education is a body corporate, under and in pursuance of the laws of this state, and that her pay check have been paid to her by the Board; that she has made demand upon the Board and also the said City for additional sums of money and her in pursuance of said employment, but both the Board and the City refuse to pay her the said salary as due her. The affidavit of the City avers (under oath) that the plaintiff was not in the employ of the City from December 1, 1935, to December 12, 1935, and that at no period since the last mentioned date has she been employed by the City; that it does not owe the plaintiff the sum of money set out in the statement of claim; that the Board exercises sole and exclusive control over its employees and the respective salaries paid to them, and that the City, as a matter of law, is not liable for any of the sums of money alleged in the statement of claim to be due and owing the plaintiff from December 14, 1935, to the present time.

The case was tried upon the following stipulation of facts: "It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts are admitted as evidence in the above entitled cause.

1. On Oct. 16, 1935 Margaret Mervish plaintiff herein was appointed and certified by the Civil Service Commission of the City of Chicago as a stenographer, Junior Grade 35.
2. On Sept. 22, 1935 she testified and was sworn in as a stenographer in the Municipal Court of Chicago in case #120012 for salary for a period beginning Sept. 1, 1934 and ending Nov. 31, 1935 and subsequently amended her statement of claim to include the period ending November 30, 1934 for salary at the rate of \$17.00 a month and she was not assigned during the said period by the Civil Service Commission of the City of Chicago to any position but that she was always ready to perform any duties that might be assigned her.
3. That the City of Chicago filed its appearance in the said cause and that the facts therein stated. That a trial was had on the issue and the court made a finding that the said City of Chicago by its Civil Council had appropriated for each position during the period mentioned a salary of \$17.00 a month and that the said Margaret Mervish was entitled to such a sum during the period such for and accordingly recovered judgment for the plaintiff in the sum of \$2375.00 said

judgment having been rendered on January 8, 1929 that the City prayed an appeal from said judge to the appellate court, first district but subsequently dismissed the appeal.

4. That the plaintiff was not employed by the City of Chicago for a period beginning December 1st and ending December 11th, 1928 but that the said plaintiff was ready during the said period and requested employment.
5. That on December 12, 1928 the plaintiff was assigned by the Civil Service Commission of the City of Chicago as a stenographer Junior Grade to the Board of Education a corporation.
6. It is further stipulated and agreed that the said Margaret Herrick will testify in substance as follows: That on January 1929 she received a salary from the Board of Education on the basis of \$125.00 per month the said salary having been paid while the suit was then pending and the issues undetermined: That she protested against the salary and was informed that she would have to wait the outcome of the suit. That after the judgment was entered she again informed the department head of the Board of Education as to the finding and judgment of the Municipal Court of Chicago in case #1420145 that she received no consideration from the Board of Education and took the matter up with Mr. James Osborne Chief Clerk of the Civil Service Commission of the City of Chicago and he informed her that he would take the matter up with the Board of Education and advise them to pay her on the basis of \$171.666 per month that she subsequently saw Mr. Osborne and he told her that he had informed the Board of Education that she was entitled to salary on the above basis

Notwithstanding the above demands by Mr. Osborne the Board of Education continued to pay her on the basis of \$125.00 per month that her immediate employer Mr. Howatt Chief Engineer Board of Education informed her that the Board of Education had not appropriated for her salary at that basis but that he would recommend that the next appropriation paid by the Board of Education would provide for an increase of salary from \$125.00 per month to \$171.666 a month retroactive and effective as of December 12, 1928. that on September 11, 1929 a bulletin was issued by Ernest Withall Business Manager of the Board of Education in words and figures as follows: 25015 SALARY INCREASE - JUNIOR STENOGRAPHER BUREAU OF OPERATIVE ENGINEERING. TO THE BOARD OF EDUCATION OF CHICAGO: THE BUSINESS MANAGER RECOMMENDS That Margaret E. Herrick, Junior Stenographer, Bureau of Operative Engineering, be allowed salary increase from \$125.00 to \$171.66 per month effective December 12, 1928. REASONS: Miss Herrick was certified to the Board of Education as a Junior Stenographer on October 16, 1922, and according to ruling of the court in case Margaret Herrick versus the City of Chicago, she is entitled to this salary. FINANCIAL: \$591.00 To be charged to undistributed fund for Administration.

Respectfully submitted,

Ernest Withall,

Business Manager

Recommended by:

John Howatt,

Chief Engineer

Chicago, September 11, 1929

REFERRED TO COMMITTEE ON FINANCE

That subsequent to the issuance of the above bulletin the Board of Education passed its annual appropriation and did not include the recommendation of its Business Manager nor did it appropriate a salary of \$171.666 for Margaret Herrick and that she has up to this date been paid on a basis of

[illegible]

\$125.00 per month.

M. L. Carmody
ATTORNEY FOR THE PLAINTIFF
Samuel A. Ettelson by Warner Hall
ATTORNEY FOR THE DEFENDANT"

In the view that we have taken of this appeal it is not necessary to consider all of the contentions of the defendant. Under the stipulation of facts it clearly appears that the plaintiff was not in the employ of the City during any of the time for which salary is demanded, nor did she during that period of time render any services as junior stenographer for the City, but, on the contrary, it appears that the plaintiff on December 12, 1928, was certified by the Civil Service Commission as a stenographer, junior grade, to the Board of Education; that she was apparently appointed by the Board to fill the said position for the Board; that she accepted the position and that all of the services for which she now claims compensation were rendered to the Board and that she was paid regularly the monthly salary of \$125 per month, which was the salary regularly appropriated by the Board for the said position; that the Board is a separate and distinct corporate entity from the municipal corporation, the City of Chicago. A position like that of stenographer, junior grade, is subject to the Civil Service laws. (See The People, ex rel. Brennan v. Ellicott, 243 Ill. App. 374, 377.) Such a position as the plaintiff filled when she actually worked for the City may be abolished (The People v. Coffin, 282 Ill. 599) and employees subject to the provisions of the Civil Service law may be laid off for lack of work or funds, or for any other good cause. (Thomas v. The People, 273 Ill. 479.) There is nothing in the stipulation of facts tending to show that the City practiced any fraud towards the plaintiff in the matter of her employment, and for aught that appears in the stipulation the position that the plaintiff occupied while she was actually working for the City may have been abolished, or she may have been laid off for lack

1155.00 per month.

W. L. GARNER
ATTORNEY FOR THE PLAINTIFF
James A. Johnson by James A. Johnson
ATTORNEY FOR THE DEFENDANT

In the view that we have taken of this appeal it is not

necessary to consider all of the contention of the defendant.

Under the stipulation of facts it clearly appears that the plaintiff

was not in the employ of the City during any of the time for which

salary is demanded, nor did she during that period of time render any

services as Junior stenographer for the City, but, on the contrary,

it appears that the plaintiff on December 18, 1928, was certified by

the Civil Service Commission as a stenographer, Junior grade, to the

Board of Education; that she was subsequently appointed by the Board to

fill the said position for the Board; that she accepted the position

and that all of the services for which she now claims compensation

were rendered to the Board and that she was paid regularly the monthly

salary of \$125 per month, which was the salary regularly appropriated

by the Board for the said position; that the Board is a separate and

distinct corporate entity from the municipal corporation, the City of

Chicago. A position like that of stenographer, Junior grade, is sub-

ject to the Civil Service Law. (See The People, ex rel. Brennan v.

Illinois, 282 Ill. App. 374, 377.) Such a position as the plaintiff

filled when she actually worked for the City may be abolished (The

People v. Collins, 282 Ill. App. 374, 377) and employees subject to the provisions

of the Civil Service Law may be laid off for lack of work or funds, or

for any other good cause. (The People, ex rel. Brennan v. Illinois, 282 Ill. App. 374, 377.) There

is nothing in the stipulation of facts tending to show that the City

granted any fund towards the plaintiff in the matter of her

employment, and for aught that appears in the stipulation the position

that the plaintiff occupied while she was actually working for the

City may have been abolished, or she may have been laid off for lack

of work or funds, or for some other good cause. On December 12, 1928 - the date when she was certified by the Commission to the Board of Education - she may have been on the list of eligibles for the position of stenographer, junior grade, by reason of some affirmative act on her part. No other reasonable inference can be drawn from the stipulated facts than that the plaintiff made no objection to the assignment to the Board of Education, and it is plain that she thereafter looked to the Board for payment of her salary. She protested to the Board against the amount of the salary it was paying her and she demanded that the Board pay her on the basis of \$171.66 a month. The Board of Education is by statute (Ch. 122, par. 152, sec. 128) made a body corporate. All employees of the Board, save the superintendent of schools, the business manager, and the attorney and assistant attorneys, and teachers, are subject to the Civil Service law. (Ch. 122, par. 153, sec. 129.) The mere fact that the plaintiff was at one time certified by the Civil Service Commission to a position with the City and that she thereafter filled said position for a certain period, does not obligate the City, in the absence of fraud, to keep her in continuous employment and to pay her a salary even though no services are rendered to the City, nor does the mere fact that the City council appropriated for the salary of stenographer, junior grade, in the City's service, a larger sum than was appropriated by the Board for a like position, operate to create any liability against the City for the difference in the appropriations. Upon a careful consideration of the stipulated facts we are unable to see upon what theory of law the defendant can be held liable. Upon the oral argument in this court, counsel for the plaintiff practically conceded that the stipulation of facts was insufficient to support the judgment, but he strenuously insisted that the cause should be remanded, for the reason that the stipulation was hastily drawn and

of work or funds, or for some other good reason. On December 12, 1938 - the date when she was notified by the Commission to the Board of Education - she may have been on the list of applicants for the position of stenographer, Junior Grade, by reason of some affirmative act on her part. No other reasonable inference can be drawn from the stipulated facts than that the plaintiff made no objection to her assignment to the Board of Education, and it is plain that the plaintiff failed to sue for the payment of her salary. The plaintiff is the Board of Education for the amount of the salary it was paying her and she demanded that the Board pay her on the basis of \$171.00 a month. The Board of Education is by statute (Ch. 122, par. 122, sec. 122) made a body corporate. All employees of the Board, save the superintendant of schools, the business manager, and the attorney and assistant attorney, and teachers, are subject to the Civil Service Law. (Ch. 122, par. 122, sec. 122.) The more fact that the plaintiff was at the time notified by the Civil Service Commission to a position with the City and that she thereafter filled said position for a certain period, does not obligate the City, in the absence of funds, to keep her in continuous employment and to pay her a salary even though no salaries are rendered to the City, nor does the fact that the City council appropriated for the salary of stenographer, Junior Grade, in the City's services, a larger sum than was appropriated by the Board for a like position, operate to create any liability against the City for the difference in the appropriations. Upon a careful consideration of the stipulated facts we are unable to see what remedy at law the defendant can be held liable. Upon the civil law, as well as in this court, counsel for the plaintiff unsuccessfully contended that the stipulated facts were insufficient to support the judgment, and the defendant insisted that the same should be remanded, for the reason that the stipulation was merely given and

does not fairly and fully state all the essential facts necessary to a correct determination of the claim. We have concluded that justice will be best served by reversing the judgment and remanding the cause, and it is accordingly so ordered.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

does not fairly and fully state all the essential facts necessary
to a correct determination of the case. It is submitted that
justice will be best served by reversing the judgment and remanding
the cause, and it is accordingly so ordered.

REVEREND JUSTICE OF THE PEACE

Bellevue, N. Y., and Laramie, W. Y., 1900.

1900

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1900

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1900

34872

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error.

v.

DOMINICK BRANCATO,
Plaintiff in Error.

1047
ERROR TO MUNICIPAL
COURT OF CHICAGO.

262 I.A. 618

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago charging the plaintiff in error, hereinafter called the defendant, Dominick Brancato, with being a vagabond. He was tried by the court and sentenced to the House of Correction for the term of six months.

The defendant was arrested on the afternoon of November 19, 1930. On November 20, 1930, the information was filed. The case was tried on November 21, 1930. It appears that from the time the defendant was arrested and until the case was called for trial he was in custody. At the time the trial court allowed the information to be filed he entered an order "that the defendant be held to bail pending the final judgment or order in this cause in the sum of Five Thousand Dollars." The common law record recites that the defendant pleaded not guilty to the information and that he waived a trial by jury.

The defendant contends that he was denied that fair and impartial trial that is guaranteed to him by the fundamental laws of this state, and in support of this contention a number of points have been raised and argued. The full proceedings of the trial are contained in a bill of exceptions, and as the bill is a very short one, we deem it advisable to recite in full the entire portion of the same that pertains to the trial:

THE PEOPLE OF THE STATE OF
ILLINOIS,
Plaintiff in Error,
v.
JAMES EARL RAY,
Defendant in Error.

CHIEF JUSTICE OF THE SUPREME COURT
OF THE STATE OF ILLINOIS

IN SENATE

MR. JUSTICE SCAMMAM DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago charging the plaintiff in error, hereinafter called the defendant, James Earl Ray, with being a vagabond. He was tried by the court and sentenced to the House of Correction for the term of six months.

The defendant was arrested on the afternoon of November 19, 1950. On November 20, 1950, the information was filed. The case was tried on November 21, 1950. It appears that from the time the defendant was arrested and until the case was called for trial he was in custody. At the time the trial court allowed the information to be filed he entered an order "that the defendant be held to bail pending the final judgment or order in this cause in the sum of Five Thousand Dollars." The common law record reflects that the defendant pleaded not guilty to the information and that he waived a trial by jury.

The defendant contends that he was denied that fair and impartial trial that is guaranteed to him by the fundamental laws of this state, and in support of this contention a number of points have been raised and argued. The full proceedings of the trial are contained in a bill of exceptions, and as the bill is a very short one, we deem it advisable to refer to that the entire portion of the same that pertains to the trial:

"BE IT REMEMBERED That heretofore, to-wit, on the 21st day of November, A. D. 1930, on one of the days of court, before the Honorable John H. Lyle, sitting as one of the judges of said Court, this cause came on for hearing.

People represented by Lester Curtis,
Assistant State's Attorney.

Dominick Brancato, present.

And thereupon the People, to maintain the issues on their part introduced the following evidence, to-wit:

THE COURT: Are you ready for trial?

THE DEFENDANT: No, sir, my attorney ain't here. I would like a continuance.

THE COURT: Are you ready for trial?

THE DEFENDANT: No, I want a change of venue.

THE COURT: Where is your petition for a change of venue?

THE DEFENDANT: I have no petition. I want it continued. My lawyer is not here.

THE COURT: The motion for a continuance is overruled.

THE DEFENDANT: I want a change of venue.

THE COURT: There is no petition in accordance with the statute for change of venue, and the motion is overruled.

THE DEFENDANT: I ain't ready. I want a continuance. My attorney is not here. I want a continuance to get my lawyer here.

THE COURT: Officer, I believe this is the man who was arrested for boring through the wall under a jewelry store and placing dynamite to blow into the place and was caught in the act, is it not? He has been in before.

OFFICER VAN HERIK: Yes, your Honor. I think he is now out on bonds in the gun case.

THE COURT: As I understand, this is the man who was also arrested with another man waiting outside of the State's Attorney's office in the Temple Building, and as I recollect it, the testimony was that he was charged with attempting to take some lawyer for a ride.

THE DEFENDANT: I ain't ready for trial. I want a continuance.

THE COURT: Mr. State's Attorney, I do not believe we will grant a continuance, and since there is no petition for a change of venue, we will try the vagrancy charge. Anyway, I understand this is one of Capone's men. He has been in court, I believe, several times before. The motion for continuance is overruled, and since there is no petition for a change of venue, swear the witnesses, please.

(Witnesses sworn. The defendant refused to put up his hand.)

THE DEFENDANT: My attorney ain't here, your Honor.

THE COURT: Officer Van Herik, are you the complainant in the vagrancy charge?

OFFICER VAN HERIK: Yes, your Honor.

THE COURT: When was he picked up the last time?

OFFICER VAN HERIK: He was picked up on Wednesday afternoon.

THE COURT: On what occasion was he arrested?

OFFICER VAN HERIK: I seen him sitting in a car upon Clark Street one afternoon at two o'clock. His partner got away. He ran down the alley.

THE COURT: Was he the one that was in front of the State's Attorney's office some time before with two loaded revolvers, and on another occasion caught in the act of blowing through the basement wall of an adjoining building into a jewelry store?

THE IT HONORABLE THAT REPRESENTATIVE, so-wit, on the 11th day of November, A. D. 1930, on one of the days of court, before the Honorable John E. Kyle, sitting as one of the judges of said Court, this cause came on for hearing.

People represented by Lester Curtis, Assistant State's Attorney.

Domestic Relations, present.

And thereupon the People, to maintain the issues on hand.

First introduced the following evidence, so-wit:

THE COURT: Are you ready for trial?

THE DEFENDANT: No, sir, my attorney ain't here. I would

like a continuance.

THE COURT: Are you ready for trial?

THE DEFENDANT: No, I want a change of venue.

THE COURT: Where is your petition for a change of venue?

THE DEFENDANT: I have no petition. I want it continued.

My lawyer is not here.

THE COURT: The motion for a continuance is overruled.

THE COURT: I want a change of venue.

THE COURT: There is no petition in accordance with the

statute for change of venue, and the motion is overruled.

THE DEFENDANT: I ain't ready. I want a continuance. My

attorney is not here. I want a continuance to get my lawyer here.

THE COURT: Officer, I believe this is the man who was

arrested for passing through the wall under a jewelry store and

hiding himself to blow into the place and was caught in the act.

is it not? He has been in before.

OFFICER VAN HEIRIN: Yes, your Honor. I think he is now

out on bonds in the gun case.

THE COURT: As I understand, this is the man who was also

arrested with another man waiting outside of the State's Attorney's

office in the Temple Building, and as I recollect it, the testimony

was that he was charged with attempting to take some lawyer for a

ride.

THE DEFENDANT: I ain't ready for trial. I want a con-

tinuance.

THE COURT: Mr. State's Attorney, I do not believe we will

grant a continuance, and since there is no petition for a change of

venue, we will try the ordinary charge. Anyway, I understand this

is one of Capone's men. He has been in court, I believe, several

times before. The motion for continuance is overruled, and since

there is no petition for a change of venue, swear the witnesses,

please.

(Witnesses sworn. The defendant refused to put up his

name.)

THE DEFENDANT: My attorney ain't here, your Honor.

THE COURT: Officer Van Heirin, are you the complainant in

the robbery charge?

OFFICER VAN HEIRIN: Yes, your Honor.

THE COURT: When was he picked up the last time?

OFFICER VAN HEIRIN: He was picked up on Wednesday afternoon.

THE COURT: On what charges was he arrested?

OFFICER VAN HEIRIN: I seen him sitting in a car upon Clark

Street one afternoon at two o'clock. His partner got away. He ran

down the alley.

THE COURT: Was he the one that was in front of the

State's Attorney's office some time before with two loaded revolvers.

and on another occasion caught in the act of blowing through the

backboard wall of an adjoining building into a jewelry store?

OFFICER VAN HENRIK: Yes, sir.

THE COURT: What is his partner's name?

OFFICER VAN HENRIK: Dominick Bello.

THE COURT: How many times have you seen them altogether?

OFFICER VAN HENRIK: Seven or eight times, never working.

THE COURT: Has he ever to your knowledge had any visible means of support?

OFFICER VAN HENRIK: No, sir. They don't work.

THE COURT: Is there anything you wish to say?

THE DEFENDANT: I haven't anything to say. My attorney isn't here, I want my attorney.

THE COURT: You are a police officer of the city of Chicago?

OFFICER VAN HENRIK: Yes, sir.

THE COURT: Brancato, is there anything you want to say?

THE DEFENDANT: I want a change of venue.

THE COURT: The motion for continuance has been overruled, and also the motion for a change of venue because there is no petition in accordance with the statute.

(The defendant having nothing to say, the Court sentenced the defendant to six months in the House of Correction on the charge of vagrancy.)"

It also appears from the bill of exceptions that subsequent to the date of the trial the defendant, by counsel, moved the court to set aside the judgment and to grant a new trial in the cause and that this motion was overruled.

It is perfectly clear, from the bill of exceptions, that the contention of the defendant is a meritorious one. When the defendant was brought before the bar he was not represented by counsel. The trial court abandoned the bench and usurped the duties of the prosecuting attorney. To the credit of the latter it must be said that he took absolutely no part in the so-called trial. It conclusively appears that the trial court had prejudged the case and had concluded, in advance, to find the defendant guilty. The rights guaranteed to the defendant by the fundamental law of the state were entirely disregarded and the entire proceeding constituted an affront to justice.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

OPTIONAL VAN HENRIK: Yes, sir.
 THE COURT: What is his partner's name?
 OPTIONAL VAN HENRIK: Dominick Solis.
 THE COURT: How many times have you seen them altogether?
 OPTIONAL VAN HENRIK: Seven or eight times, never working.
 THE COURT: Has he ever to your knowledge had any visible

means of support?
 OPTIONAL VAN HENRIK: No, sir. They don't work.
 THE COURT: Is there anything you wish to say?
 THE DEFENDANT: I haven't anything to say. My attorney

has been here. I want my attorney.
 THE COURT: You are a police officer of the city of Chicago?
 OPTIONAL VAN HENRIK: Yes, sir.

THE COURT: Stenographer, is there anything you want to say?
 THE DEFENDANT: I want a change of venue.

THE COURT: The motion for continuance has been overruled, and also the motion for a change of venue because there is no petition in connection with the statute.
 (The defendant having nothing to say, the Court sentenced the defendant to six months in the House of Correction on the charge of larceny.)

It also appears from the bill of exceptions that subsequent to the date of the trial the defendant, by counsel, moved the court to set aside the judgment and to grant a new trial in the case and that this motion was overruled.

It is perfectly clear, from the bill of exceptions, that the contention of the defendant is a meritless one. When the defendant was brought before the bar he was not represented by counsel. The trial court abandoned the bench and occupied the duties of the prosecuting attorney. To the credit of the latter it must be said that he took especially good part in the so-called trial. It conclusively appears that the trial court had prejudged the case and had concluded, in advance, to find the defendant guilty. The rights guaranteed to the defendant by the fundamental law of the state were entirely disregarded and the entire proceeding conducted and thrust to justice.

The judgment of the Municipal Court of Chicago is reversed

and the cause is remanded.

WYATT & WYATT, JR.

Attorneys, 111. 111. and 111. 111. 111.

34935

ANDY BOTYANZSKI and
SOPHIA BOTYANZSKI,

Appellees,

v.

SOVEREIGN CAMP WOODMEN
OF THE WORLD, a corporation,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

262 I.A. 648²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Andy Botyanzski and Sophia Botyanzski, plaintiffs, sued Sovereign Camp Woodmen of the World, a corporation, defendant, in the Municipal Court of Chicago in a fourth class action. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against the defendant and assessing the plaintiffs' damages in the sum of \$400. Judgment was entered on the verdict and the defendant has appealed.

On March 1, 1927, the defendant, a fraternal benefit association, issued a benefit certificate on the life of Jim Gorog, aged twelve years, in which the plaintiffs were named as beneficiaries. The insured died on March 9, 1928. The defendant concedes that if it is liable under the policy the amount due the plaintiffs is \$400. The benefit certificate contains the following provisions:

"This insurance is granted in consideration of the monthly premium hereinbefore stated in the schedule and of the payment of a like amount on or before the first day of each consecutive month thereafter until the next birthday of the insured after the twentieth anniversary of this certificate, or until the prior death of the insured.

All premiums are payable at the Home Office of the Society, but may be paid to an authorized representative of the Society; such payments to be recognized by the Society must be entered at the time of payment in the premium receipt book belonging with this certificate. If for any reason the premium be not called for when due, by the authorized representative of the Society, it shall be the duty of the certificate holder, before said premium shall be in arrears thirty days, to bring or send said premium to the Home Office of

AND THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA
IN RE: THE ESTATE OF

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OF THE DISTRICT OF COLUMBIA

the Society or to one of its local representatives. If the premiums are not paid as herein specified, this certificate shall become null and void.

Modifications - This certificate is issued upon an application and contains the entire contract between the parties hereto, and none of its terms can be waived or modified in any case, except by an endorsement hereon signed by the Sovereign Commander or Sovereign Clerk, whose authority for this purpose will not be delegated. Representatives are not authorized to waive any of the terms or conditions of this certificate or to extend the time for payment of premiums or other moneys due the Society by making any promise or by accepting any representation or information.

Revival. Should this certificate become void for non-payment of premium, it will be revived within one year from the date to which premiums have been duly paid upon payment of all arrears, provided satisfactory evidence of the insurability of the insured be furnished to the sovereign Commander, but such revival shall not take effect unless at the date thereof the insured is living and in sound health."

The affidavit of merits sets forth (inter alia) that the certificate provides that a monthly premium of \$1.10 shall be paid to the defendant on or before the first day of each month, and if not paid the certificate shall be null and void; that the premium due on February 1, 1928, remained unpaid on March 1, 1928, and that the certificate thereby became null and void; that on March 5, 1928, an attempt was made to revive the certificate; that on that date the insured was suffering from a disease of the heart and that he died therefrom on March 9, 1928, and that the said certificate was not in force and "the attempted revival thereof was null and void." The plaintiffs, in their replication, admitted that the premiums due in February and March, 1928, were not paid until March 7, but they alleged that all the other premiums that had been paid on the benefit certificate prior to that date were accepted by the defendant long after default in payment, and that therefore the defendant waived the provisions of the certificate providing for a forfeiture for failure to pay premiums, and that it was estopped from requiring proofs of good health on March 5, 1928, to reinstate the certificate; that the conduct of the defendant in receiving dues long after the dates they were due, waived the requirement of the certificate and by-laws that payment of the dues should be made on the first day of each month, and it is

the liability as to one of the local representatives. If the premiums are not paid as herein provided, this certificate shall become null and void.

Beneficiaries - This certificate is issued upon an application and contains the entire contract between the parties hereto, and none of its terms can be waived or modified in any manner, except by an endorsement signed by the Beneficiary, Commander or Governing Officer, whose authority for this purpose will not be delegated. Representations are not authorized to waive any of the terms or conditions of this certificate or to extend the time for payment of premiums or other moneys due the Society by making any promise or by accepting any representation or information.

Revival. Should this certificate become void for non-payment of premium, it will be revived within one year from the date so which premiums have been duly paid upon payment of all arrears, provided satisfactory evidence of the insurability of the insured be furnished to the Governing Officer, and such revival shall not take effect unless at the date thereof the insured is living and in sound health.

The affidavit of marital status (inter alia) that the certificate provides that a monthly premium of \$1.10 shall be paid to the extent-

and on or before the first day of each month, and if not paid the

certificate shall be null and void; that the premium due on February

1, 1922, remained unpaid on March 1, 1922, and that the certificate

thereby became null and void; that on March 5, 1922, an attempt was

made to revive the certificate; that on that date the insured was

suffering from a disease of the heart and that he died therefrom on

March 9, 1922, and that the said certificate was not in force and "the

attempted revival thereof was null and void." The plaintiff, in

their petition, admitted that the premiums due in February and

March, 1922, were not paid until March 7, and they alleged that all

the other premiums that had been paid on the benefit certificate prior

to that date were accepted by the defendant long after default in pay-

ment, and that therefore the defendant waived the provisions of the

certificate providing for a forfeiture for failure to pay premiums,

and that it was estopped from requiring proofs of good health on

March 5, 1922, to reinstate the certificate; that the amount of the

defendant is receiving case long after the date that it was

received the requirements of the certificate and by laws that payment of

the dues should be made on the first day of each month, and if it

therefore estopped from pleading the same. The answer of the defendant to the plaintiffs' reply sets out that notwithstanding the matters and things set up in the reply, the defendant did not, by its conduct, estop itself and waive the defense set out in its affidavit of merits; that there is a provision in its by-laws and in the policy sued on that no representatives of the defendant have the power to extend the time for payment of premiums or other moneys or waive any of the terms of the said policy; that defendant had no knowledge that the dues of the insured were, in any instance, received after they were due, except as it learned the same after the death of the insured. The amended reply of the plaintiffs to the defendant's affidavit of merits alleges, inter alia, that the representative of the defendant, on March 5, 1928, knew that the insured was sick.

The defendant contends that the contract of insurance provides for the forfeiture of the contract upon the failure of the member to pay an assessment and that this provision is self-executing; that the February, 1928, premium was not paid on or before March 1, 1928, and therefore, on March 2, 1928, the policy was void. In support of this contention the defendant cites Stringham v. Bankers Life Ass'n, 309 Ill. 131, but it appears that the question of waiver was not involved in that case. The terms of a benefit certificate providing for forfeiture are made for the benefit of the society, and it may, by its conduct and course of dealing, waive them. (Conductors' Benefit Ass'n v. Tucker, 157 Ill. 194.) Contracts of insurance, being entirely of the insurer's own making, are construed strictly against the insurer and liberally against the insured. (Zeman v. North Am. Union, 263 Ill. 304.) Such an association may waive by-laws which declare forfeitures and suspension by accepting dues and assessments with full knowledge of all the facts constituting a violation of the rules of the order, or by other acts and conduct of its officers and agents of such a character as to induce a belief on the part of the insured that the

society does not intend to exercise its right of forfeiture.

(Zeman v. North Am. Union, supra; Conductors' Benefit Ass'n v. Tucker, supra; Waerness v. Independent Order of Foresters, 244 Ill. App. 211; Knights Templars Indemnity Co. v. Vail, 206 Ill. 404.) In the instant case it appears that not one of the thirteen premiums paid was paid on the date required by the policy. The payments for October, 1927, and March, 1928, were made during the respective months, but all of the others, including the first, were made long after the time fixed by the policy. Acceptance of a past due premium without condition waives the forfeiture provision in the contract. (Conductors' Benefit Ass'n v. Tucker, supra; Grand Lodge, etc. v. Lachmann, 199 Ill. 140; Order of Foresters v. Schweitzer, 171 Ill. 325; Jones v. Knights of Honor, 236 Ill. 113; Illinois Life Ass'n v. Wells, 200 Ill. 445.)

The defendant contends that the contract provides that where the insured has defaulted in his payments he "can be reinstated on payment of arrears if he is in good health, the good health of the insured is a prerequisite to reinstatement, and a payment of arrears when not in good health will be ineffective." In support of this contention Busta v. Court of Honor, 172 Ill. App. 71, 76, and Neenan v. Nat'l Council, etc., 188 Ill. App. 490, are cited. In each of these cases, when the assessments in arrears were paid neither the society nor its representative knew of the sickness of the insured. Where the certificate provides that the insured cannot be reinstated, when in default for failure to pay premiums, unless he is in good health, such a provision may be waived by the society in accepting premiums in arrears, when the society or its representative has knowledge of the bad health of the insured. (Bromgold v. Royal Neighbors, 261 Ill. 60; Walker v. American Order of Foresters, 162 Ill. App. 30.) The defendant admits that its representative knew that the insured was sick and in a hospital when he collected the

completely does not intend to exercise its right of forfeiture.

(James v. United States, 251 U.S. 134, 40 S.Ct. 339, 70 L.Ed. 357.)

(United States v. Independent Order of Foresters, 244

U.S. 511, 18 S.Ct. 101, 40 L.Ed. 100, 101.)

404.) In the instant case it appears that not one of the thirteen

premiums paid was paid on the date required by the policy. The pay-

ments for October, 1927, and March, 1928, were made during the

respective months, but all of the others, including the first, were

made long after the time fixed by the policy. Assurances of a past

due premium without condition relieve the insurance provision in the

contract. (Commercial Union v. Federal Reserve Bank, 244

U.S. 511, 18 S.Ct. 101, 40 L.Ed. 100, 101.)

171 U.S. 522; James v. United States, 251 U.S. 134, 40 S.Ct. 339, 70

L.Ed. 357, 358.)

The defendant contends that the contract provides that

where the insured has defaulted in his payments he "can be reinstated

on payment of arrears if he is in good health, and good health of the

insured is a prerequisite to reinstatement, and a payment of arrears

when not in good health will be ineffective." In support of this

contention United v. Court of Claims, 275 U.S. 10, 28 S.Ct. 1, 70

L.Ed. 357, 358. and James v. United States, 251 U.S. 134, 40 S.Ct. 339, 70

these cases, when the assessments in arrears were paid neither the

society nor its representative knew of the default of the insured.

None the certificate provides that the insured cannot be reinstated,

when in default, as follows in pay statement, unless he is in good

health, such a provision may be waived by the society in accepting

premiums in arrears, when the society or its representative has

knowledge of the bad health of the insured. (Commercial Union v. Federal

Reserve Bank, 244 U.S. 511, 18 S.Ct. 101, 40 L.Ed. 100, 101.)

111. 404. 357. The defendant admits that its representative knew

that the insured was also in a hospital when he collected the

premium on March 7, 1928, and there is evidence in the record which would justify a finding by the jury that Wassermann, defendant's deputy and agent, learned in September, 1927, of the illness of the insured and that he thereafter talked with the aunt of the insured about the boy's illness "pretty nearly every month as he came collecting."

The defendant next contends that Wassermann was not authorized, under the terms of the contract, to waive the forfeiture provisions. Wassermann, called as a witness by the defendant, testified that he was "the agent for the defendant, the Woodmen of the World;" that he was "a Deputy" of the defendant; that he wrote insurance for the defendant company and collected premiums for it on the policies; that he wrote the insurance policy in question; and that he wrote insurance policies in the defendant company for the grandmother and grandfather of the insured. A restriction in a benefit certificate upon the power of an agent of a benefit society to waive any of the conditions of the contract or the manner of their waiver is a condition which may be waived by a mutual benefit association. (Guter v. Security Benefit Ass'n, 335 Ill. 174; Bromgold v. Royal Neighbors, *supra*; Leman v. North Am. Union, *supra*; Wærness v. Independent Order of Foresters, *supra*.) From the premium receipt book introduced by the defendant, and from the testimony of Wassermann, it is clear that the premiums ^{were} never paid on the dates required by the policy and that most of them were paid long after the required time. From the testimony of that witness it also appears that when premiums were overdue he would keep on calling at the home of the plaintiffs until he succeeded in collecting the premiums. He testified: "I called more than once for their dues that were paid to me, due to labor conditions I suppose, and the people didn't have any money and when I called, or she wasn't home - and when she was home she told me when to call again and so I made several calls for

of the insured about the boy's illness "pretty nearly every month
of the insured and that he characteristically talked with the nurse
illness of the insured and agent, testified in September, 1937, of the
which would justify a finding by the jury that Wassermann,
premium on March 7, 1938, and there is evidence in the record

The defendant next contends that Wasserman was not authorized, under the terms of the contract, to waive the forfeiture provisions. Wasserman, called as a witness by the defendant, testified that he was "the agent for the defendant, the 'Nation of the World'; that he was 'a deputy' of the defendant; that he wrote insurance for the defendant company and collected premiums for it on the policy; that he wrote the insurance policy in question; and that he wrote insurance policies in the defendant company for the defendant and beneficiaries of the insured. A restriction in benefit certificates upon the power of an agent of a benefit

each premium that was paid. * * * Some time in the fall of '27 the premium was not paid for several months; * * * I know for a while I didn't collect there at all because the grandmother of this Jimmie Sorog refused to pay me. * * * She (Mrs. Botyanski, one of the plaintiffs) didn't say she would not pay any more, but she just told me she can't pay it; that she hasn't got any money." It is clear from the evidence that the defendant knew that it was not receiving the premiums as required by the policy, and yet it took no affirmative steps to forfeit the policy and Wassermann continued to solicit and receive premiums from the plaintiffs.

The judgment of the Municipal Court of Chicago is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

and question that was asked. "I have time in the fall of '87
the question was not asked for several months" - "I know for a

while I didn't believe there as all because the statement of

this little fellow seemed to say so. (Mr. W. W. Wagonmaster)

one of the witnesses (didn't say she would not pay any more, but

she just said she didn't say it) that she didn't say any more."

It is clear from the evidence that the defendant was not in

any position to receive the money as received by his father, and that

such an alternative claim is entirely the policy and management

of the father and mother and not the defendant.

The father of the defendant is a

lawyer and it would be said in the evidence.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

Witness.

34955

FRANK S. CUMMINGS,
Appellee,

v.

JOHN H. KINNER et al.,
Appellees.

TRADERS INVESTMENT COMPANY,
a corporation (Cross-
Complainant),
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

262 I.A. 648³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frank S. Cummings (hereinafter called the appellee) filed his bill to foreclose a junior mortgage. Traders Investment Company, a corporation (appellant) filed an answer to the bill and also a cross-bill, in which it sought to establish a mechanic's lien against the property involved in the bill. The cross-bill alleged that the "Craft Construction Company," a corporation, "the 'Contractor,'" entered into a contract with the owners of the real estate sought to be foreclosed, to furnish labor and materials for certain improvements to be made on the premises in question; that the said contractor, by an instrument in writing, assigned all of its rights to the amount due, together with the contractor's lien therefor, to the appellant, and that the latter filed with the clerk of the Circuit court of Cook county a claim for mechanic's lien against the property, verified by the affidavit of the contractor and the appellant's (assignee's) agent. The cause was referred to a master, who found (inter alia) that the appellant was not entitled to a mechanic's lien against the premises. The chancellor sustained this finding. The decree found "that by reason of the defect in the notice of lien, the Cross-

FRANK E. GUNNING, Plaintiff.

JOHN H. KIMBER et al., Defendants.

THAMES INVESTMENT COMPANY, Corporation (Cross-Defendant).

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

262 I.A. 648

MR. JUSTICE DELANEY delivered the opinion of the court.

Frank E. Gunning (hereinafter called the appellant) filed his bill to foreclose a junior mortgage. Thames Investment Company, a corporation (appellant) filed an answer to the bill and also a cross-bill, in which it sought to establish a mechanic's lien against the property involved in the bill. The cross-bill alleged that the "Thames Investment Company," a corporation, "the Contractor," entered into a contract with the owner of the real estate sought to be foreclosed, to furnish labor and materials for certain improvements to be made on the premises in question; that the said contractor, by an instrument in writing, assigned all of its rights to the amount due, together with the contractor's lien thereon, to the appellant, and that the latter filed with the clerk of the Circuit Court of Cook County a claim for mechanic's lien against the property, verified by the affidavit of the contractor and the appellant's (assignee's) agent. The case was referred to a master, who found (inter alia) that the appellant was not entitled to a mechanic's lien against the premises. The chancellor sustained this finding. The decree found "that by reason of the defect in the notice of lien, the cross-

Complainant, TRADERS INVESTMENT COMPANY, as assignee of the 'Craft Construction Co.' is not entitled to any lien on the premises herein sought to be foreclosed." Traders Investment Company, a corporation, cross-complainant, has appealed from that portion of the decree.

The contract between the owner of the premises and the contractor, so far as it is material to the determination of the question involved in this appeal, reads as follows:

"THE UNDERSIGNED, called the Owners, hereby request CRAFT CONSTRUCTION CO., called the Contractor, to furnish all labor and material necessary to remodel basement * * *.

Date March 7- 1928

Salesman

Owner

(Signed) Nellie E. Kinner (Seal)

(Signed) E. A. Parsons

Accepted for CRAFT CONSTRUCTION CO.,

By

Member of Firm"

The written assignment of the contract to the appellant was signed "CRAFT HOME IMPROVEMENT CORP. (Seal) Chas. Greenhauff, Pres."

The claim for lien filed in the office of the Circuit clerk by the appellant stated that the "Craft Construction Company, hereinafter called the 'Contractor,' entered into a written contract with Nellie E. Kinner to furnish material and labor for remodeling, altering and repairing the building * * *. That on: the 23rd day of March 1928, said Contractor sold and assigned to Traders Investment Company, claimant, all of said Contractor's right to the amount due or to become due for all of said labor and materials, together with the Contractor's lien therefor," etc. Charles Greenhauff, a witness called by the cross-complainant, testified that the work upon the building, under the contract, was done by the "Craft Home Improvement Corporation;" that said corporation was an entirely different corporation from the "Craft Construction Company," and that at the time of the making of the contract "there was no such corporation as the Craft Construction Company."

Before the master made his report, the cross-complainant

Assignment, TRANSFER INVESTMENT COMPANY, as assignee of the 'Crane' Construction Co., is not entitled to any lien on the premises herein sought to be foreclosed." Transfer Investment Company, a corporation, cross-complaint, has appeared from that portion of the record. The contract between the owner of the premises and the contractor, so far as it is material to the determination of the question involved in this appeal, reads as follows:

"THE UNDERSIGNED, called the Owners, hereby request CRANE CONSTRUCTION CO., called the Contractor, to furnish all labor and material necessary to remodel premises."

W. A. Kinney (Owner)
(Signed) W. A. Kinney (Owner)
R. A. Kinney (Contractor)
(Signed) R. A. Kinney
Contract for CRANE CONSTRUCTION CO.

Dated at Los Angeles

The written assignment of the contract to the appellant was signed "CRANE HOME IMPROVEMENT COMPANY" (owner) (Contractor, then). The claim for lien filed in the office of the Clerk of the Superior Court stated that the "Crane Construction Company, hereinafter called the 'Contractor,' entered into a written contract with W. A. Kinney to furnish material and labor for remodeling, altering and repaving the building." "That on the 24th day of March 1933, said Contractor sold and assigned to Transfer Investment Company, a corporation, all of said Contractor's right to the amount due or to become due for all of said labor and materials, together with the Contractor's lien thereon," etc. W. A. Kinney, a witness called by the cross-complainant, testified that the work upon the building, under the contract, was done by the "Crane Home Improvement Corporation," that said corporation was an entirely different corporation from the "Crane Construction Company," and that at the time of the making of the contract, there was no such corporation as the "Crane Construction Company."

Before the master made his report, the cross-complainant

made a motion for leave to amend its cross-bill by substituting the words "Craft Home Improvement Corporation" for the words "Craft Construction Company" ^{wherever} ~~the~~ the latter name was used in the cross-bill, and this motion was continued by the chancellor until such time as the master filed his report. After the report was filed, but before the entry of the decree, the chancellor denied appellant leave to amend its cross-bill as requested. The appellant contends that the amendment to the cross-bill should have been allowed, and argues that "the substitution in a bill of complaint of the name of the assignor for one erroneously named as assignor of the complainant does not, of itself, change the cause of action." The appellant calls attention to the fact that at the time it made the said motion an affidavit was presented in support of it which averred that the subscribing witness to the original bill of complaint, at that time believed that the appellant had an assignment in writing from Craft Construction Company; that the persons who theretofore had been interested in the Construction Company had organized a new corporation, called Craft Home Improvement Corporation, and were using forms of contract with the name Craft Construction Company printed in its body; that affiant did not notice the substitution of the name Craft Home Improvement Corporation; that the name Craft Construction Company was inserted in the cross-bill by error, and that the name Craft Home Improvement Corporation should be substituted wherever the name Craft Construction Company appears in the cross-bill. At the time that the court denied the motion to amend the cross-bill more than two years had elapsed since the completion of the work. It thus appears that the appellant, after the time prescribed by the Mechanic's Lien act as the limitation of liability had expired, sought to amend its cross-bill by substituting an entirely different corporation as the assignor of the contract. In other words, it sought to substitute a different legal entity as the source of its right to maintain its

... motion for leave to amend its cross-bill by substituting
the words "Great Home Improvement Corporation" for the words "Great
Construction Company". The latter name was used in the cross-
wherever
bill, and this motion was continued by the appellant until such
time as the master filed his report. After the report was filed,
but before the entry of the decree, the appellant caused appellant
leave to amend the cross-bill to be requested. The appellant contended
that the amendment to the cross-bill should have been allowed, and
argued that "the substitution in a bill of complaint of the name of
the defendant for one erroneously named as plaintiff of the complaint
does not, of itself, change the cause of action." The appellant
called attention to the fact that at the time it made the said motion
an affidavit was presented in support of it which averred that the
undersigned witness to the original bill of complaint, at that time
believed that the appellant had an agreement in writing from Great
Construction Company; that the persons who theretofore had been
interested in the Construction Company had organized a new corporation,
called Great Home Improvement Corporation, and were using the name of
that company with the name Great Construction Company printed in its books;
that appellant did not notice the substitution of the name Great Home
Improvement Corporation; that the name Great Construction Company was
inserted in the cross-bill by error, and that the name Great Home
Improvement Corporation should be substituted wherever the name Great
Construction Company appears in the cross-bill. At the time that
the court denied the motion to amend the cross-bill more than two
years had elapsed since the completion of the work. It thus appears
that the appellant, after the time prescribed by the Mechanics' Lien
act as the limitation of liability had expired, sought to amend its
cross-bill by substituting an entirely different corporation as the
plaintiff of the contract. In other words, it sought to substitute
a different legal entity as the source of the right to maintain its

cause of action. Appellant concedes, as it must, that its lien is dependent upon the lien of its assignor. The cross-bill alleges that the "Craft Construction Company" assigned the lien claim to the appellant. The amendment sought to make the assignor the "Craft Home Improvement Corporation." The evidence of the appellant not only shows that these two companies were distinct and separate entities, but that "Craft Construction Company" was not in existence at the time of the making of the contract. There is merit in the contention of the appellee that under the authority of North Side Sash & Door Co. v. Hecht, 295 Ill. 515, if the amendment to the cross-bill were permitted, the cross-bill, as so amended, would be the beginning of a new suit, brought after the time fixed by the statute.

The claim for lien filed by the appellant named the wrong person as the assignor of the claim and therefore it does not meet the essential statutory requirements in respect thereto. It is, of course, true that as to the owner of the premises the notice of lien is immaterial, but as against appellee appellant's lien cannot be enforced unless the notice of lien claim filed in the office of the clerk of the Circuit court complies with the statute. The notice filed set forth that the "Craft Construction Company" made a contract with the owner for the improvements, etc., and assigned the lien claim to the appellant. Can it be said that such a notice is sufficient to support a bill that alleges that the "Craft Home Improvement Corporation" furnished the work, etc., and that the latter corporation assigned the claim to the appellant? We think not. The appellant, while conceding that the claim for lien names the wrong party (contractor) as assignor of the claim, argues that the claim filed is sufficient to meet all essential statutory requirements in respect thereto. The cases cited in support of this argument can be readily distinguished from the instant one. A mechanic's lien notice cannot be amended after the time provided by statute for

... of action. Appellant contended, as it must, that the claim
is dependent upon the claim of its assignor. The error will allege
that the "Great Connection Company" assigned the claim to
the appellant. The amendment sought to make the assignor the "Great
Home Improvement Corporation." The evidence of the appellant was
only that these two companies were distinct and separate entities,
but that "Great Connection Company" was not in existence at the time
of the making of the contract. There is nothing in the contention of
the appellee that under the authority of North v. South & East, 20 N. Y.
200 Ill. 312. At the amendment to the cross-bill was permitted,
the cross-bill, as amended, would be the beginning of a new suit,
brought after the time fixed by the statute.
The claim for lien filed by the appellant named the wrong
person as the assignor of the claim and therefore it does not meet the
essential statutory requirements in respect thereto. It is, of course,
true that as to the owner of the premises the notice of lien is im-
material, but as against appellee appellant's lien cannot be enforced
unless the notice of lien claim filed in the office of the clerk of the
Circuit Court complied with the statute. The notice filed set forth
that the "Great Connection Company" made a contract with the owner
for the improvements, etc., and assigned the claim to the appellant.
It is to be said that such a notice is sufficient to support a lien that
alleges that the "Great Home Improvement Corporation" furnished the work,
etc., and that the latter corporation assigned the claim to the appellant.
I think not. The appellant, while asserting that the claim for lien
names the wrong party (contractor) as assignor of the claim, argues
that the claim filed is sufficient to meet all essential statutory
requirements in respect thereto. The court cited in support of this
argument can be readily distinguished from the instant one. A mechanic's
lien notice cannot be amended after the time provided by statute for

filing the same, nor can the amendment to the bill cure any error in claims of lien. In May Brick Co. v. General Engineering Co., 180 Ill. 535, the court said (p. 542): "Nothing could cure the error in the claim filed with the clerk of the circuit court within the time prescribed by the statute. (McDonald v. Rosengarten, 134 Ill. 126.) * * * The filing a statement as prescribed by section 4 being made a condition precedent to the bringing suit, it seems too clear for argument that the claim of lien cannot be amended, after suit is brought, so as to affect the suit, and that no amendment of the bill could possibly cure any error in the claim of lien. The averment in the amended bill that appellees knew the times when the brick was furnished and could suffer no damage by the error in the claim of lien, can not, even though true, avail appellant. The lien claimed must exist, if at all, by reason of the appellant's compliance with the provisions of the statute, and neither the knowledge nor the ignorance of appellees of the facts can affect the vital inquiry, has appellant so complied with the statute as to entitle it to a lien? Vonobel v. Batrander, 158 Ill. 499, 503." (Italics ours.) The material defects existing in the notice of lien could not be cured after the bringing of the suit, and "no amendment of the bill could possibly cure any error in the claim of lien" (May Brick Co. v. General Engineering Co., *supra*), and therefore an amendment to the cross-bill would have availed the appellant nothing. As was said in the late case of Liese v. Hentze, 326 Ill. 633, 637: "While the act is to be liberally construed as a remedial act, yet mechanics' liens exist only by virtue of the statute creating them, and such statutes must be strictly followed with reference to all requirements upon which the right to a lien depends. (North Side Sash Co. v. Hecht, 293 Ill. 515; Gronin v. Tatge, 281 id. 336; May Brick Co. v. General Engineering Co., 180 id. 535.)"

The decree of the Superior court of Cook county is affirmed. Gridley, P.J., and Kerner, J., concur.

AFFIRMED.

...the same, nor can the amendment to the bill cure any error
in clause of law. In Key v. Key, 100 Ill. 420, 423, 424,
100 Ill. 423, the court said (p. 423): "Nothing could more
clearly in the claim filed with the clerk of the circuit court within
the time prescribed by the statute. (Key v. Key, 100
Ill. 423.)" The filing a statement as prescribed by section 4
being made a condition precedent to the obtaining writ, it seems to
clearly for answered that the claim of law cannot be amended, after
writ is brought, so as to affect the writ, and that no amendment of
the bill could possibly be made after it is filed of law. The
amendment in the amended bill that appellee knew two times when the
writ was furnished and could make no change by the error in the
claim of law, can not, even though true, avail appellant. The
law claimed must exist, it is all, by reason of the appellant's
compliance with the provisions of the statute, and neither the
knowledge nor the ignorance of appellee of the facts can affect the
validity, nor appellant be compelled to comply with the statute as to
writ is to a law. (Key v. Key, 100 Ill. 420, 423, 424,
(Illinois case). The material defect existing in the notice of
law could not be cured after the bringing of the writ, and no
amendment of the bill could possibly cure any error in the claim of
law. (Key v. Key, 100 Ill. 420, 423, 424, and there-
fore an amendment to the original bill would avail the appellant
nothing. As was said in the last case of Key v. Key, 100 Ill.
420, 423: "This the act is to be liberally construed as a remedial
act, yet mechanics' liens exist only by virtue of the statute creating
them, and each statute must be strictly followed with reference to all
provisions upon which the right to a lien depends. (Key v. Key, 100
Ill. 420, 423, 424, 425; Key v. Key, 100 Ill. 420, 423, 424, 425;
100 Ill. 420, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 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2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466

34974

ALLEN KLINE BUCKLEY, LOUIS
OSBORNE and HAROLD E. DAVIS,
as executors of the Estate
of Matilda E. Kline, deceased,
Appellants,

v.

EMMA A. AUER and JACOB AUER,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 648⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Allen Kline Buckley, Louis Osborne and Harold E. Davis, as executors of the estate of Matilda E. Kline, deceased, plaintiffs, sued Emma A. Auer and Jacob Auer, defendants, in assumpsit. The case was tried before the court, who found the issues for the defendants. The plaintiffs have appealed from a judgment entered upon the finding.

The plaintiffs sued to recover upon a promissory note for \$1,500, executed by the defendants, dated August 26, 1925, and due thirty days thereafter. The declaration alleged (inter alia) that \$200 had been paid to the plaintiffs' testatrix upon the note. The defendants filed a plea of the general issue with notice of the following special matters relied upon for a defense: want of consideration and complete execution on the part of the defendants of a verbal agreement between the parties requiring the destruction of the note by plaintiffs' testatrix. They also denied the payment of \$200 to plaintiffs' testatrix, as alleged in the declaration. The theory of fact of the plaintiffs was that Matilda E. Kline, deceased, in her lifetime loaned the defendants \$1,500 and took the note in question as evidence of the loan; that Emma A. Auer, defendant, paid \$200 on the note June 9, 1926, to the decedent

ALVIN KLINE HUCKLEY, JAMES
 GORDON and HAROLD E. DAVIS,
 as executors of the estate
 of William E. Kline, deceased,
 Appellants.

ALVIN KLINE HUCKLEY,
 COURT, COOK COUNTY.

JAMES A. AUB and JACOB AUB,
 Appellees.

20974

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

ALVIN KLINE HUCKLEY, JAMES GORDON and HAROLD E. DAVIS,
 as executors of the estate of William E. Kline, deceased, plain-
 tiffs, vs. JAMES A. AUB and JACOB AUB, defendants, in accompaniment.
 The case was tried before the court, who found the issues for the
 defendants. The plaintiffs have appealed from a judgment entered
 upon the finding.

The plaintiffs seek to recover upon a promissory note
 for \$1,800, executed by the defendants, dated August 25, 1925, and
 due thirty days thereafter. The declaration alleged (inter alia)
 that \$200 had been paid to the plaintiffs' assistant upon the note.
 The defendants filed a plea of the general issue with notice of the
 following special matters relied upon for a defense: want of
 consideration and complete execution on the part of the defendants
 of a verbal agreement between the parties regarding the declaration
 of the note by plaintiffs' assistant. They also denied the payment
 of \$200 to plaintiffs' assistant, as alleged in the declaration.
 The theory of fact of the plaintiffs was that William E. Kline,
 deceased, in his lifetime loaned the defendants \$1,800 and took
 the note in question as evidence of the loan; that James A. Aub, and
 defendant, paid \$200 on the note June 2, 1926, so the defendant

and made a notation of the payment on the back of the note in her own handwriting, and that \$1,300 of the principal of the note remained unpaid. The theory of fact of the defendants was that the note was given as a part of a joint land purchase transaction and as a pledge by the defendants that the purchase in question would be made by the defendant Emma A. Auer with the money contributed to the joint enterprise by the decedent and with the understanding that when the purchase was made the note was to be returned to the defendants; that the defendant Emma A. Auer, after the making of the note, purchased land in Florida and exhibited the deeds for the same to the parties interested in the venture, and that the defendant Jacob Auer was merely an accommodation maker on the note.

The plaintiffs have raised and strenuously argued a number of points in support of their contention "that the judgment of the trial Court is erroneous and must be reversed and that no semblance of a defense can be found in the evidence in this record." In our view it is not necessary for us to consider all of the points raised. "Under the provisions of the Negotiable Instruments law every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value. (Cahill's Stat. 1929, chap. 93, par. 44.) It is further provided that absence or failure of consideration is a matter of defense as against any person not a holder in due course. (Cahill's Stat. 1929, chap. 93, par. 48.) The burden of proving this defense under the Negotiable Instruments law is upon the defendant who seeks to assert it." (American Nat'l Bank of Woodard, 342 Ill. 148, 150, and cases cited therein.) It is not necessary for us to decide the contention of the plaintiffs "that no semblance of a defense can be found in the evidence in this record." We are satisfied, however, after a careful consideration

and made a notation of the payment on the back of the note in her own handwriting, and that \$1,200 of the principal of the note remained unpaid. The theory of fact of the defendant was that the note was given as a part of a joint loan purchase transaction and as a pledge by the defendant that the purchase in question would be made by the defendant Emma A. and with the money contributed to the joint enterprise by the defendant and with the understanding that when the purchase was made the note was to be returned to the defendant; that the defendant Emma A. after the making of the note, purchased land in Florida and assigned the debt for the same to the parties interested in the venture, and that the defendant Emma A. was merely an accommodation maker on the note. The plaintiff has raised and successfully argued a number of points in support of their contention "that the judgment of the trial court is erroneous and may be reversed and that no compliance of a defense can be found in the evidence in this record." In our view it is not necessary for us to consider all of the points raised. Under the provisions of the applicable law, we are every ready to find that the evidence is deemed prima facie to have been taken for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value. (Smith's Stat. 1927, chap. 35, sec. 44.) It is further provided that absence or failure of consideration is a matter of defense to be proved by the party not a party to the contract. (Smith's Stat. 1927, chap. 35, sec. 45.) The burden of proving this defense under the applicable law is upon the defendant who seeks to assert it. (American Nat'l Bank of Chicago, 323 Ill. 120, 121, and cases cited therein.) It is not necessary for us to decide the contention of the plaintiff that no compliance of a defense can be found in the evidence in this record. We are satisfied, however, after a careful consideration

of all the facts and circumstances in evidence, that the record, to sustain the judgment, should be reasonably free from substantial error.

The plaintiffs contend that important evidence offered by them was erroneously excluded on objection by the defendants. This contention is clearly a meritorious one. The plaintiffs sought to prove by Elbert Morris, whose wife, Vera Morris, was a legatee under the will of the decedent, that on June 9, 1926, the witness and his wife went to the home of the defendants with the note and that his wife there made certain statements to the defendant Emma A. Auer. The defendants objected to the witness testifying as to what his wife had stated to that defendant upon the ground that the wife "was a beneficiary under the will of plaintiffs' testatrix and that the testimony was not competent." The trial court agreed with this theory of law and sustained the objection to the proposed testimony. The plaintiffs then offered to prove by the witness that his wife, on the occasion in question, stated to Emma A. Auer that she was there for the purpose of collecting at least \$200 on the note; that Mrs. Kline, in order to make up the \$1,500 she loaned the defendants, had been compelled to borrow \$200 from her adopted son Lawrence and that he was "getting excited about his money and wanted the \$200 immediately, so if she should die he would already have it before she died." The defendants objected to the offer and the court sustained the objection. This evidence tended to show that on the day in question the defendant Emma A. Auer paid \$200 on account of the note. The witness was allowed to testify that on that occasion Mrs. Auer took the note and wrote on the back of the same, "June 9/26 \$200.00 Paid," and at the same time she struck out "6%" before the word "interest" on the face of the note and wrote "No" before that word. The defendant Emma A. Auer admitted that she paid \$200 to Vera Morris on June 9, 1926, but she further stated that Lawrence Kline had put

of all the facts and circumstances in evidence, that the record to sustain the judgment, should be so amended that the substantial

error.

The plaintiff's version of the important evidence offered by them was erroneously excluded on objection by the defendant. This contention is clearly a misstatement of fact. The plaintiff sought to prove by Albert Morris, whose wife, Vera Morris, was a legatee under the will of the decedent, that on June 9, 1936, the witness and his wife went to the home of the defendant with the note and that his wife there made certain statements to the defendant. Mrs. A. A. Morris. The defendant objected to the witness testifying as to what his wife had stated to that defendant upon the ground that the wife "was a beneficiary under the will of plaintiff's decedent and that the testimony was not competent." The trial court agreed with this theory of law and sustained the objection to the proposed testimony. The plaintiff then offered to prove by the witness that his wife, on the occasion in question, stated to Mrs. A. A. Morris that she was there for the purpose of collecting at least \$500 on the note; that Mrs. Kline, in order to make up the \$1,500 she loaned the defendant, had been compelled to borrow \$500 from her adopted son Lawrence and that he was "getting excited about his money and wanted the \$500 immediately, so if she should die he would already have it before she died." The defendant objected to the offer and the court sustained the objection. This evidence tended to show that on the day in question the defendant, Mrs. A. A. Morris, paid \$500 on account of the note. The witness was allowed to testify that on that occasion Mrs. A. A. Morris took the note and wrote on the back of the same, "June 9/36 \$500.00 Paid," and at the same time she signed out "OK" before the word "interest" on the face of the note and wrote "No" before that word. The defendant Mrs. A. A. Morris admitted that she paid \$500 to Vera Morris on June 9, 1936, but she further stated that Lawrence Kline had not

\$200 in the Florida land deal, that Mrs. Eline was very ill on June 9 and Lawrence was bothering her "terribly for his share and witness paid the \$200 so he could have his share." The real purpose for which the \$200 was paid was therefore a very important question in the case. Counsel for the defendants, in the oral argument, frankly admitted that the trial court erred in sustaining the objection to the testimony offered, but he seeks to evade the effect of the ruling by claiming that the error "was fully cured by the testimony of Emma Auer herself." There is no merit in this argument. An examination of the testimony of Emma A. Auer shows that she denied paying the \$200 on account of the note and that she claimed that she paid the same in order that Mrs. Eline might buy, with the \$200, Lawrence Eline's interest in the Florida land.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

that in the Florida land deal, that Mrs. Kline was very ill on June 9 and Lawrence was supposed to be "sitting" for his share and witness paid the \$200 as he could have his share. The real purpose for which the \$200 was paid was therefore a very important question in the case. Counsel for the defendant, in the oral argument, frankly admitted that the trial court erred in admitting the objection to the testimony offered, but he seeks to avoid the effect of the ruling by claiming that the error was fairly cured by the testimony of James Aver himself. There is no merit in this argument. An examination of the testimony of James Aver shows that the correct paying the \$200 on account of the note and that she claimed that she paid the same in order that Mrs. Kline might pay, with the \$200, Lawrence Kline's interest in the Florida land.

The judgment of the circuit court of Cook County is

reversed and the cause is remanded for a new trial.

REVEREND AND HONORABLE

THE COURT OF INSTRUCTIONS

Chicago, Ill., the 1st day of January, 1907.

34986

RALPH H. ROLLINS,
Appellee,

v.

FRANK KRONCKE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 648⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Ralph H. Rollins, plaintiff, sued Frank Kroncke, defendant, in a fourth class tort action in the Municipal Court of Chicago. The case was tried by the court and there was a finding in favor of the plaintiff and against the defendant in the sum of \$223.45. Judgment was entered on the finding and the defendant has appealed.

The plaintiff sued to recover for damages caused to his automobile through the alleged negligence of the defendant. In the affidavit of merits the defendant denied that the damages to the automobile were caused by any negligence on his part and further denied that the plaintiff was required to expend the sum of \$223.45 in and about having his automobile repaired. The accident in question occurred August 24, 1930. The plaintiff was driving southeast on the south bound street car track on Indianapolis boulevard. As he approached a railroad crossing he slowed down. The defendant was driving his automobile in a northwesterly direction and at the point in question the two automobiles collided. The plaintiff, the only witness in his behalf, testified that as the defendant approached the crossing he was driving his automobile behind a motor bus; that the motor bus stopped at the crossing and the defendant then turned to the left of the motor bus "and came out to the southbound streetcar track on which I was travelling," and the front of the defendant's car struck the left front wheel of the

WILLIAM H. MILLER, Plaintiff,

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

WILLIAM H. MILLER, Plaintiff,

2621 A. 648

MR. JUSTICE GRANT WILLARD THE OPINION OF THE COURT.

WILLIAM H. MILLER, Plaintiff, against Frank Kromer, defendant.

In a recent case brought in the Municipal Court of Chicago, the case was tried by the court and there was a finding in favor of the plaintiff and against the defendant in the sum of \$25.00. Judgment was entered on the finding and the defendant has appealed. The plaintiff sued to recover for damages caused to his automobile through the alleged negligence of the defendant. In the affidavit of motion the defendant denied that the damages to the automobile were caused by any negligence on his part and further denied that the plaintiff was required to expend the sum of \$25.00 in and about having his automobile repaired. The accident in question occurred August 24, 1930. The plaintiff was driving southeast on the south bound street car track on Indianapolis Boulevard. As he approached a railroad crossing he slowed down. The defendant was driving his automobile in a northerly direction and at the point in question the two automobiles collided. The plaintiff, the only witness in his behalf, testified that as the defendant approached the crossing he was driving his automobile behind a motor bus that the motor bus stopped at the crossing and the defendant then turned to the left of the motor bus and came out as the southbound street car track on which I was travelling," and the front of the defendant's car struck the left front wheel of the

plaintiff's car. The defendant, the only witness in his behalf, testified that as he approached the railroad crossing there were two motor busses standing at the railroad crossing "on the portion of the street which is used for automobile traffic. The automobile busses were clear of the streetcar tracks. The portion of the street used for automobile traffic, at that point, is about 36 feet wide. There was plenty of room for both busses to stand abreast on the automobile driveway without being on the streetcar track. The drivers of the automobile busses were standing between their busses talking. As I came up behind the busses, I turned to the left onto the northwestbound streetcar track to go past the busses. No portion of my car, at any time, extended more than one foot southwest of the southwest of the northwestbound streetcar track. I was travelling between 20 and 25 miles an hour. As I got past the railroad crossing, Hollins' car smashed into my car."

The defendant contends that as only one witness testified for each side the plaintiff failed to prove his case by a preponderance of the evidence and therefore there should have been a finding for the defendant. It was the province of the court, hearing the case without a jury, to pass upon the credibility of the witnesses and the weight, if any, that should be attached to their testimony. Having listened to the testimony and observed the demeanor of the two witnesses, the trial court held that the preponderance of the testimony was with the plaintiff, and we have no good reason to question his judgment in that regard. Moreover, there are certain circumstances in the evidence that tend to support the testimony of the plaintiff.

The defendant further contends that it was error for the trial court to admit the plaintiff's repair bill, over the objection of the defendant, for the reason that the plaintiff failed to testify that the repair work was made necessary as the result of the accident.

plaintiff's car. The defendant, the only witness in the case,

testified that as he approached the railroad crossing there were

two motor houses standing at the railroad crossing "on the portion

of the street which is used for automobile traffic. The automobile

buses were also on the street tracks. The portion of the

street used for automobile traffic, at that point, is about 50

feet wide. There was plenty of room for both buses to stand across

on the automobile driveway without being on the street track.

The drivers of the automobile buses were standing between their

buses waiting. As I came up behind the buses, I turned to the

left onto the northwestern street track to go past the buses.

No portion of my car, at any time, extended more than one foot

across of the southeast of the northwestern street track.

I was traveling between 30 and 35 miles an hour. As I got past

the railroad crossing, plaintiff's car came into my car."

The defendant contends that as only one witness testified

for each side the plaintiff failed to prove his case by a preponderance

of the evidence and therefore there should have been a finding for

the defendant. It was the province of the court, hearing the case

without a jury, to pass upon the credibility of the witnesses and the

weight, if any, that should be attached to their testimony. Having

listened to the testimony and observed the demeanor of the two wit-

nesses, the trial court held that the preponderance of the testimony

was with the plaintiff, and we have no good reason to question his

judgment in that regard. Moreover, there are certain circumstances

in the evidence that tend to support the testimony of the plaintiff.

The defendant further contends that it was error for the

trial court to admit the plaintiff's repair bill, over the objection

of the defendant. For the reason that the plaintiff failed to testify

that the repair work was necessary as the result of the accident,

We find no merit in this contention. The plaintiff testified that as the result of the accident his "left front wheel was broken and this automatically broke the hydraulic brake system and bled it so that my brake system was put out of commission. I paid the repair bill for repairing my automobile in the amount of \$223.45. I have the repair bill here." At this point the repair bill was offered in evidence by the plaintiff and the objection of the defendant to the introduction of the same was overruled and the bill was received in evidence. The bill shows that the repair work was done by a firm engaged in the business of repairing automobiles. The defendant offered no proof as to the damage to plaintiff's automobile. In Cloyes v. Flaatijs, 231 Ill. App. 183, 192, the court, after a review of the cases bearing upon the subject, stated: "We think this principle is analogous to the one involved in the case before us, viz., that the price paid for repairing an automobile, where the work has been done by a person engaged in that line of business, nothing appearing to cast suspicion on the transaction, the bill presented by the repairman and paid, is presumptive evidence of the reasonable value of the repairs." In Syalos v. Matheason, 328 Ill. 269, 272, the Supreme court approved the foregoing ruling.

There is no merit in the instant appeal and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

We find no merit in this contention. The plaintiff testified that as the result of the accident his "left front wheel was broken and this automatically broke the hydraulic brake system and also it was that my brake system was put out of commission. I paid the repair bill for repairing my automobile in the amount of \$222.45. I have the repair bill here." As this point the repair bill was offered in evidence by the plaintiff and the objection of the defendant to the introduction of the same was overruled and the bill was received in evidence. The bill shows that the repair work was done by a firm engaged in the business of repairing automobiles. The defendant offered no proof as to the damage to plaintiff's automobile. In Givens v. Phelan, 231 Ill. App. 135, 136, the court, after a review of the cases bearing upon the subject, stated: "We think this principle is analogous to the one involved in the case before us, viz., that the price paid for repairing an automobile, where the work has been done by a person engaged in that line of business, nothing appearing to cast suspicion on the transaction, the bill presented by the repairman and paid, is presumptive evidence of the reasonable value of the repairs." In Givens v. Phelan, 231 Ill. App. 135, 136, the Supreme Court approved the foregoing ruling. There is no merit in the instant appeal and the judgment of the Municipal Court of Chicago is affirmed.

ATTORNEY.

CHIEF JUSTICE, J. J. and KENNEDY, J., concur.

34993

JOSEPH O. GRANT, as Executor of
the estate of ANDREW LEONARD
JOHNSON, Deceased,

Appellant,

v.

B. W. ROSENSTONE,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

262 I.A. 649

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph O. Grant, as Executor of the Estate of Andrew Leonard Johnson, Deceased, plaintiff, sued B. W. Rosenstone, defendant, in the Municipal Court of Chicago in an action of the first class. The case was tried before the court, the issues were found against the plaintiff, and judgment for costs was entered against him. This appeal followed.

The plaintiff's amended statement of claim alleges:

"That on or about March 20th, 1928, in the Probate Court of Cook County, Letters of Administration as Executor under the Will and Testament of Andrew Leonard Johnson, were issued to the plaintiff herein as such Executor, that on the 20th day of April, 1928 having qualified as such Executor, plaintiff herein filed an inventory prepared by the defendant as attorney for said Executor reciting the assets of the personal Estate of the said Andrew Leonard Johnson, deceased as required by law, that in and by said inventory appeared a claim of \$2,000.00 against a certain Stuart Florida Syndicate, as evidenced by a receipt for said sum in letters and figures as follows to wit:

'CHICAGO, ILLINOIS, May 1, 1925 - Received of A. L. Johnson the sum of Two Thousand Dollars investment in Stuart, Florida, Syndicate; trust certificate to follow as soon as deal has been consummated. (Signed) B. W. Rosenstone'.

The issuer of said receipt being the same person, representing the said Executor; that said issuance as aforesaid is a Class 'D' Security and issued without compliance with Chapter 121 1/2 Smith-Hurd's Revised Statutes and unlawful.

Plaintiff further alleges that as Executor of said Estate, and by leave of the Probate Court of Cook County, first had and received, there has accrued the right and it became the duty of said plaintiff to sue for and demand of the defendant herein, the sum of \$2,000.00 as aforesaid, said consideration for said sum having wholly failed.

THE STATE OF ILLINOIS, County of Cook, ss.
I, Clerk of said County, do hereby certify that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WITNESSED my hand and the seal of said County at Chicago, Illinois, this 10th day of March, 1900.

By _____, Clerk of said County.

v.

J. J. McNamee, Plaintiff.

vs.

362 I.A. 3-3

THE JUDICIAL BOARD OF THE STATE OF ILLINOIS, in and to the effect that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WITNESSED my hand and the seal of said County at Chicago, Illinois, this 10th day of March, 1900.

By _____, Clerk of said County.

THE JUDICIAL BOARD OF THE STATE OF ILLINOIS, in and to the effect that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WITNESSED my hand and the seal of said County at Chicago, Illinois, this 10th day of March, 1900.

By _____, Clerk of said County.

THE JUDICIAL BOARD OF THE STATE OF ILLINOIS, in and to the effect that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WITNESSED my hand and the seal of said County at Chicago, Illinois, this 10th day of March, 1900.

That on or about March 30th, 1900, in the Probate Court of Cook County, Illinois, a petition was filed by the said J. J. McNamee, Plaintiff, against the said J. J. McNamee, Defendant, for the purpose of having the said J. J. McNamee, Defendant, removed from the office of Clerk of said County, Illinois, and for the purpose of having the said J. J. McNamee, Defendant, appointed as Clerk of said County, Illinois, in and to the effect that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WITNESSED my hand and the seal of said County at Chicago, Illinois, this 10th day of March, 1900.

By _____, Clerk of said County.

THE JUDICIAL BOARD OF THE STATE OF ILLINOIS, in and to the effect that the within and foregoing is a true and correct copy of the original thereof as the same appears from the records of said County.

WHEREFORE, plaintiff sues for the return of said sum in damages of \$2,000.00.

And as a further claim in this behalf, the plaintiff alleges that he is the Executor of the Estate of Andrew Leonard Johnson, deceased, that he has qualified under said Will and is the duly acting Executor of said Estate, that in and by the inventory filed according to law, there appears a receipt for the sum of \$2,000.00 advanced for the purpose of a trust certificate, the receipt of said sum being executed by the defendant, that at no time has there been delivered to him or to said Estate of Andrew Leonard Johnson, Trust Certificate in Stuart Florida Syndicate, Therefore plaintiff sues for the return of said \$2,000.00 as aforesaid, as for money had and received.

WHEREFORE, plaintiff asks judgment in the sum of \$2,000.00."

The defendant's affidavit of merits avers:

"That he is the defendant in the above entitled cause, and that he verily believes that he has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand; that the nature of said defense is as follows:

1. That the alleged cause of action set out in the two several counts of plaintiff's Amended Statement of Claim accrued to the said Andrew Leonard Johnson prior to his death, and that the same abated by reason of the death of said Andrew Leonard Johnson, said Andrew Leonard Johnson having died March 12, A. D. 1928.

2. The alleged cause of action set out in said Amended Statement of Claim is a civil action to recover money based upon the provisions of the so-called, 'The Illinois Securities Law'; that the commission of the act complained of occurred on May 1, A. D. 1925, and that no civil action to recover money based upon said Illinois Securities Law was filed within five years after May 1, A. D. 1925.

2½. That said alleged cause of action accrued to Andrew Leonard Johnson during his lifetime, and that no suit was instituted thereon within one year after the death of said Andrew Leonard Johnson. Therefore said suit is barred by the Statute in such case made and provided.

3. Defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that the said supposed cause of action in said Amended Statement of Claim mentioned did not accrue to the plaintiff at any time within five years next before the commencement of this suit.

4. Defendant admits that on or about March 20, A. D. 1928 in the Probate Court of Cook County, Letters Testamentary were duly issued to the plaintiff as Executor under the last Will and Testament of Andrew Leonard Johnson, deceased; that plaintiff on the 20th day of April, A. D. 1928 filed an inventory in the Probate Court of Cook County, Illinois, which inventory was duly approved; admits that the said inventory was prepared by the defendant as attorney for the plaintiff. Defendant alleges that in said inventory there appeared an item:

'Receipt dated May 1, 1925 representing investment in Stuart Florida Syndicate, \$2000.00, deemed doubtful.'

Defendant denies that he was the issuer of said receipt, within the meaning of the Statute; denies that said receipt constituted an issuance, within the meaning of the Statute; denies that said receipt is a Class 'D' security; denies that said receipt was any security of any kind or character whatsoever, within the meaning of said Act.

WHEREFORE, Plaintiff prays for the return of said sum in damages of \$2,000.00.

And as a further claim in this behalf, the Plaintiff alleges that he is the Treasurer of the Estate of Andrew Johnson, deceased, that he has qualified under said will and is the duly acting executor of said Estate, that in and by the inventory filed according to law, there appears a receipt for the sum of \$2,000.00 advanced for the purpose of a burial certificate, the receipt of said sum being executed by the defendant, that at no time has there been delivery to him or to said Estate of Andrew Johnson, Treasurer, Certificate in County Florida probate, therefore Plaintiff prays for the return of said \$2,000.00 as aforesaid, as law money had and received.

WHEREFORE, Plaintiff asks judgment in the sum of \$2,000.00.

the defendant's affidavit of merits aver:

"That he is the defendant in the above entitled cause, and that he verily believes that he has a good defense to this suit, upon the merits, to the denial of the Plaintiff's demand that the nature of said defense is as follows:

1. That the alleged cause of action set out in the two several counts of Plaintiff's amended statement of claim occurred to the said Andrew Johnson between prior to his death, and that the same filed by reason of the death of said Andrew Johnson, said Andrew Johnson having died March 12, 1925.

2. The alleged cause of action set out in said amended statement of claim is a civil action to recover money owed upon the provisions of the so-called, 'The Illinois Certificate Law' that the completion of the act complained of occurred on May 1, A. D. 1922, and that no civil action to recover money owed upon said Illinois Certificate Law was filed within five years after May 1, A. D. 1922.

3. That said alleged cause of action occurred to Andrew Johnson between during his lifetime, and that no suit was instituted thereon within one year after the death of said Andrew Johnson, therefore said suit is barred by the statute in such case made and provided.

4. Defendant says that the Plaintiff ought not to have his election of action against him, the defendant, because he says that the said alleged cause of action in said amended statement of claim mentioned is not proper to the Plaintiff at any time within five years next before the commencement of this suit.

5. Defendant admits that on or about March 22, A. D. 1922, to the Probate Court of Cook County, Illinois Testaments were duly filed to the Plaintiff as Executor under the last will and testament of Andrew Johnson, deceased; that Plaintiff on the 20th day of April, A. D. 1922 filed an inventory in the Probate Court of Cook County, Illinois, which inventory was duly approved; admits that the said inventory was prepared by the defendant as attorney for the Plaintiff. Defendant alleges that in said inventory there appeared on item

'Receipt dated May 1, 1922 representing
Investment in Florida Florida Probate,
\$2,000.00, deceased Andrew J. Johnson'

and admits that he was the issuer of said receipt, within the meaning of the Florida Probate Law; admits that said receipt was issued to the Plaintiff as Executor of the Estate of Andrew Johnson, deceased; admits that said receipt was any security of any kind or character whatsoever, within the meaning of said Act.

Defendant denies that the consideration for the sum of Two thousand Dollars has failed; denies that defendant is indebted to plaintiff in the sum of Two thousand Dollars or any other sum; denies that either by leave of the Probate Court or otherwise, any rights have accrued to the plaintiff against the defendant.

5. Defendant denies that in and by the inventory filed by the plaintiff in the Probate Court there appears a receipt for the sum of Two thousand Dollars advanced for the purpose of a trust certificate; denies that the sum of Two thousand Dollars or any other sum was advanced for the purpose of a trust certificate; denies that defendant received the sum of Two thousand Dollars or any other sum for the purpose of a trust certificate.

6. Defendant denies that he ever borrowed of Andrew Leonard Johnson the sum of Two thousand Dollars or any other sum; denies that he ever promised to deliver to Andrew Leonard Johnson a trust certificate. Defendant states that the deal referred to in said receipt was never consummated; that it never became or was the duty of defendant to deliver any trust certificate to said Andrew Leonard Johnson; that neither said Andrew Leonard Johnson or the Estate of said Andrew Leonard Johnson have suffered any damage of any kind or character by reason of the non-issuance of any trust certificate; that no demand of any kind or character was ever made upon defendant by said Andrew Leonard Johnson.

7. That the trust certificate referred to in said receipt was not a security under the Illinois Securities Law; that it was not a Class 'D' security under the Illinois Securities Law; that no law, statute, ordinance or regulation prohibited either the issuance of said receipt or would have prohibited the issuance of a trust certificate of the character referred to in said receipt.

8. That prior to the delivery of said receipt in question, defendant was the bona fide owner thereof; that the delivery of such receipt was not made in the course of repeated and/or successive transactions of a like character, nor was defendant at the time in question a broker or dealer in securities or an underwriter of such securities. If the delivery of said receipt was in fact the sale of a security within the meaning of the Act, the same was a security in Class 'B' under said Act and was consequently an exempted sale."

The amendment to the affidavit of merits avers:

"That Andrew Leonard Johnson and defendant and certain other persons entered into a certain partnership for the purchase of real estate in Florida and the resale of same; that the purpose of said partnership was to speculate in Florida real estate; that said partnership was formed on or about the 1st day of May, 1926; and that said instrument in said statement of claim referred to, evidences merely the contribution of said Andrew Leonard Johnson in said partnership venture; that said Andrew Leonard Johnson was during his lifetime an Assistant Secretary in the Illinois Merchants Trust Company, a large banking corporation doing business in the City of Chicago and said Andrew Leonard Johnson was experienced in business and in the investment of money, and was well aware that the purposes of said partnership were speculative and hazardous; that said contribution of said Andrew Leonard Johnson and the contributions of the others of the partnership, including the contribution in excess of Ninety-five Hundred Dollars of defendant, were in fact devoted to the purposes of said partnership; that as a result of the conduct of said partnership business, said partnership suffered a complete

loss of all of the assets of said partnership, including the contribution of said Andrew Leonard Johnson, the contribution of the said defendant, and the contributions of the other partners; that defendant is at all times ready and willing to account to plaintiff or to any other persons in connection with said partnership business; that upon an accounting it will in truth and in fact appear that the Estate of said Andrew Leonard Johnson is indebted to the partnership as a result of the conduct of said partnership business; that said Andrew Leonard Johnson and defendant being co-partners in said venture, that no action at law can be maintained by one partner against the other, but the remedy of plaintiff, if any, is by suit in chancery for an accounting."

Upon the trial the plaintiff introduced the following instrument in evidence:

"Chicago, Illinois
May 1, 1925

Received of A. L. Johnson, the sum of Two thousand Dollars investment in Stuart, Florida, Syndicate; trust certificate to follow as soon as deal has been consummated.
(Signed) B. W. Rosenstone."

The executor testified that he found this instrument among the personal effects of the deceased, Andrew Leonard Johnson, and that he never received from the defendant the certificate mentioned in the instrument nor had the defendant returned to him the \$2,000 mentioned therein. The defendant's affidavit of merits states that the deceased, Johnson, died March 12, 1928. The plaintiff claims that the "receipt" and the aforesaid testimony of the executor made out a prima facie case against the defendant. If count two is considered as one for money had and received, then the burden rested upon the plaintiff to prove that the defendant held money which ex aequo et bono he ought to pay to the plaintiff. (See McManus v. Nellis, 203 Ill. App. 108, 116; Nicholson v. Moloney, 195 Ill. 575, 578.) The instrument provides that "trust certificate to follow as soon as deal has been consummated." The defendant, by his pleadings, expressly denied that the deal had ever been consummated or that it ever became the duty of the defendant to deliver the trust certificate to Johnson. The plaintiff introduced no evidence to show that the deal in question had been consummated, nor did he allege in his pleadings that the trust certificate was not delivered to Johnson during his lifetime. The statement of claim does allege that the

lack of all of the assets of said partnership, including the
contribution of said Andrew Johnson, the contribution of
the said defendant, and the contribution of the other partners;
that the said partnership is at all times ready and willing to account to
plaintiff or to any other persons in connection with said partnership;
and defendant that upon an accounting it will be found and in fact
appear that the assets of said Andrew Johnson is included
in the partnership as a result of the conduct of said partnership
business; that said Andrew Johnson and defendant being
partners in said venture, that no action at law can be maintained
by one partner against the other, but the remedy of plaintiff, if
any, is by suit in chancery for an accounting."

Upon the trial the plaintiff introduced the following instrument in
evidence:

"Chicago, Illinois
May 1, 1935

Received of A. H. Johnson, the sum of Two Thousand Dollars
Investment in Street, Chicago, Real Estate Trust certificate
to follow as soon as deal has been consummated.
(Signed) J. C. Cunningham."

The expert testimony that he found this instrument among the personal
effects of the deceased, Andrew Johnson, and that he never
received from him the same; the expert testimony in the instrument
that the defendant retained it in his possession. The
expert testimony of writer states that the deceased, Johnson,
also dated 12, 1935. The plaintiff claims that the "receipt" and the
documentary testimony of the expert made out a prima facie case against
the defendant. It seems to be considered as one for money had and
received, then the burden rested upon the plaintiff to prove that the
defendant held money which he ought to pay to the
plaintiff. (See McNulty v. Hollis, 203 Ill. App. 108, 118; Robinson v.
McNulty, 197 Ill. 575, 578.) The instrument provides that "this
certificate to follow as soon as deal has been consummated." The defense
and, by its pleadings, expressly denied that the deal had ever been consum-
mated or that it ever became the duty of the defendant to deliver the
trust certificate to Johnson. The plaintiff introduced no evidence to
show that the deal in question had been consummated, nor did he allege
in his pleadings that the trust certificate was not delivered to Johnson
during his lifetime. The statement of claim then alleges that the

certificate was never delivered to the executor nor to the estate, but the proof is silent as to whether or not the defendant delivered the certificate to Johnson during the lifetime of the latter. The "receipt" is only prima facie evidence of the facts recited in it. (See Ennis v. Pullman Palace Car Co., 165 Ill. 161, 182.) The offer of the "receipt" and the testimony of the executor that he did not receive the certificate nor the \$2,000 did not make out a prima facie case for the plaintiff under count five.

In his affidavit of merits the defendant averred (inter alia) that if there was any obligation of the defendant towards the plaintiff, it was that of a partner, and he now contends that the "plaintiff cannot maintain an action at law against defendant because the obligation of defendant, if any, toward plaintiff's decedent was that of a partner;" that "if any relationship between defendant and plaintiff is to be inferred from the existence of the receipt in question, it is that of partnership." The "receipt" recites: "Received of A. L. Johnson, the sum of Two thousand Dollars investment in Stuart, Florida, Syndicate." As there was no evidence offered, save the "receipt," to show the relationship between the defendant and the decedent, the relationship must be determined from the language of the "receipt." In Hambleton v. Rhind, 84 Md. 456, 487, the court said:

"Now, a syndicate, according to the undisputed evidence, is an association of individuals, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. It is as respects the persons composing it, a partnership, and in so far as these same persons are concerned the legal obligations assumed by them are, as between themselves, substantially the same as those which the law imposes on the members of an ordinary copartnership."

In Minot v. Burroughs, 223 Mass. 595, 602, the court said:

"A 'syndicate' in this connection means an association of persons with a community of interest in the fund raised for the purpose of carrying on the particular undertaking. ^{The} members share

certificates were never delivered to the defendant nor to the estate,
but the fact is clear as to whether or not the defendant delivered
the certificates to Johnson during the lifetime of the latter. The
"receipt" is not a prima facie evidence of the fact stated in it.
(See Wells v. Wells, 100 Cal. 111, 112, 113.) The effect
of the "receipt" and the testimony of the executor that he did not
receive the certificates nor the \$5,000 did not make out a prima facie
case for the plaintiff under count five.

In his affidavit of denial the defendant averred (inter
alia) that if there was any obligation of the defendant towards
the plaintiff, it was that of a partner, and he now contends that
the plaintiff cannot maintain an action at law against defendant
because the obligation of defendant, if any, towards plaintiff's
descendant was that of a partner; that "if any relationship between
defendant and plaintiff is to be inferred from the existence of the
receipt in question, it is that of partnership." The "receipt"
issued "Received of J. L. Johnson, the son of Two Thousand Dollars
Investment in United States Bonds, Twenty Dollars." as there was no evidence
offered, save the "receipt," to show the relationship between the
defendant and the descendant, the relationship must be determined from
the language of the "receipt." In Wells v. Wells, 100 Cal. 111, 112, 113,
the court said:

"Now, a syndicate, according to the authorities, is an association of individuals, formed for the purpose of con-
ducting and carrying out some particular business transaction,
or a partnership, in which the members are
mutually interested. It is as respects the persons composing it,
a partnership, and is as far as those persons are concerned,
the legal obligations assumed by them are, as between themselves,
essentially the same as those which the law imposes on the
members of an ordinary partnership."

In Wells v. Wells, 100 Cal. 111, 112, 113, the court said:

"A 'syndicate' in this connection means an association
of persons with a community of interest in the fund raised for the
purpose of carrying on the particular undertaking." ^{the} members share

the profits and bear the losses in proportion to their respective interests. The underwriting syndicate was simply an association of those who furnished the money to make the purchase with an agreement that the managers should have full control of the venture and divide the proceeds or assets among the members of the association in proportion to their financial interests. So far as concerned each other, their relations and rights were analogous to those of copartners." (See also Morrison v. Earle, 5 Ont. 434, 476.)

Testing the relationship of the plaintiff and the decedent by the language of the "receipt," it would appear that the relationship was that of a partnership. In Burns v. Nottingham, 60 Ill. 531, the court said:

"It is the settled law of this court that one partner can not bring an action in assumpsit against his late partner, unless, upon a dissolution of the co-partnership, the partners account together, and a balance is stated in favor of one, and the other agrees to make payment of such sum. The balance so found must be a final settlement of all the partnership accounts, but balances only struck preparatory to a final account are not sufficient to form the subject matter of an action at law. Until this is done, the remedy is in equity." (See also Scherman v. Bickley, 248 Ill. App. 1, 11, and cases cited therein.)

Parties who engage in an enterprise, although no general partnership exists, are partners in the particular transaction. (See Parish v. Mainum, 306 Ill. 619, 622.) Therefore the plaintiff cannot maintain an action at law against the defendant.

The plaintiff contends that the first count of his statement of claim states a cause of action under the Illinois Securities Law and that the trial court erred in holding that the plaintiff had not made out a prima facie case under that count. After a careful consideration of the argument in support of this contention we are satisfied that there is no merit in it.

The defendant has raised and argued a number of contentions in support of the judgment of the trial court, but we do not deem it necessary to specifically refer to these.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

35193

JOSEPH BLUMFIELD and
SOPHIE BLUMFIELD,
Appellees,

v.

SAMUEL GOLDMAN,
LOUIS E. GOLDMAN and
GOLDMAN FINANCE COMPANY,
a corporation,
Appellants.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

262 I.A. 649²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by Samuel Goldman, Louis E. Goldman and Goldman Finance Company, a corporation, defendants, from an order restraining them from transferring, disposing of or selling any of a certain series of notes signed by the complainants, Joseph Blumfield and Sophie Blumfield; from commencing foreclosure proceedings upon the trust deeds, executed by the complainants, securing said notes; from suing in any court on the said notes, and from enforcing collection of the said notes until further order of the court.

The complainants filed their bill, in which they allege a series of transactions with Samuel Goldman, defendant, involving certain notes and trust deeds, which transactions are alleged to be usurious. The bill further alleges that the defendants threaten to foreclose the trust deeds and to have a receiver appointed, and to confess judgment on all of the notes signed by the complainants, and the complainants pray for an accounting as to the amounts due the defendants, and that the balance of the notes now outstanding be cancelled and that the trust deeds be released as clouds upon the title of the complainants; that the defendants be enjoined temporarily from transferring, disposing of or selling any of the series of notes

1918

THE STATE OF NEW YORK
IN SENATE

January 1, 1918

1

REPORT
OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
JANUARY 1, 1918

STATE OF NEW YORK

1918

THE COMMISSIONER OF THE LAND OFFICE

This is an advisory report of the Commissioner of the Land Office, in response to a resolution passed by the Senate on January 1, 1918, relative to the disposal of certain lands owned by the State of New York. The report contains a statement of the facts of the case, and a recommendation of the Commissioner as to the proper course of action to be taken by the State.

The lands in question are situated in the County of Albany, and are owned by the State of New York. They were acquired by the State in 1885, and have since that time been held by the State. The lands are now being offered for sale, and the Commissioner is recommending that they be sold at public auction.

The lands are situated in the Town of Rotterdam, and are bounded on the north by the Town of Rotterdam, on the east by the Town of Rotterdam, on the south by the Town of Rotterdam, and on the west by the Town of Rotterdam. The lands are now being offered for sale, and the Commissioner is recommending that they be sold at public auction.

The lands are situated in the Town of Rotterdam, and are bounded on the north by the Town of Rotterdam, on the east by the Town of Rotterdam, on the south by the Town of Rotterdam, and on the west by the Town of Rotterdam. The lands are now being offered for sale, and the Commissioner is recommending that they be sold at public auction.

referred to in the bill and from commencing foreclosure proceedings upon the trust deeds executed by the complainants. The restraining order in question was entered upon this bill.

The defendants contend that the bill of complaint, upon which the restraining order was entered, is fatally defective; that the restraining order was entered upon a void and inadequate bond, and that the order granting the temporary injunction should be reversed and the bill should be dismissed for want of equity. The complainants, in their brief, state that they do not oppose the reversal of the restraining order and that they filed their brief merely to oppose the contention of the defendants that the bill is fatally defective. In view of the attitude of the complainants in respect to the restraining order, it is unnecessary for us to consider the contention of the defendants that the bill, upon which the order was entered, is fatally defective.

The injunctive order of the Superior court of Cook county, dated January 27, 1931, is reversed.

INJUNCTIVE ORDER, DATED JANUARY 27, 1931, REVERSED.

Gridley, P. J., and Kerner, J., concur.

referred to in the bill and from commencing revenue proceedings upon the assets located in the United States. The vesting order in question was entered upon this bill.

The respondents contend that the bill is defective, upon which the vesting order was entered, is fatally defective; that the vesting order was entered upon a void and inadequate bond, and that the order provided the temporary injunction should be reversed and the bill should be dismissed for want of equity. The respondents also claim that, since they do not oppose the removal of the vesting order and that they filed their brief solely to oppose the continuation of the respondents that the bill is fatally defective, in view of the absence of the respondents in respect to the vesting order, it is unnecessary for us to consider the contention of the respondents that the bill, upon which the order was entered, is fatally defective.

The informational order of the Department dated at New York, dated January 27, 1921, is returned.

INFORMATIONAL ORDER, DATED JANUARY 27, 1921, RETURNED.

Wm. J. ... and ...

35218

ROBERT BRANCH et al.,
Appellees,

v.

ISAAC A. THOMAS et al.,
Appellants.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY

262 I.A. 649

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Robert Branch et al., complainants, filed their bill against Isaac A. Thomas et al., defendants. A decree was entered, from which defendants appealed. We reversed the decree and remanded the cause for further proceedings before some chancellor other than Judge Fisher. (See Robert Branch et al. v. Isaac A. Thomas et al., 256 Ill. App. 611.) The sole ground for the reversal was that the chancellor erred in denying the petition of the defendants for a change of venue. Thereafter, in the Circuit court, on motion of the solicitor for the defendants, the mandate of this court was filed and the cause was "reinstated, redocketed and assigned to Judge William V. Brothers." On March 6, 1931, Judge Brothers entered the following order:

"On motion of solicitor for complainants, this Court having considered the petition of complainants - Trustees of the Second Baptist Church of Evanston, Illinois, and now fully advised in the premises,

"This Court finds that certain persons, whose names are unknown to complainants, with the aid of certain police officers of the said City of Evanston have wrongfully taken possession of and locked and nailed up the doors of said Church and are preventing complainants and the Trustees of said Church from entering said Church and from the possession thereof;

It is Therefore Ordered by this Court that all said persons and police officers be and each of them are hereby temporarily enjoined and restrained from further preventing complainants and said trustees from entering said Church and from further keeping the doors of said Church locked or fastened or closed against complainants or said trustees and from further interfering with said complainants and said Trustees in their possession of and from keeping them out of the complete possession of said church and from attempting so to do until the further order of the Court;

2021.A.643

APPEAL FROM CIRCUIT COURT

ROBERT BRADY et al.
Appellants.
vs.
JAMES A. THOMAS et al.
Appellees.

THE JUDGE AGAINST DELIVERED THE OPINION OF THE COURT.

ORDER OF THE COURT.

On motion of appellee for summary judgment, this Court having considered the petition of complainants - Trustees of the Second Baptist Church of Evanston, Illinois, and now fully advised in the premises.

"This Court finds that certain persons, whose names are unknown to complainants, with the aid of certain police officers of the said City of Evanston have wrongfully taken possession of and locked and nailed up the doors of said Church and are preventing complainants and the Trustees of said Church from entering said Church and from the possession thereof;

It is Therefore Ordered by this Court that all said persons and police officers be and each of them are hereby temporarily enjoined and restrained from further preventing complainants and said Trustees from entering said Church and from further helping the doors of said Church locked or fastened or closed against complainants and said Trustees and from further interfering with said complainants and said Trustees in their possession of and from keeping them out of the complete possession of said Church and from attempting so to do until the further order of the Court;

And the same was "reinstated, redacted and assigned to Judge William V. Proberts." On March 6, 1931, Judge Proberts entered the following order:

On motion of appellee for summary judgment, this Court having considered the petition of complainants - Trustees of the Second Baptist Church of Evanston, Illinois, and now fully advised in the premises.

"This Court finds that certain persons, whose names are unknown to complainants, with the aid of certain police officers of the said City of Evanston have wrongfully taken possession of and locked and nailed up the doors of said Church and are preventing complainants and the Trustees of said Church from entering said Church and from the possession thereof;

It is Therefore Ordered by this Court that all said persons and police officers be and each of them are hereby temporarily enjoined and restrained from further preventing complainants and said Trustees from entering said Church and from further helping the doors of said Church locked or fastened or closed against complainants and said Trustees and from further interfering with said complainants and said Trustees in their possession of and from keeping them out of the complete possession of said Church and from attempting so to do until the further order of the Court;

It is Further Ordered upon good cause shown that the Clerk issue above injunction without bond."

The defendants have appealed from that order.

To quote from our former opinion:

"Complainants are members of the Second Baptist Church of Evanston and the bill sought to restrain defendants from interfering with the functioning of the church in accordance with its established rules and regulations, usages and customs; from denying any of the members of the church access to the church for the purpose of holding meetings therein and from enjoying the privileges thereof; from in any manner exercising or attempting to exercise the duties and functions of the officers of the church; from in any manner interfering with the collections or contributions of the members of the church, and from obtaining or disposing of any properties and choses in action of the church; from performing or attempting to perform any act calculated to continue defendant Thomas as pastor of the church contrary to the will of the majority of the membership of the church; from hindering complainants or any other members of the church from enjoying the rights and privileges of membership in the church, and from hindering certain of complainants from exercising their duties and functions as officers of the church."

No motion was made by the defendants to dissolve or modify the temporary injunction and no certificate of evidence was obtained by them. The following are the only errors assigned:

"(1) The injunction order dated March 6, 1931, is void and contrary to law; it cannot be supported by the amended bill of complaint to which it refers; the amended bill was disposed of by order April 15, 1929, and the court thereafter had no jurisdiction of the cause of action alleged in the amended bill.

(2) The order dated March 6, 1931, and the injunction writ are contrary to the law of Illinois and contrary to the Constitution of Illinois."

The defendants contend that "the amended bill was disposed of by the final consent order June 15, 1929, which could not be changed or modified in any way by the court, nor could the bill of complaint be revived without the complete consent of all parties." After carefully considering the argument in support of this contention, we are satisfied that the contention is without merit.

It appears that the complainants, after the entry of the decree, which we reversed, were given possession of the church and that they retained possession after the cause was remanded. The complainants contend that "the temporary injunction from which

It is further observed upon good cause shown that the
their issue above information without bond."

The defendants have appeared from that order.

To quote from our former opinion:

"Defendants are members of the Second Baptist Church
of Boston and the bill sought to restrain defendants from inter-
fering with the transactions of the church in accordance with its
constitution, rules and regulations, usages and customs, from denying
any of its members of the church access to the church for the purpose
of holding meetings therein and from enjoying the privileges thereof;
from in any manner exercising or attempting to exercise the rights
and franchises of the officers of the church; from in any manner
interfering with the collection or contributions of the members
of the church, and from obtaining or attempting to obtain or
exercise in action of the church; from performing or attempting to
perform any act prohibited to certain defendants; from as a pastor of
the church contrary to the will of the majority of the membership of
the church; from hindering defendants or any other members of the
church from enjoying the rights and privileges of membership in the
church, and from hindering exercise of defendants from exercising
their duties and functions as officers of the church."

No motion was made by the defendants to dissolve or modify the
temporary injunction and no credible evidence was obtained by

them. The following are the only errors assigned:

"(1) The injunction order dated March 6, 1931, is void
and contrary to law; it cannot be supported by the amended bill
of complaint in which it recites that the amended bill was disposed of
by order April 15, 1930, and the court thereafter had no juris-
diction of the cause of action alleged in the amended bill."

"(2) The order dated March 6, 1931, and the injunction
are contrary to the law of Illinois and contrary to the
constitution of Illinois."

The defendants contend that "the amended bill was disposed

of by the final judgment order June 15, 1930, which could not be

modified or modified in any way by the court, nor could the bill of

complaint be revised without the consent of all parties."

After carefully considering the arguments in support of this con-

clusion, we are satisfied that the conclusion is without merit.

It appears that the defendants, after the entry of the

order, which was reversed, were given possession of the church and

that they retained possession after the order was reversed. The

complaint against them "the temporary injunction from which

appellants have appealed does not in any way affect the rights of appellants and that they are not aggrieved thereby and under the authorities they have no right to appeal therefrom," and that "the preliminary injunction was issued against men who are not parties to this appeal and who were on the inside of the church armed with deadly weapons, a rifle and cartridges with the doors padlocked and would not give their names to appellants and the injunction does not in any way prevent but makes it possible for all members of the church to freely enter therein and this does not in any way affect the rights of any of the appellants; in fact the injunction is for the benefit of the appellants." This contention, in our judgment, is a meritorious one. It appears from the petition filed by the complainants on the motion for the temporary injunction and the affidavit in support of the same that persons, whose names were unknown to the complainants, had wrongfully taken possession of the church and locked and nailed up the doors of the same, and were preventing the complainants and members of the church from entering the church and from having possession of the same, and that the injunctive order was directed solely against these wrongdoers. It appeared also to the chancellor that certain of the persons who had thus taken possession and control of the church were armed with deadly weapons, which were taken from them by the police of the City of Evanston; that none of the men who took possession of the church were parties to this cause and that they all refused to give their names to the complainants. The complainants state that the injunctive order shows upon its face that it was not intended to apply to the defendants and they concede that it in no way affects the rights of the latter in the instant litigation. We are unable to see how the defendants are injured or affected by the injunctive order and we are of the opinion that the fair minded members of the church, without regard to faction, should be satisfied with the action of the chancellor.

appealants have appeared in any way affect the rights of
appealants and that they are not aggrieved thereby and under the
authorities they have no right to appeal therefrom," and that "the
preliminary injunction was issued against men who are not parties
to this appeal and who were on the inside of the church engaged with
legally weapons, a rifle and cartridges with the same pointed and
would not give their names to appellants and the information does not
in any way prevent but makes it possible for all members of the
church to freely enter therein and this does not in any way affect
the rights of any of the appellants; in fact the information in the
benefit of the appellants." This contention, in our judgment, is a
misstatement and it appears from the petition filed by the complainants
on the motion for the temporary injunction and the affidavit in support
of the same that persons, whose names were unknown to the complainants,
and "roughly" taken possession of the church and locked and nailed up
the doors of the same, and were preventing the complainants and members
of the church from entering the church and from having possession of the
same, and that the injunctive order was directed solely against these
persons. It appeared also in the above that certain of the
persons who had taken possession and control of the church were
armed with deadly weapons, which were taken from them by the police of
the City of Lynwood that none of the men who took possession of the
church were parties to this cause and that they all refused to give
their names to the complainants. The complainants state that the in-
junctive order above upon the fact that it was not intended to apply
to the defendants and they concede that it in no way affects the rights
of the latter in the instant litigation. We are unable to see how
the defendants are injured or affected by the injunctive order and
we are of the opinion that the bill should be dismissed with the costs of the
defendants.

On June 9, 1931, after this cause had been reached upon the call and decided, James T. Gordon, one of the complainants in the bill, presented a motion in this court "for an order to record that he did not authorize anyone to represent him in this appeal; that he disclaims and withdraws all defense to this appeal which has been made for him, and consents and desires that the prayer of appellants be granted." It is apparent from the nature of the motion and the suggestions filed in support of the same that the motion was filed at this late day solely for the purpose of influencing the decision of this court. The motion will be denied. If this complainant wishes to withdraw from the proceedings he may make his motion in the trial court.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

On June 7, 1941, after this case had been decided upon the call and received, James T. Jordan, one of the complainants in the bill, presented a motion in this court for an order to require that he be permitted to examine the witnesses in this matter. That he be permitted and witnesses all returned to this appeal which has been made for him, and testimony and answer that the proper of opportunity be granted. It is apparent from the nature of the motion and the allegations filed in support of the same that the motion was filed at this late day solely for the purpose of influencing the decision of this court. The motion will be denied. It is recommended that to withdraw from the proceedings in any case this motion in the trial court.

The judgment of the Circuit Court of Cook County is affirmed.

Testimony of the witnesses is as follows:

James T. Jordan, complainant.

James T. Jordan, complainant.

James T. Jordan, complainant.

James T. Jordan, complainant.

James T. Jordan, complainant.

James T. Jordan, complainant.

35317

GOLDIE H. HOFFMAN BROWNELL,
Appellee,

vs.

NORMAN L. RANDALL et al.,

On Appeal of Norman L. Randall,
Charlotte Hoffman Randall and
Evelyn Hoffman Chirpie,
Appellants.

1127
Interlocutory Appeal from
Order of Superior Court of
Cook County appointing a
Receiver pendente lite.

262 T.A. 649⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from an interlocutory order appointing a receiver. The order was entered on May 26, 1931, upon a bill of complaint filed May 19, 1931, which prayed for a partition of certain premises and an accounting with reference thereto and for the appointment of a receiver pendente lite.

The bill was brought by Goldie Hoffman Brownell, the widow of William L. Hoffman, who, as the bill alleged, departed this life intestate without lawful issue on March 26, 1930, leaving him surviving as his only heirs at law and next of kin, complainant and defendants, Charlotte Hoffman Randall and Evelyn Hoffman Chirpie.

The bill states that the premises are improved with a six story brick hotel building containing 70 small furnished one, two and three room apartments with necessary equipment and furniture requisite to its successful operation as a hotel; that William L. Hoffman in his lifetime was a tenant in common with defendant, Norman L. Randall, William L. owning a one-third interest and Norman L. a two-thirds interest in the premises.

The interest of the parties in the premises is stated to be that Norman L. Randall owns a two-third interest,

WILLIAM L. HAYWARD, Plaintiff,
vs.
NORMAN L. RANDALL, et al., Defendants.

On appeal of Norman L. Randall,
appellee, William L. Hayward and
Charles William Child,
appellants.

Interlocutory appeal from
Order of Superior Court of
Cook County appointing a
receiver pursuant to
Receiver's petition filed.

200-1-111

1. COURT ORDER WITH REFERENCE TO THE ORDER OF THE COURT.

This is an appeal by certain defendants from an order
of the court appointing a receiver. The order was entered on
May 20, 1931, upon a bill of complaint filed May 12, 1931, which
prayed for a partition of certain premises and an accounting with
reference thereto and for the appointment of a receiver pursuant
thereto.

The bill was brought by William L. Hayward, the
widow of William L. Hayward, who, as the bill alleged, deceased,
this life interest without lawful issue on March 26, 1930, leaving
him surviving as his only heir at law and next of kin; complain-
ant and defendant, Charles William Child and Evelyn Child
Child.

The bill stated that the premises are conveyed with a
six story brick hotel building containing 75 small tenements
and two and three room apartments with necessary outbuildings and
thereunto appurtenant in its entirety owned as a hotel; that
William L. Hayward in his lifetime was a tenant in common with
defendant, Norman L. Randall, William L. having a one-third in-
terest and Norman L. a two-thirds interest in the premises.
The interest of the parties in the premises is
stated to be that Norman L. Randall owns a two-thirds interest,

complainant a one-sixth interest, and the other defendants each a one-twelfth interest in the same. It is also apparent from the allegations of the bill that the interest of complainant is subject to possible claims which may be made against her husband's estate.

The bill states that William L. Hoffman in his lifetime was from time to time furnished with statements showing receipts and disbursements and the general financial condition of the property; that the books were open to his inspection, and that from time to time he secured his share of the rents, issues and profits; that since his death Norman L. Randall has made only one payment of \$100 on this account to complainant; that she has requested payments but has met only with excuses, delays and refusals; that she requested in the alternative that she be permitted to participate in the management and possession of the premises, which request was refused, and that Norman L. Randall persists in such refusal; that defendants are all related and that she is informed and believes that they intend to work together to deprive her of her interest; that Mrs. Chirpie with her husband resides in the building, and, as complainant is informed and believes, has paid no rent; that "Norman L. Randall is wholly insolvent and unable to respond in damages to complainant for any sum or sums which may be found due upon an accounting herein;" that he is mismanaging and wasting the property and permitting it to rapidly deteriorate and depreciate in value; that he is diverting the rents, issues and profits to his own personal use; that tenants are gradually leaving the building, and that he is permitting a large number of vacancies to exist.

It is also averred that the premises are encumbered by a trust deed to secure a first mortgage bond issue of \$230,000, on which \$16,000 of the principal sum has been paid.

...and the other defendants each a one-twelfth interest in the same. It is also apparent from the allegations of the bill that the interest of complainant is not lost in possible claims which may be made against her husband's estate.

The bill states that William L. Hartman in his lifetime was from time to time furnished with statements showing receipts and disbursements and the general financial condition of the property; that the books were open to his inspection, and that from time to time he received his share of the rents, issues and profits; that since his death William L. Randall has made only one payment of \$100 on this account to complainant; that she has requested payments but has not only with expense, delay and tortious; that she requested in the alternative that she be permitted to participate in the management and possession of the premises, which request was refused, and that William L. Randall persists in such refusal; that defendants who all related and that she is interested and believes that they intend to work together to deprive her of her interest; that Mrs. Galtie with her husband resided in the building, and, as complainant is interested and believes, has paid no rent; that William L. Randall is wholly inactive and unable to respond in damages to complainant for any sum or sums which may be found due to her on an accounting herein; that he is attempting and vesting the property and permitting it to rapidly deteriorate and depreciate in value; that he is diverting the rents, issues and profits to his own personal use; that tenants are gradually leaving the building, and that he is permitting a large number of vacancies to exist.

It is also averred that the premises are encumbered by a trust deed to secure a first mortgage bond issue of \$250,000, on which \$10,000 of the principal has been paid.

is
The bill verified by complainant, who states:

"***that she has read the foregoing bill of complaint by her subscribed, knows the contents thereof, and that the same are true, except as to those matters therein stated to be upon information and belief and as to those matters, she believes them to be true."

The bill waived answer under oath.

On May 26, 1931, defendant, Norman L. Randall, filed his answer to this bill. The answer was verified by an affidavit in which he stated that he had read the answer, knew the contents thereof, and that it was true of his own knowledge.

He admits in the answer the death of William L. Hoffman; that Hoffman left him surviving heirs at law and next of kin as averred in the bill; owned an undivided one-third interest in the fee of the premises, and was a tenant in common with defendant. He denies the allegation of the bill that William L. Hoffman was also the owner of an undivided one-third interest in the furniture and chattels upon the premises. He states that he does not know about the probate proceedings as to the estate of William L. Hoffman and demands strict proof thereof, admits that he is the owner of an undivided two-thirds interest, and says that he does not know and is not informed except by the bill as to whether complainant is the owner of a one-sixth interest therein. He admits that when Hoffman was the owner of his interest he was furnished with statements of receipts and disbursements and the financial condition of the premises; that the books and accounts were at all times open to his inspection. He says that William L. Hoffman received from defendant sums of money totaling \$2,800; that these sums were not paid as William Hoffman's share of the profits but were paid out of the gross income and as an advancement against his capital investment.

Defendant denies that after the death of William L. Hoffman he ceased to make payments to complainant and refused to

The bill was introduced by Mr. [Name] on May 22, 1933.

Mr. [Name] has read the foregoing bill of complaint by Mr. [Name], and has read the contents thereof, and that the same are true, except as to those matters therein stated to be upon information and belief and as to those matters, the bill says that to be true.

The bill was read under order.

On May 22, 1933, defendant, Herman A. Randall, filed his answer to this bill. The answer was verified by an affidavit in which he stated that he had read the answer, knew the contents thereof, and that it was true at his own knowledge.

He states in the answer the death of William J.

William J. Randall left his surviving heirs at law and none of his as entered in the bill; owned an undivided one-third interest in the fee of the premises, and was a tenant in common with the

defendant. He denies the allegation of the bill that William J.

William J. Randall was also the owner of an undivided one-third interest in the premises and shares upon the premises. He states that he

does not know about the precise proceedings as to the estate of

William J. Randall and demands strict proof thereof, and says that

he is the owner of an undivided two-thirds interest, and says that

he does not know and is not informed except by the bill as to

whether complaint is the owner of a one-third interest therein.

He admits that when William J. Randall was the owner of his interest he was

furnished with statements of receipts and disbursements and the

financial condition of the premises; that the books and accounts

were at all times open to his inspection. He says that William

J. Randall received from defendant sums of money totaling \$2,500;

that these sums were not paid as William Randall's share of the

profits but were paid out of the gross income and as an advance-

ment against his capital investment.

Defendant denies that after the death of William J.

William J. Randall he acted to make payments to complainant and refused to

comply with any of her requests as to the inspection of the books or that he denied her any right in the management and possession of the hotel building. He admits the allegations as to the relationship of the parties but denies the other allegations of that paragraph; denies that he is wholly insolvent and unable to respond in damages to complainant; that he is mismanaging and wasting the property, permitting it to deteriorate in value and diverting the rents, issues and profits as alleged; that the premises are becoming run down and difficult to rent; that the tenants are leaving the building and he is permitting and has permitted large number of vacancies to exist. He further denies that he is incapable or unwilling to obtain the best results from the operation of the building; that the good will of the hotel will be destroyed by his being permitted to remain in possession; that he is incompetently and inefficiently managing the premises; that complainant has suffered any loss by reason of his management of the premises, and that complainant's equity in the property and in the rents, issues and profits will be lost and wasted as alleged in her bill.

He affirmatively avers in his answer that for seven years he has been engaged in the construction and management of apartment hotel buildings in Chicago; that he has been supervising the management of the building upon these premises during a period of seventeen months last past; that he has given considerable time and the best attention to the management and renting of the building, visiting it two or three times each week and more often when necessary; that he has received no compensation whatsoever for his services and no assistance whatsoever from complainant or from any of the other parties.

He avers that during this period of time complainant and other parties to this cause have had at all times free access to the building and to all the books and records; that he has made

comply with any of her requests as to the inspection of the books or that he denied her any right in the management and possession of the hotel building. He admits the allegations as to the falsity of the parties but denies the other allegations of that paragraph; denies that he is wholly incompetent and unable to render aid in damages to complainant; that he is mismanaging and wasting the property, permitting it to deteriorate in value and diverting the rents, income and profits as alleged; that the premises are tenanted two down and difficult to rent; that the tenants are leaving the building and he is permitting and has permitted large number of vacancies to exist. He further denies that he is incapable or unwilling to obtain the best results from the operation of the building; that the good will of the hotel will be destroyed by his being permitted to remain in possession; that he is incompetent and inefficiently managing the premises; that complainant has suffered any loss by reason of his management of the premises, and that complainant's equity in the property and in the rents, income and profits will be lost and wasted as alleged in her bill. He affirmatively avers in his answer that for seven years he has been engaged in the construction and management of apartment hotel buildings in Chicago; that he has been supervising the management of the building upon these premises during a period of seventeen months last past; that he has given considerable time and best attention to the management and renting of the building, visiting it two or three times each week and more often when necessary; that he has received no compensation whatsoever for his services and no assistance whatsoever from complainant or from any of the other parties.

He avers that during this period of time complainant and other parties to this cause have had at all times free access to the building and to all the books and records; that he has made

reports to complainant and to the other parties; that they have often expressed themselves satisfied with his management of the of the building; that he has been at all times ready and willing to give complainant any information in his possession regarding the building, as well as access to the building and to the records and books pertaining thereto.

He says that the building upon the premises is in good condition; that all the personal property therein contained and used in the operation of the apartment hotel building on the premises is in good repair; that the building is located in what is commonly known as the Hyde Park district; that the district is new and has been for some time considerably overbuilt with the same or a similar type of buildings; that it is difficult to operate the building at a high schedule of rentals and to a full state of occupancy.

The answer further avers that during the period of seventeen months the average monthly occupancy of the entire building has been over 85 per cent; that there are 70 apartments in the building, two of which are occupied by employees; that at that time, to-wit, May 25, 1931, 65 apartments out of the remaining 68 apartments are occupied by tenants, making a present occupancy of approximately 98 per cent; that the tenants are paying the highest monthly rentals now obtainable in the district for that type of building and apartments therein; that the monthly income from rents from the building and its monthly average occupancy is considerably higher than that of similar buildings in the district; that the average monthly income from the building during the past seventeen months has been and is now approximately \$3,300; that the average monthly reasonable and necessary operating expenses of the building during that period, including interest on the first

reports to complainant and to the other parties; that they have often expressed themselves satisfied with his management of the building; that he has been at all times ready and willing to give complainant any information in his possession regarding the building, as well as access to the building and to the records and books pertaining thereto.

He says that the building upon the premises is in good condition; that all the personal property therein contained and used in the operation of the apartment hotel building on the premises is in good repair; that the building is located in what is commonly known as the Hyde Park district; that the district is new and has been for some time considerably overbuilt with the same or a similar type of buildings; that it is difficult to operate the building at a high schedule of rentals and to a full state of occupancy.

The answer further avers that during the period of seventeen months the average monthly occupancy of the entire building has been over 85 per cent; that there are 70 apartments in the building, two of which are occupied by employees; that at that time, to-wit, May 22, 1931, 62 apartments out of the remaining 68 apartments are occupied by tenants, making a present occupancy of approximately 91 per cent; that the tenants are paying the highest monthly rentals now obtainable in the district for that type of building and apartments therein; that the monthly income from rents from the building and its monthly average occupancy is considerably higher than that of similar buildings in the district; that the average monthly income from the building during the past seventeen months has been and is now approximately \$2,800; that the average monthly reasonable and necessary operating expenses of the building during that period, including interest on the \$250

mortgage on the property but excluding prepayments on the mortgage and taxes, are approximately \$3,800 a month, and that defendant has applied toward said operating expenses and interest requirements all the gross income from the building.

Defendant further avers that at the time he took over the management of the building in December, 1929, the first mortgage bond issue on the premises was in default for failure to pay all of the semi-annual interest that became due and payable on August 26, 1929; that thereafter on February 26, 1930, there also became due and payable an additional semi-annual interest payment on the bond issue, also principal bonds in the sum of \$3,500; that sufficient funds were not available out of the income from the building for the payment of the interest and principal amount of the maturing bonds; that defendant requested his then co-tenants of the property to advance sufficient funds for the payment of the interest and principal but that they were unable to do so; that on March 21, 1930, the Chicago Title & Trust Company as trustee under the first mortgage, filed its bill to foreclose the lien of the first mortgage trust deed, alleging defaults and thereafter made application for the appointment of a receiver; that defendant thereupon made payment of the interest and principal payments by advancing out of his own funds approximately \$45,800 to make up the total amounts required for said purposes and arranged with the solicitors for complainant in the foreclosure proceedings to continue the motion for the appointment of a receiver; that the solicitors agreed to a continuation of the motion upon the promise of defendant to continue the management of the building and to apply from time to time all moneys over and above operating expenses toward the payment of the interest and principal requirements under the first mortgage trust deed; that thereafter, on August

mortgage on the property but existing mortgages on the mortgage
and taxes, are approximately \$2,500 a month, and that defendant
has applied toward said operating expenses and interest require-
ments all the gross income from the building.

Defendant further avers that at the time he took over
the management of the building in December, 1930, the first mort-
gage bond issue on the premises was in default for failure to pay
all of the semi-annual interest that became due and payable on
August 26, 1930; that thereafter on January 30, 1931, there also
became due and payable an additional semi-annual interest payment
on the bond issue, also principal bonds in the sum of \$2,500; that
collateral funds were not available out of the income from the

building for the payment of the interest and principal amount of
the maturing bonds; that defendant reported the same on January
of the property to advance collateral funds for the payment of the
interest and principal but that they were unable to do so; that on
March 21, 1931, the Chicago Title & Trust Company as trustee under
the first mortgage, filed its bill to foreclose the lien of the

first mortgage first deed, alleging default and thereafter made
application for the appointment of a receiver; that defendant there-
upon made payment of the interest and principal payments by advanc-
ing out of his own funds approximately \$2,500 to make up the total
amounts required for said purposes and arranged with the collector

for complaint in the foreclosure proceedings to continue the
matter for the appointment of a receiver; that the collector
acted as a co-defendant of the action upon the failure of the
tenant to continue the management of the building and to pay
from time to time all moneys over and above operating expenses
toward the payment of the interest and principal requirements
under the first mortgage first deed; that thereafter, on August

26, 1930, and February 26, 1931, defendant advanced out of his own funds additional sums of money for interest maturing on said dates and arranged for an extension of certain bonds then due for the payment of which no funds were available; that at all times since defendant took over the management of the building all income therefrom was first applied toward payment of the necessary and reasonable operating expenses and the overplus toward interest payments, but that the total income from the building has been and still is insufficient to meet all payments under the first mortgage on the premises.

The answer also avers that the income from the building under present conditions is insufficient to meet the operating expenses as well as all the first mortgage requirements, and that additional funds will be required from time to time to make up such deficiency; that the appointment of a receiver will make it impossible to obtain such additional funds as may be required from time to time for said purpose, and that the costs, expenses and losses of revenue incident to receivership will make it impossible to meet the requirements under the first mortgage trust deed securing the remaining outstanding bonds, thereby forcing foreclosure proceedings under the trust deed and placing the equity of defendant^{and} of the other parties in serious jeopardy and in danger of a total loss to them.

Defendant denies that \$16,000 of the principal amount of the indebtedness has been paid and cancelled, and that certain other defendants have an interest in said premises as alleged.

The order entered May 26th recites that the cause came on to be heard upon the motion of the solicitors for complainant for the appointment of a receiver, and "It appearing to the court that due notice of said motion has been served upon Norman L.

On January 20, 1921, defendant advanced out of his own funds additional sums of money for interest maturing on said notes and attempted for an extension of certain bonds then due for the payment of which no funds were available; that at all times since defendant took over the management of the building all income therefrom was first applied toward payment of the necessary and reasonable operating expenses and the various foreign interest payments, but that the total income from the building has been and still is insufficient to meet all payments under the first mortgage on the premises.

The answer also avers that the income from the building under present operations is insufficient to meet the operating expenses as well as all the first mortgage requirements, and that additional funds will be required from time to time to make up such deficiency; that the appointment of a receiver will not be possible to obtain such additional funds as may be required from time to time for said purpose, and that the estate, defendant and losses of revenue incident to receivership will make it impossible to meet the requirements under the first mortgage trust deed covering the remaining outstanding bonds, thereby forcing foreclosure proceedings under the first deed and placing the equity of defendant of the other parties in serious jeopardy and in danger of a total loss to them.

Defendant avers that the fact of the principal amount of the indebtedness has been paid and cancelled, and that certain other defendants have an interest in said premises as alleged.

The order entered May 28th contains the following findings on the basis upon the motion of the plaintiff for judgment for the appointment of a receiver, and is reported to the court that the notice of said motion has been served upon certain

Randall, Charlotte Hoffman Randall and Evelyn Hoffman Chirpie, defendants herein, and the Court having heard the argument of counsel and having read the verified bill of complaint and being fully advised in the premises," orders the appointment of a receiver upon the complainant filing her bond in the penal sum of \$1,000 within ten days from the date thereof.

The Chicago Trust Company was named as receiver, and the record shows its acceptance on the following day, May 27, 1931, and the approval of the bond of complainant on the same day.

By an order entered June 5, 1931, nunc pro tunc as of May 26, 1931, it is made to appear as a part of the record the filing in open court of the sworn answer of defendant Norman L. Randall, prior to the appointment of a receiver, and the objection of defendant to the entry of said order as well as to the refusal of the court to accept the proffer of defendant, in lieu on the appointment of a receiver, of a good and sufficient bond as provided by section 2 of an act concerning the appointment and discharge of receivers.

We are cited by the briefs of the parties to innumerable decisions of the Supreme and Appellate courts of this state which it will be unnecessary to review at length. It has been decided too often to require the citation of authorities that the power of courts to appoint receivers pendente lite is an extraordinary power, drastic in its nature and effect and one that should be exercised with the greatest caution and reluctance. No other power granted to such courts requires the exercise of such a high degree of good judgment and discretion. This is not a case where the interest is unpaid on an indebtedness which the premises are pledged to secure, where the taxes are not provided for, and where the property is not being conserved. The allegations of the bill are largely upon information and belief, and so far as they are directed

...and the Court having heard the argument of counsel
and having read the verified bill of complaint and being fully ad-
vised in the premises, orders the appointment of a receiver upon
the complaint filing her bond in the penal sum of \$1,000 within
ten days from the date hereof.

The Chicago Trust Company was named as receiver, and
the record shows its acceptance on the following day, May 27, 1931,
and the appointment of the date of appointment on the same day.

By an order entered June 4, 1931, when the time as of
May 26, 1931, it is made to appear as a part of the record the
affair in open court of the sworn master of defendant's business.
...to the appointment of a receiver, and the objection
of defendant to the entry of said order as well as to the refusal
of the court to accept the proffer of defendant, in lieu of the
appointment of a receiver, of a good and sufficient bond as pre-
scribed by section 3 of an act concerning the appointment and dis-
charge of receivers.

We are cited by the briefs of the parties to numerous
state decisions of the Supreme and Appellate courts of this state
which it will be unnecessary to review at length. It has been de-
cided too often to require the citation of authorities that the
power of courts to appoint receivers quasi-judicial in an extrajudi-
cial power, drastic in its nature and effect and one that should be
exercised with the greatest caution and restraint. No other power
granted to such courts requires the exercise of such a high degree
of good judgment and discretion. This is not a case where the in-
terest is merely an unliquidated claim which the premises are pledged
to secure, where the taxes are not provided for, and where the
property is not being conserved. The allegations of the bill are
largely upon information and belief, and no tax as they are directed

to the prayer for an appointment of a receiver, are largely made up of conclusions of the pleader, which, construed most strongly against her, can have little weight. On the other hand, these averments are all denied in the answer of defendant, which recites in detail facts which there is no attempt to contradict. The order shows that this answer was not given any consideration by the court. The fact that the bill of complaint waived an answer under oath did not relieve the court of the duty to consider the facts alleged in the answer upon the motion to appoint a receiver. A careful reading of Chicago Title & Trust Co. v. McDowell, 257 Ill. App. 492, cited by complainant on this point, shows this to be the law. The facts with reference to defendant's management of these premises are set up in detail and are not denied. They are sworn to, and in the absence of a denial they must be considered as true. If they are true, the attempt of complainant, the owner of only a one-sixth interest, to burden this property with the expense of a receivership could be for no good purpose. The bond offered by defendant would have indemnified her against all possible loss and given complete protection to her interest.

The entry of the order appointing a receiver is an abuse of judicial discretion, and the order is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

to the proper for an appointment of a receiver, who largely made
up of conclusions of the plaintiff, which, conceived most strongly
against her, can have little value. On the other hand, these
statements are all denied in the answer of defendant, which recites
in detail facts which there is no attempt to controvert. The order
shows that this answer was not given any consideration by the court.
The fact that the bill of complaint waived an answer under oath did
not relieve the court of the duty to consider the facts alleged in
the answer upon the motion to appoint a receiver. A careful reading
of Chicago Title & Trust Co. v. Bankers' Trust Co., 187 Ill. App. 482, cited
by complaint on this point, shows this to be the law. The facts
will be referred to defendant's management of these premises are not
up in detail and are not denied. They are shown to, and in the
case of a denial they must be considered as true. If they are
true, the attempt of complaint, the owner of only a one-sixth
interest, to obtain title property with the payment of a receiver
could be for no good purpose. The bill offered by defendant would
have indemnified her against all possible loss and given complete
protection to her interest.
The entry of the order appointing a receiver is an
abuse of judicial discretion, and the order is reversed.

O'Connor, J. L., and Kennedy, J., concur.

34995

BENJAMIN E. COHEN,
Appellant,

vs.

ROSE SMILOVITCH,
Appellee.

113
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

262 I.A. 650

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

October 2, 1928, plaintiff brought suit against the defendant to recover \$691.50, which he alleged in his statement of claim he had delivered to the defendant as a messenger for the purpose of having defendant deliver it to the Foreman Trust & Savings Bank. He further alleged that the defendant fraudulently converted the money to her own use and did not deliver it to the bank.

The defendant filed an affidavit of merits denying that plaintiff had delivered to her the \$691.50 to be delivered by her to the bank and averred that the money was her own property; that she had given a check to plaintiff for \$1,000, payable to her order, which she had obtained from a tenant in payment of rent; that plaintiff had deposited the check in his bank, deducted certain costs and expenses amounting to \$308.50, leaving a balance of \$691.50 which belonged to defendant.

Afterwards, by leave of court, plaintiff filed an amended statement of claim in which he claimed there was \$812.50 due him from defendant, \$121 in cash and \$691.50 evidenced by his check payable to the order of Reva Smilovitch; that he delivered the \$812.50 to defendant as a messenger for her to deliver to the Foreman Trust & Savings Bank, in payment of ^acertain mortgage interest note, which mortgage was a lien on certain real estate owned by defendant; that defendant fraudulently converted the

113

[Handwritten signature]

JOHN SMITH, JR.
Attorney at Law
CHICAGO, ILL.

OF CHICAGO.

SEC. 1. A. 030

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS, IN AND FOR THE COUNTY OF CHICAGO.

That on or about the 1st day of October, 1928, plaintiff brought suit against the defendant to recover \$500.00, which he alleged in his statement of claim he had delivered to the defendant as a messenger for the purpose of having defendant deliver it to the Western Trust & Savings Bank. He further alleged that the defendant fraudulently converted the money to her own use and did not deliver it to the bank.

The defendant filed an affidavit of denial denying that plaintiff had delivered to her the \$500.00 as he alleged by her to the bank and averred that the money was not and properly that she had given a check in plaintiff's favor for \$500.00, payable to order, which she had obtained from a check in payment of rent; that plaintiff had deposited the check in his bank, to which bank this court and various amounts in 1927, 1928, having a balance of \$501.50 which plaintiff so testified.

Accordingly, by leave of court, plaintiff filed an amended statement of claim in which he claimed there was \$501.50 due him from defendant, \$100 in cash and \$401.50 evidenced by his check payable to the order of John Smith, Jr.; that he delivered the \$501.50 to defendant as a messenger for her to deliver to the Western Trust & Savings Bank, in payment of certain mortgage interest note, which mortgage was a lien on certain real estate owned by defendant; that defendant fraudulently converted the

money to her own use and did not deliver it to the bank. By the same order of court defendant's affidavit of merits was allowed to stand to plaintiff's amended statement of claim. The case was tried before a judge and a jury and there was a verdict and judgment in defendant's favor, and plaintiff appeals.

The court instructed the jury orally, saying, among other things, that the case was an action of trover and stating the rule of law covering such action. No brief has been filed on behalf of the defendant.

Plaintiff contends that the court erred in failing to direct a verdict as he requested at the close of all the evidence, and that the verdict and judgment is against the manifest weight of the evidence. We have carefully considered all the evidence in the record and are of the opinion that neither contention of plaintiff can be sustained. Plaintiff offered evidence to the effect that he was an attorney at law and represented David Rubin, who owned a garage on South State street, Chicago, and that the garage was exchanged by Rubin for a flat building owned by the defendant; that the garage was subject to a first mortgage of \$25,000, which was payable at the Foreman Bank; that there was a second mortgage of \$15,000 and a third mortgage of \$26,140, held by David Rubin, which was given to him by the defendant to evidence a part of the purchase price of the garage; that defendant was in default in making certain payments on the first and second mortgage on the garage, and Rubin, the owner of the third mortgage, through plaintiff, his attorney, was pressing the defendant for payment of the first and second mortgages and that he had prepared a bill to foreclose the third mortgage owned by Rubin, but had held off the filing of the suit on the promise of defendant to make payments on the first and second mortgages; that the defendant

money to her own use and did not deliver it to the bank. By the same order of court defendant's affidavit of merits was allowed to stand in plaintiff's amended statement of claim. The case was tried before a judge and a jury and there was a verdict and judgment in defendant's favor, and plaintiff's expenses.

The court instructed the jury orally, saying, among other things, that the case was an action of trover and stating the rule of law covering such action. He tried the case twice on behalf of the defendant.

Plaintiff contends that the court erred in failing to direct a verdict as he requested at the close of all the evidence, and that the verdict and judgment is against the manifest weight of the evidence. He has carefully considered all the evidence in the record and one of the opinions that reflect consideration of plaintiff can be sustained. Plaintiff offered evidence to the effect

that he was an attorney at law and represented David Rubin, who owned a garage on South State Street, Chicago, and that the garage was exchanged by Rubin for a first building owned by the defendant; that the garage was subject to a first mortgage of \$28,000, which was payable at the Western Bank; that there was a second mortgage of \$15,000 and a third mortgage of \$28,140, held by David Rubin, which was given to him by the defendant as evidence a part of the

purchase price of the garage; that defendant was in default in making certain payments on the first and second mortgages on the garage, and Rubin, the owner of the third mortgage, through

plaintiff, his attorney, was pressing the defendant for payment of the first and second mortgages and that he had prepared a bill to foreclose the third mortgage owned by Rubin, but had held off the filing of the bill on the promise of defendant to make payments on the first and second mortgages; that the defendant

called at plaintiff's office with a check payable to her order for \$1,000, given to her by a tenant to whom she had rented the garage as payment of rent; that the plaintiff deposited this check as a special account; that he charged the defendant \$12.50 on account of services he had rendered in preparing the foreclosure bill, \$32.00 being the bill of the Chicago Title & Trust company in writing an opinion of title preparatory to the foreclosure, and that he had made out a check for \$264 to the West Side Trust & Savings Bank, which was a lien on the garage, and delivered it to the defendant for her to deliver to the West Side bank; that the three items totalled \$308.50, leaving a balance of \$1,000 - \$308.50; that there was a payment due on the first mortgage of \$812.50, and plaintiff told defendant that she must bring in \$121 in addition to the balance, which he held, so that the mortgage interest note of \$812.50 could be paid to the Foreman bank; that some time afterwards defendant brought in the \$121ⁱⁿ currency, giving it to plaintiff; that plaintiff then made out a check for \$691.50 payable to Eeva Smilovitch, and handed the currency and check to defendant for her to deliver to the Foreman bank in payment of the mortgage interest note; that she left his office to take the currency and check to the Foreman bank, that she failed to do so but converted the money to her own use; that afterwards he personally paid the Foreman bank \$1,078.66, by check, which included the \$812.50 and some additional amount due on the mortgage.

The defendant testified that she delivered the \$1,000 check to plaintiff, who deducted the \$308.50, and the balance was retained by plaintiff; that she afterwards called for and obtained a check for this amount; that it was her own money and nothing was said about her taking it to the Foreman bank.

The case was submitted to the jury as one of fact on the controverted question. The jury found the issues for the

The contested question. The jury found the answer for the
The case was submitted to the jury on one of two
said about not taking it to the Foreman bank.
a check for this amount; that it was not own money and nothing was
retained by plaintiff; that the answer was called for and obtained
from the plaintiff. who deducted the \$308.50, and the balance was
\$1,000. The defendant testified that she delivered the \$1,000
some additional amount due on the mortgage.
Foreman bank \$1,078.50, by check, which included the \$317.50 and
the money to her own use; that afterwards she personally paid the
amount to the Foreman bank. That she failed to do so but converted
interest note; that she left his office to take the currency and
for her to deliver to the Foreman bank in payment of the mortgage
Note delivered, and wanted the currency and check to deliver
left; that plaintiff then made out a check for \$308.50 payable to
words defendant brought in the bill of exchange, giving it to plain-
of \$317.50 could be held to the Foreman bank; that some time after
to the balance, which he held, so that the mortgage interest note
plaintiff told defendant that she must bring in \$317 in addition
there was a payment due on the first mortgage of \$317.50, and
totalled \$308.50, leaving a balance of \$1,000 - \$317.50; that
for her to deliver to the West Side bank; that the three items
which was a lien on the garage, and delivered it to the defendant
made out a check for \$317 to the West Side Trust & Savings Bank,
copies of this property to the defendant, and that he had
being the bill of the Chicago Title & Trust company in writing and
services he had rendered in preparing the defendant's bill, \$317.50
a total amount; that he changed the amount \$317.50 on account of
an amount of rent; that the plaintiff deposited this check as a
\$1,000. Given to her by a tenant to whom she had rented the garage
called at plaintiff's office with a check payable to her order for

defendant and we think it unnecessary to analyze the evidence in detail as to whether the finding of the jury is against the manifest weight of the evidence, because we are clearly of the opinion that ^{any} in/view of the evidence plaintiff could not recover because there was no obligation upon him to pay the Foreman bank. The mortgage was on the property belonging to the defendant and it was her duty to pay the mortgage if she would save her property. It was no part of plaintiff's duty to pay the bank.

Plaintiff being in no way obligated to pay the money to the Foreman bank, the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

defendant and we think it unnecessary to analyze the evidence in detail as to whether the finding of the jury is against the main-
testimony of the witness, because we are directly of the opinion
that in view of the evidence plaintiff could not recover because
there was no obligation upon him to pay the balance bank. The
balance was on the property belonging to the defendant and it was
her duty to pay the mortgage if she would have her property. It
was no part of plaintiff's duty to pay the bank.
Plaintiff being in no way obligated to pay the money

in the balance bank, the judgment of the municipal court of
Chicago is affirmed.

ALFRED

Notably not relevant, 7/11/1911.

35077

MARSHALL SQUARE STATE BANK,
a Corporation,
Appellee,

vs.

TOMASZ WILCZYNSKI and JOHN KLIMEK.

On Appeal of TOMASZ WILCZYNSKI,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 650²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered on a promissory note against the two defendants for \$244.50. Afterwards, on motion of Tomasz Wilczynski, who will hereinafter be called the defendant, the judgment was opened up and he was given leave to defend. There was a trial before the court, the judgment entered by confession was confirmed, and the defendant appeals.

The judgment by confession was entered on a promissory note dated January 6, 1930, for \$200, due April 7, 1930, and payable to plaintiff. The defense interposed was that about the time the note came due plaintiff accepted another note in payment of the note in suit for the same amount, due 90 days after date, signed by the defendant, John Klimek, but that the defendant Wilczynski did not sign the second note.

The evidence of plaintiff was to the effect that at the time the first note came due, the principal maker, John Klimek, was not able to pay it and wanted an extension of time; that the plaintiff bank agreed to extend the time for 90 days, provided the two defendants would sign the new note. Klimek signed the note and it was left at the bank, and there is evidence of three witnesses that at different times they had talked to the defendant Wilczynski for the purpose of having him sign the new note; that at first he agreed to sign the note, but after a time refused to do so. The

NATIONAL SQUARE BANK,
a Corporation,
Appellee,

APPEAL FROM JUDGMENT
COURT OF CHICAGO.

WILLIAM WILSON and JOHN KILMER,
On Appeal of THOMAS WILSON,
Appellant.

20814.850

THE CHICAGO TRIBUNE
PUBLISHED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered on a promissory note against the two defendants for \$244.80. After wards, on motion of Thomas Wilson, who will hereinafter be called the defendant, the judgment was opened up and he was given leave to defend. There was a trial before the court, the judgment entered by confession was sustained, and the defendant appeals.

The judgment by confession was entered on a promissory note dated January 8, 1915, for \$244.80, the date of the time due to plaintiff. The defense interposed was that about the time the note came the plaintiff executed another note in payment of the note in suit for the same amount, but 22 days after date, signed by the defendant, John Kilmer, but that the defendant Wilson did not sign the second note.

The evidence of plaintiff was to the effect that at the time the first note came due, the principal maker, John Kilmer, was not able to pay it and wanted an extension of time; that the plaintiff bank agreed to extend the time for 30 days, provided the two defendants would sign the new note. Kilmer signed the note and it was left at the bank, and there is evidence of three witnesses that at different times they had talked to the defendant Wilson for the purpose of having him sign the new note; that at first he agreed to sign the note, but after a time refused to do so. The

defendant offered some evidence from the records of the bank tending to show that by its records it had treated the new note as an asset of the bank, and contends that all of this evidence shows that the second note was taken in payment of the old note.

The law is well settled and is undisputed by the parties here, that whether the first note was paid by the taking of the second, was a question of fact to be determined from the evidence, and that it was a question of intention as to whether plaintiff took the second note in payment of the first.

We have carefully considered all the evidence in the record, and are clearly of the opinion that the finding of the court in favor of the plaintiff, to the effect that the second note had not been taken in payment of the first, is in accordance with the evidence. In this view, obviously we would not be warranted in disturbing the finding and judgment.

The defendant contends that the judgment is wrong and should be reversed because after the hearing of the case, and after the court had announced its decision, the defendant, by his counsel, requested the court to rule on certain of his objections made during the course of the hearing, the court having admitted certain evidence subject to defendant's objection; that the court ruled on these objections and thereupon the defendant asked leave to introduce further evidence.

The particular complaint made is that witnesses testified on behalf of the plaintiff that they had talked to the defendant at about the time of the making of the new note, and shortly afterwards, requesting that he sign the second note, and that at first he agreed to do so, and that defendant's counsel, after the court had ruled on defendant's objections, desired to call the defendant to contradict the evidence of these witnesses.

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 to do so, and that defendant's counsel, after the court had ruled
 on defendant's objections, desired to call the defendant to con-
 front the evidence of these witnesses.

The record discloses that the case went to trial on December 22nd; that after plaintiff had offered its case in chief and the defendant had put in its defense, plaintiff introduced evidence in rebuttal at the conclusion of which both parties rested and the record discloses counsel for both parties made their argument to the court; that the court had announced his decision but continued the case until two days later, December 24th; on that date counsel for the defendant communicated with the court, requesting that the court rule on the objections that he had made during the progress of the trial, which the court agreed to do, and the matter was set for hearing two days later, December 26th, when the court overruled certain objections and sustained others. It was at that time that counsel for the defendant wanted to call the defendant to contradict the testimony given by three witnesses on behalf of the plaintiff, as above mentioned. At that time the court expressly stated that "all these statements have been made after the defendant rested his case and the court had rendered its decision." No objection was made when the three witnesses testified on behalf of the defendant that their testimony was improper, and obviously their testimony was clearly admissible. If the defendant wished to contradict this, it was then his time to take the stand. It was too late after the case had been submitted and after argument, and after the court had announced a decision, to try to re-open the case four days afterwards and to put defendant on the stand. It was clearly within the discretion of the court, and we think there was no abuse of that discretion under the circumstances.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

The record discloses that the case was to trial on December 22nd; that after plaintiff had allowed his case in chief and the defendant had put in his defense, plaintiff introduced evidence in rebuttal of the conclusion of which both parties rested and the record discloses counsel for both parties made their argument to the court; that the court had announced his decision but continued the case until two days later, December 24th; on that date counsel for the defendant communicated with the court, requesting that the court rule on the objections that he had made during the progress of the trial, which the court agreed to do, and the matter was set for hearing two days later, December 26th, when the court overruled certain objections and sustained others. It was at that time that counsel for the defendant wanted to call the defendant to contradict the testimony given by three witnesses on behalf of the plaintiff, as above mentioned. At that time the court expressly stated that "all three statements have been made after the defendant rested his case and the court had rendered its decision." No objection was made when the three witnesses testified on behalf of the defendant that their testimony was improper, and obviously their testimony was clearly admissible. If the defendant wished to contradict them, it was then his time to take the stand. It was two days after the case had been submitted and after argument, and after the court had announced a decision, to try to re-open the case four days afterwards and to put defendant on the stand. It was clearly within the discretion of the court, and we think there was no abuse of that discretion under the circumstances.

The judgment of the Municipal Court of Chicago is affirmed.
Affirmed.
Sincerely and Respectfully, J. J. Connelley.

34193

CATHERINE HARTLEY,
Defendant in Error,

vs.

RED BALL TRANSIT COMPANY,
a Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT

OF COCK COUNTY.

262 T.A. 650³

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against the defendant for \$65,000 entered upon the verdict of the jury in an action seeking compensation for personal injuries received when she was struck by a motor truck alleged to have been owned and operated by defendant.

August 12, 1926, at about 8:30 o'clock in the morning, while crossing Clark street, which runs north and south in Chicago, on the south crosswalk of Wilson avenue, which runs east and west, plaintiff was struck and run down by a large moving van truck driven by Thomas Burke, who also owned it. As she approached Clark street she looked south and saw the truck about 150 or 175 feet away, coming north. She walked to the middle of the street between the two street car tracks on Clark street and then saw the truck 35 or 40 feet away, slowing down to a stop. She saw a hand signalling from the left side of the truck, waving toward the east. Wilson avenue is a through street and all vehicles on Clark street are required to stop before crossing it. She started to go east, but apparently the driver paid no attention to her but continued on and struck her when he was going ten or twelve miles an hour.

This is the second time this case is before us. Upon the prior consideration we reversed the judgment and remanded the cause upon the ground, as it seemed to us, that the case was improperly tried in that the trial court was not asked to construe

DEPARTMENT OF JUSTICE
DIVISION OF INVESTIGATION
WASHINGTON, D. C.
JULY 1, 1936
MEMORANDUM FOR THE ATTORNEY GENERAL
SUBJECT: [Illegible]

22112-1-1

RE: JUSTICE DEPARTMENT MEMORANDUM THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against the defendant for \$25,000 entered upon the verdict of the jury in an action seeking compensation for personal injuries received when she was struck by a motor truck alleged to have been owned and operated by defendant.

On August 12, 1935, at about 8:30 o'clock in the morning, while traveling Clark street, which runs north and south in Chicago, on the south sidewalk of Wilson Avenue, which runs east and west, plaintiff was struck and run down by a large moving van truck driven by Thomas Burke, who also owned it. At the time of the accident she looked south and saw the truck about 150 or 175 feet away, coming north. She walked to the middle of the street between the two street car tracks on Clark street and then saw the truck 25 or 30 feet away, moving down to a stop. She saw a hand signaling from the left side of the truck, waving toward the east. Wilson Avenue is a through street and all vehicles on Clark street are required to stop before crossing it. She started to go east, but apparently the driver paid no attention to her but continued on and struck her when he was going ten or twelve miles an hour.

This is the second time this case is before us. Upon the prior consideration we returned the judgment and remanded the cause upon the ground, as it seemed to us, that the case was improperly tried in that the trial court was not asked to consider

the contract between the defendant and Thomas Burke, the owner and driver of the truck. The Supreme court in an opinion filed June 18, 1931, has held we were in error in this respect and that the contract was properly submitted to the jury for construction, citing Turner v. Osgood Art Colortype Co., 223 Ill. 639. This latter case was not cited or called to our attention upon the former hearing, so we did not consider the rule therein stated. The Supreme court has remanded the cause to this court with directions to consider other errors assigned and argued but not passed upon by us.

The Supreme court opinion holds that the jury properly found that in the instant occurrence "Burke was the servant of defendant and not an independent contractor;" also that there were no reversible errors in the instructions nor in the rulings on the admissibility of evidence. This leaves, therefore, only two errors assigned and argued upon which we are required to pass. The first is the alleged improper remarks of the court during the trial.

The plaintiff while testifying was attempting to state that she saw some one at the driver's place on the truck wave his hand from the left side of the truck to the east, which was the direction in which plaintiff was going. The witness was demonstrating with her hand as to the kind of motion which was made, which demonstration naturally would not show in the record. The court said: "Let the record show the hand stuck out from the side of the cab, moving in a partial circulatory manner, indicating an intention to direct the traffic to the east." The court was intending only to describe the motions of the witness, so that they might appear in the record. The record does not show that the court's interpretation was contrary to the testimony of the witness who had said: "The hand swung this way (indicating) and waved toward the east." The court's remarks were

the contract between the defendant and Thomas Burke, the owner and driver of the truck. The Supreme court in an opinion filed June 18, 1931, has held we were in error in this respect and that the contract was properly submitted to the jury for consideration, giving Turner v. General Electric Co., 253 Ill. 630. This latter case was not cited or relied on our attention upon the former hearing, so we did not consider the rule therein stated. The Supreme court has remanded the cause to this court with directions to consider other errors assigned and argued but not passed upon by us.

The Supreme court again holds that the jury properly found that in the instant occurrence "Burke was the servant of defendant and not an independent contractor;" also that there were no reversible errors in the instructions nor in the rulings on the admissibility of evidence. This leaves, therefore, only one error assigned and argued upon which we are required to pass. The issue is the alleged improper remarks of the court during the trial.

The plaintiff while testifying was attempting to state that she saw one of the driver's men on the truck wave his hand from the left side of the truck to the east, which was the direction in which plaintiff was going. The witness was demonstrating with her hand as to the kind of motion which was made, which demonstration naturally would not show in the record. The court said: "For the record, now the hand went out from the side of the cab, moving in a partial circular manner, indicating an intention to direct the traffic to the east." The court was intending only to describe the motions of the witness, so that they might appear in the record. The record does not show that the court's interpretation was contrary to the testimony of the witness who had said: "The hand swung this way (indicating) and moved toward the east." The court's remarks were

simply descriptive of the manner in which the witness was waving her hand on the stand and could not be understood as any statement of fact as to the occurrence. There was no reversible error in the court so doing; indeed it was quite proper.

The other point which we are asked to consider is the size of the verdict. It is argued that the amount of \$65,000 is excessive. Whether or not a verdict in a personal injury case is excessive is one of the most difficult questions for a court of review to determine. Courts of review should ordinarily leave this to the determination of the jury who saw the parties and whose judgment is fully as sound in this respect as that of the court of review.

Maskaliunas v. Chicago & N. W. Ry. Co., 235 Ill. App. 198.

Counsel for plaintiff in their brief site the injuries of plaintiff in great detail, occupying eight and a half pages, with specific references to the record. The truck at the time it struck her was going about fifteen or eighteen miles an hour. It struck plaintiff with the front fender and carried her forward some six feet, when she fell under the truck and was picked up in front of the left rear wheels, indicating that the front left wheel had passed over her. Plaintiff was at the time twenty-two years of age, earning \$1800 as agent in charge of the Elevated Railroad at its Wilson avenue station, in Chicago. She had always been in good health with no prior illness. From the time she was struck, about 3:00 o'clock in the morning, she was unconscious until the following morning. She remained in the hospital about a week, receiving treatment. She was then taken home in an ambulance, where she remained ten weeks before she was able to get out of bed, all of the time suffering great pain. For two years and nearly nine months from the time of the accident until the time of the trial she suffered great pain in the back of her head and cannot walk for any distance without becoming weak and dizzy. Her menstruation periods

highly descriptive of the manner in which the witness was waving
 her hand on the stand and could not be understood as any statement
 of fact as to the occurrence. There was no intelligible error in
 the court as being induced it was quite proper.

The other point which we are asked to consider is the
 size of the verdict. It is argued that the amount of \$50,000 is
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 excessive is one of the most difficult questions for a court of
 review to determine. Courts of review should ordinarily leave this
 to the determination of the jury who saw the parties and whom they
 must be fully as well as the weight of the evidence at the time of review.
Washington v. The People, 111 Ill. 209, 1894.

Counsel for plaintiff in their brief also the injuries of
 plaintiff in great detail, occupying eight and a half pages, with
 specific references to the record. The track at the time it struck
 her was going about fifteen or sixteen miles an hour. It struck
 plaintiff with the front tender and carried her forward some six
 feet, when she fell under the track and was picked up in front of
 the left foot wheel, indicating that the front left wheel had passed
 over her. Plaintiff was at the time twenty-two years of age, earning
 \$1000 as agent in charge of the Elevated Railroad at the Wilson
 Avenue station, in Chicago. She had always been in good health
 with no prior illness. From the time she was struck, about 8:00
 o'clock in the morning, she was unconscious until the following
 morning. She remained in the hospital about a week, receiving
 treatment. She was then taken home in an ambulance, where she
 remained ten weeks before she was able to get out of bed, all of
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 from the time of the accident until the time of the trial she suf-
 fered great pain in the back of her head and cannot walk for any
 distance without becoming weak and dizzy. Her conversation during

stopped for about seven months and at the time of the trial had to be brought on through medical aid every month. She uses a crutch in walking. The left leg is smaller and shorter than the other. The X-ray shows a definite fracture line running through the right parietal bone at about its center portion and indicates that this results from force or violence which cracked the bone. There is also an interruption in the bony continuity or a break in the bone in the lower or back portion of the body of the first segment of the sacrum. There is a lateral curvature of the spine. The X-ray shows a fracture line running from the upper and lateral border. There is a tremor of the tongue on protrusion and a tremor of the fingers. There was evidence of a hardening along the muscles in the small of the back. The plaintiff suffers from a swaying or leaning to the left when standing and has to be held to keep from hurting herself when falling. There was evidence that this cannot be controlled by the patient and that the conditions found are permanent. There was evidence that she has what is called retrograde amnesia, which means a lapse of memory of events preceding the time the injury was sustained, resulting from concussion of the brain.

Plaintiff has been transformed from a healthy, active young woman into a permanent invalid and cripple. While the verdict is very large, yet we cannot find any reasonable basis for holding that the jury did not use its best judgment in arriving at the amount of compensation. Under such circumstances we would not be justified in changing it.

For the reasons above indicated, we hold that the judgment must be affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

...escaped for about seven months and at the time of the trial had to
be brought on through medical aid every month. She was a woman
in waiting. The left leg is smaller and shorter than the other.
The X-ray shows a definite fracture line running through the right
part of the bone at about its center portion and indicates that this
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also an interruption in the bone continuity or a break in the bone
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the sacrum. There is a lateral curvature of the spine. The X-ray
shows a fracture line running from the upper and lateral border.
There is a fracture of the tibia on the anterior and a fracture of the
fibula. There was evidence of a ribcage along the middle in the
wall of the back. The glenoid cavity from a swelling of the
to the left when standing and has to be held to keep from falling
itself when falling. There was evidence that this cannot be con-
trolled by the patient and that the condition found to be permanent.
There was evidence that she has what is called retrograde amnesia,
which means a lapse of memory of events preceding the time the
injury was sustained, resulting from concussion of the brain.
The X-ray has been transmitted from a healthy, active
young woman into a permanent invalid and cripple. While the verdict
is very large, yet we cannot find any reasonable basis for holding
that the jury did not use its best judgment in arriving at the
amount of compensation. Under such circumstances we would not be
inclined to disturb it.

For the reasons above indicated, we hold that the jury
must have been correct.

ATTESTED.

Witness, J. J., and Robert, J., counsel.

35134

MAX M. ROSTON,
Appellee,

vs.

WILLIAM A. BLESSING,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

265 L.A. 650⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant in a joint action for rent and possession of certain premises wherein there was a verdict for plaintiff on the issue of possession and for defendant on the issue of rent due, with judgment accordingly, after motions of defendant for a new trial and in arrest had been overruled. There has been no appearance in this court for plaintiff, and the record of 101 pages, including a stenographic report of the trial, is only briefly abstracted.

It is argued for reversal that the jury consisted of only eleven instead of twelve men, as required at common law and as guaranteed by article 2, section 5, of the Constitution of our state. Cases are cited in which the opinions state that the common law jury should consist of twelve men, etc. (Airion v. E. J. Verschner Contracting Co., 312 Ill. 343; Sinopoli v. Chicago Rys. Co., 316 Ill. 609; Linka v. Chicago Rys. Co., 318 Ill. 570.) The record fails to disclose, however, any objection on the part of defendant, and his waiver of any objection to the trial of the case by eleven jurors (he having participated in the trial) must be implied under the inadequate abstract submitted.

It is urged that the verdict for possession in favor of plaintiff is inconsistent with the verdict that no rent was due. The demand for possession was not only for non-payment of rent but also for failure to repair and paint as agreed. The verdicts are

therefore not necessarily inconsistent.

It is urged that Hon. J. H. Clayton, the presiding Judge, was not in fact a judge at the time of the trial and that the judgment should be reversed for that reason. The placita, however, discloses that there was present, together with the clerk, bailiff and state's attorney, "Honorable J. H. Clayton, Judge of the City Court of Johnson City, County of Williamson, Illinois, holding a branch of the Municipal court of Chicago at the request of the judges of said Municipal court." This is, we think, sufficient. Moreover, this court will take judicial notice of the fact that at the time of the trial Hon. J. H. Clayton was a Judge of the said City court. See the opinion in New York, Chicago & St. Louis R. R. Co. v. Zajicek, general number 35138, this day filed.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

therefore not necessarily inconsistent.

It is urged that Hon. J. M. Clayton, the presiding judge, was not in fact a judge at the time of the trial and that the judgment should be reversed for that reason. The justice, however, discloses that there was present, together with the clerk, bailiff and state's attorney, "Honorable J. M. Clayton, Judge of the City Court of Jackson City, County of Williamson, Illinois, holding a branch of the Municipal court of Chicago at the request of the judges of said Municipal court." This is, we think, sufficient. Moreover, this court will take judicial notice of the fact that at the time of the trial Hon. J. M. Clayton was a judge of the said city court. See the opinion in the case.

Chicago v. Jackson, 111 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For the reasons indicated the judgment is affirmed.

ATTORNEY GENERAL

CHIEF JUSTICE, U. S. SUPREME COURT.

35158

THE NEW YORK, CHICAGO & ST.
LOUIS RAILROAD COMPANY, a
corporation,

Appellee,

v.

JAMES ZAJICEK,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

2021 A. 650⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The railroad company filed a complaint in forcible detainer against James Zajicek. Defendant appeared, made a motion to quash which was denied, filed a plea, and on October 15, 1930, the case was called for trial and was submitted to the court without a jury. The court heard the evidence and arguments of counsel, and on December 12, 1930, made a finding that defendant was guilty and on December 19th entered a judgment for restitution and costs. Defendant excepted and prayed an appeal to the appellate court which was allowed upon the filing of a bond of \$250 within five days to be approved by the clerk of the Circuit court, and 90 days was allowed for filing a bill of exceptions. December 24th thereafter an order was entered extending the time 20 days in which to file the appeal bond. This time allowed is beyond the limit prescribed by statute for perfecting the appeal in forcible detainer cases, which is five days. Smith-Hurd's Illinois Revised Statutes (1929) chapter 57, section 13.

The record of the clerk shows a hearing was had on January 9, 1931, upon a motion to vacate the judgment entered December 19, and that the matter was continued to January 22 when it was again continued to January 29, on which date an order was entered by Judge Caverly denying the motion. From that order this appeal has been perfected.

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THE NEW YORK
LAWYERS ASSOCIATION
INCORPORATED

NEW YORK

NEW YORK

JAMES H. HARRIS
APPLICANT

2018

THE NEW YORK LAWYERS ASSOCIATION

The applicant company filed a complaint in forcible

detainer against James H. Harris. Defendant appeared, made a motion

to quash which was denied, filed a plea, and on October 12, 1930,

the case was called for trial and was submitted to the court with-

out a jury. The court heard the evidence and arguments of counsel.

and on December 12, 1930, made a finding that defendant was guilty

and on December 12, 1930, a judgment for plaintiff was entered.

Defendant excepted and moved an appeal to the appellate court which

was allowed upon the filing of a bond of \$250 within five days to

be approved by the clerk of the Circuit court, and 30 days was allowed

for filing a bill of exceptions. Defendant thereupon entered an order

was entered extending the time to file the appeal

and this time allowed is beyond the limit prescribed by statute

for perfecting the appeal in forcible detainer cases, which is five

days. With-Harris' Illinois Revised Statutes (1930) chapter 44.

Section 12.

The record at the clerk shows a hearing was had on January

2, 1931, upon a motion to vacate the judgment entered December 12,

and that the matter was continued to January 22 when it was again con-

tinued to January 29, on which date an order was entered by Judge

quashing the motion. From that order this appeal has been

perfected.

There is no bill of exceptions in the record and therefore no showing as to the motion to set aside the judgment or the grounds upon which the trial court was asked to do so.

It is contended by defendant, however, that the Hon. William B. Wright, by whom the judgment purports to have been entered, was not a judge of the Circuit court of Cook county on December 12, 1930, or on December 19, 1930, and that the purported judgment is void and the entry thereof a nullity for that reason. Defendant says that this court will take judicial notice of the fact that Judge Wright was not at the times mentioned a judge of the Circuit court of Cook county, and that it was therefore unnecessary to support the motion by an affidavit showing that fact.

The placita which appears in the supplemental record shows that at the September term, 1930, of the Circuit court of Cook county, the Hon. William B. Wright, judge of the fourth judicial district of the state of Illinois, was holding a branch of the Circuit court of Cook county. The placita for the December term of said court, 1930, is as follows:

"United States of America
State of Illinois)Cook County)SS.

Pleas, before the Honorable William B. Wright, Judge of the Fourth Judicial District of the State of Illinois holding a branch of the Circuit Court of Cook County, at the request of the Judges of said Circuit Court at a term thereof begun and holden at Chicago, in the Court House in said County and State on the Third Monday (being the 15th day) of December in the year of Our Lord One Thousand Nine Hundred and Thirty and of the Independence of the United States the One Hundred and Fifty-fifth.

Present, Honorable William B. Wright, Judge of the Fourth Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, State of Illinois.

John A. Swanson, State's Attorney.
William D. Meyering, Sheriff.

Attest:

Thomas O. Wallace, Clerk."

It is the settled law of this state that a Circuit court judge is not confined to his own circuit and has power upon request of a resident judge to hold court in any circuit of the state.

There is no bill of exceptions in the record and there-
fore no showing as to the motion to set aside the judgment or the
grounds upon which the trial court was asked to do so.
It is contended by defendant, however, that the Hon.
William B. Wright, by whom the judgment was entered, is now
a judge of the Circuit Court of Cook County, and that the
judgment is void and the entry thereof a nullity for that reason.
Plaintiff says that this court will take judicial notice of the fact
that Judge Wright was not at the time mentioned a judge of the
Circuit Court of Cook County, and that it was therefore unnecessary
to support the motion by an affidavit showing that fact.
The plaintiff which appears in the supplemental record
shows that at the September term, 1930, of the Circuit Court of
Cook County, the Hon. William B. Wright, Judge of the Fourth
Judicial District of the State of Illinois, was holding a session
of the Circuit Court of Cook County. The plaintiff for the December
term of said court, 1930, is as follows:
"United States of America
State of Illinois (Cook County, Ill.)
Plaintiff, against the Honorable William B. Wright, Judge
of the Fourth Judicial District of the State of Illinois holding
a session of the Circuit Court of Cook County, at the request of
the judges of said Circuit Court of Cook County, and the
Judges of Chicago, in the Court House in said County and State
on the first Monday (being the 15th day) of December in the year
of our Lord One Thousand Nine Hundred and thirty and of the
Independence of the United States the second and fifty-third
years, do hereby certify that William B. Wright, Judge of the Fourth
Judicial District of the State of Illinois, holding a session
of the Circuit Court of Cook County, State of Illinois,
John A. Kennedy, Clerk of the Court,
William B. Wright, Clerk,
Thomas B. Wright, Clerk."
It is the settled law of this state that a Circuit Court
judge is not entitled to his own clerks and has power upon request
of a plaintiff judge to have a clerk in any district of the state.

(Solomon v. C. T. & T. Co., 115 Ill. App. 194.) Where the placita shows that a judge of another circuit presided, it will be presumed he did so by request of a proper judge. (Nietz v. People, 77 Ill. 518.) The Supreme and Appellate courts take judicial notice of who are judges, their terms of office, the organization of the courts and the jurisdiction thereof. (Vahle v. Brackenneik, 154 Ill. 231.) The courts also take judicial notice as to who are the judges of the County courts in the respective counties. (Village of Hinsdale v. Shannon, 182 Ill. 312.) The courts of review also take judicial notice as to who is the judge of a particular city court and of the fact that he may hold circuit court in any of the circuits of the state when properly requested to do so. (Madden v. City of Chicago, 283 Ill. 165.) The courts of the Supreme and Appellate courts also take notice of the division of the United States into states and the corporate bodies into which these different states are subdivided. (People v. Snyder, 279 Ill. 435; Village of Catlin v. Tilton, 281 Ill. 601; Kristel v. Mich. Cent. R. R. Co., 213 Ill. App. 518.) They also take judicial notice of a proclamation of the president of the United States. (Lindelsee v. C. O. & P. Ry. Co., 226 Ill. App. 20.)

Defendant says that Judge Wright in fact was not sitting an holding court in the Circuit court of Cook county on December 19, 1930, when the judgment was entered, and that this court should take judicial notice of that fact. As already stated, the record affirmatively shows that Judge Wright was present, and there is no bill of exceptions showing to the contrary. This court may and does take judicial notice of the fact that Judge Wright was not on the dates mentioned a judge of the Circuit court of Cook county, but it does not take judicial notice of the fact as to the precise time at which he ceased to hold court and returned to his own district. This court can and does

(Pollock v. W. T. & F. Co., 113 Ill. App. 194.) Where the

plaintiff shows that a judge of another circuit presided, it will be presumed he did so by request of a proper judge. (Wicks v. Brown,

77 Ill. 218.) The Supreme and Appellate courts take judicial

notice of who are judges, their terms of office, the organization of the courts and the jurisdiction thereof. (Wicks v. Brown, 113 Ill.

218.) The courts also take judicial notice as to who are the

judges of the County courts in the respective counties. (Wicks v.

Wicks, 113 Ill. 218.) The courts of review also

take judicial notice as to who is the judge of a particular city

court and of the fact that he may hold circuit court in any of the

counties of the State when properly requested to do so. (Wicks v.

Wicks, 113 Ill. 218.) The courts of the Supreme and

Appellate courts also take notice of the division of the United

States into States and the corporate bodies into which these different

States are subdivided. (People v. Wicks, 113 Ill. 218; Wicks v.

Wicks, 113 Ill. 218; Wicks v. Wicks, 113 Ill. 218.)

They also take judicial notice of a proclamation

of the President of the United States. (Wicks v. Wicks, 113 Ill.

218; Wicks v. Wicks, 113 Ill. 218.)

Defendants say that Judge Wright was not sitting on

holding court in the Circuit court of Cook County on December 19, 1929,

when the judgment was entered, and that this court should take judicial

notice of that fact. As already stated, the record affirmatively

shows that Judge Wright was present, and there is no bill of exceptions

showing to the contrary. This court may and does take judicial notice

of the fact that Judge Wright was not on the dates mentioned a judge

of the Circuit court of Cook County, but it does not take judicial

notice of the fact as to the precise time at which he ceased to hold

court and returned to his own district. This court can and does take

take judicial notice of the rising and the setting of the sun, but it cannot take judicial notice of the rising up or lying down of a judge of the Circuit court. Defendant cites authority to the effect that when the term of office of a judge has expired, he is wholly without authority or power to enter any order or judgment. We do not doubt it (Waite v. The People, 228 Ill. 173), but the proposition is not controlling here, since the record affirmatively shows that Judge Wright at the time the judgment in question was entered was present by invitation of the Judges of the Circuit court of Cook county and holding a branch of that court in Chicago. What, if any, authority he might have over matters undisposed of in Cook county upon his return to his own district, it is therefore unnecessary to consider.

The order will be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

take judicial notice of the rising and the setting of the sun, but it cannot take judicial notice of the rising up or lying down of a judge of the Circuit court. Defendant cites authority to the effect that when the term of office of a judge has expired, he is wholly without authority or power to enter any order or judgment. We do not doubt it (Waite v. The People, 228 Ill. 173), but the proposition is not controlling here, since the record affirmatively shows that Judge Wright at the time the judgment in question was entered was present by invitation of the judges of the Circuit court of Cook county and holding a branch of that court in Chicago. What, if any, authority he might have over matters undisposed of in Cook county upon his return to his own district, it is therefore unnecessary to consider.

The order will be affirmed.

AFFIRMED.

O'Connor, P. J., and McGurley, J., concur.

34925

1637
WILLIAM JOY,
Defendant in Error,

v.

UNION BANK OF CHICAGO, as
administrator of the estate of
Minnie Williams, deceased,
Plaintiff in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

262 L.A. 651

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

This writ of error is sued out to reverse a decree of the circuit court, entered October 10, 1930, wherein it was adjudged that defendant, Union Bank of Chicago, as administrator of the estate of Minnie Williams, deceased, "pay to complainant, William Joy, the sum of \$1297.53, as his half interest in the partnership funds on deposit in the Industrial State Bank and the Hyde Park-Kenwood National Bank, at the time of the death of Minnie Williams." Complainant has neither entered his appearance nor filed a brief in this court. No certificate of evidence is contained in the transcript of the record.

In complainant's bill, filed February 21, 1930, the prayer is that defendant, as administrator, etc., account to him, etc., and upon the accounting being had that it be decreed to pay to him whatever sum may appear to be due to him, etc. In the bill complainant alleged in substance that he, during the lifetime of Minnie Williams and for two years prior to her death, was a co-partner with her in the business of carrying on a rooming house at 21 West 47th street, Chicago, and a garage at 4527 South Wabash avenue, Chicago; that the funds of the co-partnership were kept in two banks in the name of Minnie Williams, - one in the Industrial State Bank and the other in the Kenwood State Bank (consolidated with another bank under the name of Hyde Park-Kenwood National Bank); that complainant does not read or write and

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T-1000 SENT TO BOSTON FOR THE FOLLOWING REASON: T-1000 WAS FOUND TO BE A MEMBER OF THE BLACK PANTHER PARTY.

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add to reports include as much as you can about the case.

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70. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Criminal Investigation, New York City, New York, dated 11/11/54:

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... ..

姓名: 王德成 性别: 男 年龄: 45 职业: 教师 籍贯: 山东 民族: 汉族 婚姻: 已婚 子女: 1 学历: 本科 学位: 硕士 职称: 副教授 工作单位: 山东省教育厅 联系电话: 13812345678 电子邮箱: wangdecheng@163.com 身份证号: 370101197801010001 住址: 山东省济南市经二路100号 邮编: 250001 备注: 无不良嗜好, 遵纪守法, 诚实守信。

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● 2000年10月1日

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None of the information in this report is to be used for any purpose other than that for which it was prepared.

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 二、经济
 三、文化
 四、教育
 五、军事
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It was, however, found that the above mentioned conditions are not sufficient to ensure the safety of the system.

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for this reason the partnership accounts were carried in said banks in the name of Minnie Williams; that at the time of her death there was on deposit in said first named bank the sum of \$1,083.93, and in said other named bank the sum of \$1811.13; that the aggregate of said two deposits is \$2595.06; that said co-partnership also owned two (2) shares of the capital stock of said first named bank, although the certificates of the stock were in the name of Minnie Williams; that when she died said stock was turned over to the undertaker, who buried her, as security for his costs and charges incurred by said burial; that all of the moneys on deposit in said two banks was, at the time of Minnie Williams' death, held by her in trust for the benefit of both partners, and complainant had and now has an equal one-half interest therein; and that defendant, as administrator, etc., has taken possession of said moneys, and has refused upon demand to turn over to complainant any portion thereof or to account to him, etc.

After defendant's plea to the bill had been overruled it filed an answer to the bill on June 2, 1930, and the cause was put at issue. In the answer, after denying all the material allegations of the bill, defendant alleged that Minnie Williams in her lifetime was the sole owner of said moneys on deposit in said two banks and that complainant had no interest therein as a copartner or otherwise.

In the decree in question, after reciting that the cause came on for hearing upon the bill, answer and replication thereto, and that evidence was heard in open court, the court made certain findings of specific and ultimate facts, which are in substantial accord with the allegations of complainant's bill as above set forth, and the court further found that, of said aggregate sum of \$2595.06, on deposit in said two banks in the name of Minnie Williams, "complainant is rightfully and equitably entitled to one-half thereof, amounting to \$1,297.53."

The only ground urged for a reversal of the decree is that

For this reason the partnership accounts were carried in said books in the name of Minnie Williams; that at the time of her death there was on deposit in said bank the sum of \$1,000.00, and in said bank were held the sum of \$100.00; that the aggregate of said two deposits is \$1,100.00; that said sum was deposited in said bank (2) where at the capital stock of said bank, Minnie Williams, the certificate of the stock was in the name of Minnie Williams; that when she died said stock was turned over to the executor, who paid her, as executor, for his estate and charges incurred by said estate; that all of the money on deposit in said bank was, at the time of Minnie Williams' death, held by her in trust for the benefit of said executor, and said executor had and has in equal one-half interest therein; and said executor, as executor, etc., and taken possession of said money, and has turned over to him over to said executor and parties interested as is shown to him, etc.

After defendant's plea to the bill had been overruled it filed an answer to the bill on June 3, 1930, and the cause was put on for hearing on the bill, answer and replication thereto, in the court. In the answer, after denying all the material allegations of the bill, defendant alleged that Minnie Williams in her lifetime was the sole owner of said money on deposit in said bank and that defendant had no interest therein as a copartner or otherwise. In the decree in question, after reciting that the cause came on for hearing upon the bill, answer and replication thereto, and that evidence was heard in open court, the court made certain findings of specific and ultimate facts, which are in substance as set forth with the allegations of complainant's bill as above set forth, and the court further found that, of said aggregate sum of \$1,100.00 on deposit in said bank in the name of Minnie Williams, "complainant is rightfully and equitably entitled to one-half thereof, amounting to

The only ground urged for a reversal of the decree is that

in it the court has not found sufficient facts to sustain the affirmative relief granted therein. There is no merit in the contention. All necessary specific and ultimate facts to sustain the relief granted are set forth in the findings of the decree. In Anderson v. Anderson, 339 Ill. 400, 408-9. it is said: "To sustain in an appellate court a decree granting affirmative relief, the party in whose favor it has been rendered must preserve in the record the evidence on which it is based or the decree must find the specific facts proved on the hearing. * * It is sufficient to find the ultimate facts justifying the relief granted, * * and it is not necessary to find minutely all the subsidiary facts which tend to prove the ultimate fact." (See, also, Roch v. Arnold, 242 Ill. 203, 210; Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 131.)

The decree of the circuit court should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

34938

ALEXANDER GRANT, MILO HOPKINS
and IVER JOHNSON, doing business
as Alexander Grant & Co.,
Appellees,

v.

SIMPSON MOTOR COMPANY,
a corporation,
Appellant.

1647
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2021A. 651²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action to recover for accountants' services rendered to defendant, there was a trial without a jury resulting in the court finding the issues in favor of plaintiffs, assessing their damages at \$1,107.50 and entering judgment for said sum against defendant on November 25, 1930. The present appeal followed.

In plaintiffs' original statement of claim, filed May 29, 1930, they sought to recover the sum of \$1107.50 for the "reasonable value" of said services, rendered in connection with an examination of the books and records of defendant to determine the amount of certain shortages.

In defendant's affidavit of defense, filed June 27, 1930, and signed by Frank R. Mesce, then its president, it is denied that plaintiffs rendered any services to defendant at its request, and it is alleged that plaintiffs never presented to defendant a report of its examination; that if such examination was made as claimed, "it was made solely at the request of one Franz R. Lauder, an employee of defendant, and for his individual benefit and not for the use and benefit of defendant;" and that said Lauder, as such employee, was not authorized by defendant to engage the services of plaintiffs.

On the issues thus made the cause came on for trial on

ALFRED J. BROWN, WILL HARRIS
and LEO J. BROWN, doing business
as BROWN, HARRIS & CO.,
Appellants,

ALFRED J. BROWN, WILL HARRIS,
a corporation,
Appellees.

COURT OF CHICAGO,
JANUARY TERM, 1930.

262 L.A. 571

MR. JUSTICE LUTHER WELLS, with the opinion of the court.

In a first class action to recover for accountants' fees
aloes rendered to defendant, there was a trial without a jury
resulting in the court finding the fees in favor of plaintiffs,
assessing their damages at \$1,157.50 and ordering judgment for said
sum against defendant on November 20, 1929. The present appeal
follows.

In plaintiffs' original statement of claim, filed May 29,
1929, they sought to recover the sum of \$1157.50 for the "reasonable
value" of said services, rendered in connection with an examination
of the books and records of defendant to determine the amount of
certain shortages.

In defendant's affidavit of defense, filed June 27, 1929,
and signed by Frank H. Hanes, then its president, it is denied that
plaintiffs rendered any services to defendant as its accountant, and it
is alleged that plaintiffs never presented to defendant a report of
its examination; that if such examination was made as claimed, "it
was made solely at the request of one Frank H. Hanes, an employee of
defendant, and for his individual benefit and not for the use and
benefit of defendant;" and that said Hanes, as such employee, was
not authorized by defendant to engage the services of plaintiffs.
On the issues thus made the case came on for trial on

November 12, 1930, and plaintiffs, in addition to introducing certain documentary evidence, called as witnesses said Lauder, two of the plaintiffs (Grant and Johnson) and C. J. Hauck, a senior accountant employed by plaintiffs. Said Mesce also testified, being called as plaintiffs' witness under section 33 of the Municipal Court act. At the conclusion of plaintiffs' evidence defendant's motion for a finding in its favor was denied. Thereupon, on plaintiffs' motion, they were given leave to file instantly an amended statement of claim and defendant within ten days a new affidavit of defense, and the further trial was ordered continued until November 25, 1930.

In the amended statement of claim plaintiffs alleged in substance that on December 12, 1929, they made an oral agreement with defendant whereby it employed them "to make an examination of its books of account and records, particularly as to the honesty of one of its employees and the account of a salesman in charge of its used car department;" that it was agreed that defendant would pay to plaintiffs \$25 per day for the services of senior accountants, \$15 per day for junior accountants, and \$50 per day for each partner's time in connection with the examination, "payment to be made on account from time to time as the work progressed;" that in pursuance of the agreement they made an examination of the books, etc., and had numerous conferences with officers and directors of defendant relative thereto; that in making the examination and having said conferences they consumed time as follows: partners' time 6-1/3 days; senior accountants' time, 26-4/3 days, and junior accountants' time, 9-2/3 days; that at said agreed prices the services were of the total value or amount of \$1107.50; that during the examination they discovered shortages in excess of \$3,800 and, as a result, defendant collected \$2000 from a bonding company; that after they had continued their examination until about January 17, 1930, they demanded a payment on account for said services but defendant refused to make any payment and still

November 12, 1930, and plaintiffs, in addition to interviewing certain documentary evidence, called as witnesses said Landst, two of the plaintiffs (Guent and Johnson) and E. J. Wenzel, a senior accountant employed by plaintiffs. said Wenzel also testified, being called as plaintiffs' witness under section 35 of the Municipal Court act. At the conclusion of plaintiffs' evidence defendant's motion for a finding in its favor was denied. Thereupon, on plaintiffs' motion, they were given leave to file interpleur an amended statement of claim and defendant within ten days a new affidavit of defense, and the further trial was ordered continued until November 22, 1930.

In the amended statement of claim plaintiffs alleged in substance that on December 12, 1929, they made an oral agreement with defendant whereby it employed them "to make an examination of the books of account and records, particularly as to the honesty of the of the employees and the accuracy of a statement in charge of the head of department;" that it was agreed that defendant would pay to plaintiffs \$25 per day for the services of senior accountants, \$15 per day for junior accountants, and \$50 per day for each partner's time in connection with the examination; "payment to be made on account from time to time as the work progressed;" that in pursuance of the agreement they made an examination of the books, etc., and had numerous conferences with officers and directors of defendant relative thereto; that in making the examination and having said conferences they consumed time as follows: partners' time 2-1/2 days; senior accountants' time, 22-1/2 days, and junior accountants' time, 2-2/3 days; that as said agreed prices the services were of the total value or amount of \$1107.50; that during the examination they discovered shortages in excess of \$2,500 and, as a result, defendant collected \$2000 from a building company; that after they had concluded their examination well about January 12, 1930, they demanded a payment on account for said services but defendant refused to make any payment and still

refuses, and that defendant is indebted to plaintiffs in said sum of \$1107.50.

The amended affidavit of defense is practically the same as defendant's original affidavit of merits with the addition that it is alleged that plaintiffs' services were of no value to defendant.

On the resumption of the trial of November 25, 1930, defendant called as witnesses said Frank M. Meace (who first became connected with defendant company in February, 1930, and was elected president in June, 1930), and Dr. H. B. Langsdale (who was a director and vice-president of defendant in January, 1930, and prior thereto.) Defendant also introduced in evidence the corporation's by-laws and the records of certain meetings of its directors prior to January, 1930.

The main contention of counsel for defendant is that the finding and judgment are against the manifest weight of the evidence. After reviewing the abstract and part of the transcript of the record, we are unable to agree with the contention. We think that all the material allegations of plaintiffs' amended statement of claim were proved by a preponderance of the evidence. The following facts in substance were disclosed upon the trial: In the latter part of the year 1929, defendant was engaged in an automobile business at 2107 Irving Park Boulevard, Chicago. There were three directors, John A. Simpson, Dr. H. B. Langsdale and Franz R. Lauder. Simpson was president, Langsdale vice-president and Lauder secretary and treasurer. Lauder was also the general manager. He had been connected with the company in different capacities for about six years. On December 1, 1929, Simpson was incapacitated by illness from performing his duties as president at the company's office, and Langsdale, a physician and surgeon by profession, was only there occasionally. Defendant's business affairs then were managed almost exclusively by

reference, and that defendant is indicted as principal in said case
of 1187-57.

The amended affidavit of defense is practically the
same as defendant's original affidavit of merits with the addition
that it is alleged that plaintiff's services were of no value to
defendant.

On the transmission of the trial of November 25, 1930,
defendant called as witnesses Frank H. Jones (who later became
connected with defendant company in February, 1930, and was elected
president in June, 1930), and Dr. H. B. Langdale (who was a director
and vice-president of defendant in January, 1930, and prior thereto).
Defendant also introduced in evidence the corporation's by-laws and
the records of certain meetings of its directors prior to January,

1930.
The main contention of counsel for defendant is that the
finding and judgment are against the manifest weight of the evidence.
After reviewing the exhibits and part of the transcript of the record,
we are unable to agree with the contention. We think that all the
material allegations of plaintiff's amended statement of claim were
proved by a preponderance of the evidence. The following facts in
evidence were disclosed upon the trial: In the latter part of the
year 1929, defendant was engaged in an automobile business at 2107
Loring Park, Chicago. There were three directors, John A.
Langston, Dr. H. B. Langdale and Frank H. Jones. Langston was
president, Langdale vice-president and bank secretary and treasurer.
Langston was also the general manager. He had been connected with
the company in different capacities for about six years. On
December 1, 1929, Langston was investigated by Illinois from performing
his duties as president of the company's office, and Langdale, a
physician and surgeon by profession, was only there occasionally.
Defendant's business affairs then were managed almost exclusively by

Lauder. He discovered certain irregularities in the books, etc., and determined that an audit should be made by outside accountants. He went to a hospital, where Simpson then was, and advised him of the situation, and was directed by Simpson to employ accountants and have the audit made. He also informed Dr. Langdale of his discoveries. On December 12, 1929, he called at plaintiffs' office, saw Grant and Johnson, informed them of the situation and plaintiffs agreed to make the requested examination and audit upon the terms as above stated in plaintiffs' amended statement of claim. On the following day they sent two accountants, a senior and a junior, to defendant's office and the work was commenced and continued until about January 17, 1930. During this period Lauder and others had various conferences with Grant, Johnson and the senior accountant, Hauck. As the result of the examination various irregularities were discovered, including a shortage of \$3,378, occasioned by embezzlements of defendant's bookkeeper, Arndt, who, by affidavit dated January 10, 1930, confessed the same. Thereafter defendant received the sum of \$2,000 on a fidelity bond written by a bonding company. About this time friction developed among the directors and officers of defendant, and Lauder, on January 13, 1930, severed all official connection with defendant and ceased to act as general manager. On January 17, 1930, plaintiffs, by Johnson, wrote and delivered a letter to defendant for "Attention of John A. Simpson." In the letter was outlined the work which had thus far been performed by plaintiffs and the results thereof. It concluded with the demand that "we be paid for our services to date or obtain a guaranty of the account." Defendant did not then pay to plaintiffs anything on account of the services rendered, nor did it give any guaranty of payment, and plaintiffs ceased further work. No formal written report of the incompleted examination or audit of defendant's books, etc., ever was presented to it. About February 10, 1930, Frank H. Meace became secretary and treasurer of defendant and at once assumed the active management of its business affairs. After Simpson's death he

... as discovered certain irregularities in the books, 1930.
and maintained that an audit should be made by outside accountants.
He went to a hospital, where, through their work, and advised him of the
situation, and was directed by Simpson to employ accountants and have
the audit made. He also informed Mr. Thompson of his discovery.
On December 12, 1929, he called at Plaintiff's office, saw Grant and
Johnson, informed them of the situation and Plaintiff agreed to make
the requested examination and audit upon the terms as above stated in
Plaintiff's amended statement of claim. On the following day they
sent two accountants, a partner and a junior, to defendant's office and
the work was commenced and continued until about January 17, 1930.
During this period Plaintiff and others had various conferences with
Grant, Johnson and the senior accountants, namely, as the result of the
examination various irregularities were discovered, including a short-
age of \$5,975, accounted for by misappropriation of defendant's bookkeeper,
Troy, who, by affidavit dated January 10, 1930, confessed the same.
Thereafter defendant received the sum of \$2,400 on a check payable to
him by a banking company. About this time friction developed among
the directors and officers of defendant, and Plaintiff, on January 15,
1930, severed all official connection with defendant and ceased to act
as general manager. On January 17, 1930, Plaintiff, by Johnson, wrote
and delivered a letter to defendant for "restoration of John A. Johnson."
In the letter was defined the work which had then far been performed by
Plaintiff and the results thereof. It concluded with the request that
"we be paid for our services to date on a basis of a twenty of the
account." Defendant did not then pay to Plaintiff anything on
account of the services rendered, nor did it give any guaranty of
payment, and Plaintiff ceased further work. He formal written report
of the requested examination on audit of defendant's books, etc.,
ever was prepared for it. About February 10, 1930, Frank M. Jones
became president and treasurer of defendant and at once assumed the
active management of its business affairs. After Simpson's death he

became president in June, 1930. The testimony of Grant, Johnson and Hauck, plaintiffs' witnesses, disclosed that the time expended in the work of examining defendant's books, etc., was as stated in the amended statement of claim. Their testimony in some particulars was corroborated by certain "working papers," consisting of 129 pages, introduced in evidence, and said testimony was not disputed. Hauck further testified that on March 12, 1930, he delivered to Mesce certain papers which had been used in connection with said examination and audit, the return of which defendant had demanded; that at that time Hauck asked Mesce when plaintiffs' bill for their services would be paid, and that Mesce replied that defendant "was now doing more business, that it was getting out of the hole and that as soon as possible the bill would be paid." Mesce denied making any such statement or that he had ever promised payment by defendant of plaintiffs' account.

Defendant's counsel further contend that the judgment should be reversed, (1) because plaintiffs failed to prove the making of any agreement by a duly authorized agent of defendant; (2) because plaintiffs failed to prove the full performance of the contract, and (3) because such services as plaintiffs rendered to defendant were of no value to it. Each and all of these contentions, in our opinion, are without substantial merit. As to the first contention it appears that the agreement for the examination and audit was made by Lauder, acting for defendant, at a time when he was the general manager of its business affairs. As such general manager he had authority to employ plaintiffs and to make the said agreement with them on behalf of defendant. (3 Fletcher's Cyc. Corp. Sec. 2104.) Furthermore, it appears that before he made the agreement he consulted defendant's president, who was then ill and in a hospital, and obtained his verbal authorization to employ accountants for the purpose of having an examination and audit of defendant's books, etc. made. In Rosehill

became prevalent in June, 1930. The testimony of Grand, Johnson and Grand, Plaintiff's witnesses, disclosed that the time expended in the work of examining defendant's books, etc., was as stated in the amended statement of claim. Their testimony in some particulars was contradicted by certain "working papers," some dated of 1930 papers, introduced in evidence, and said testimony was not disputed. However, further testified that on March 12, 1930, he delivered to Grand and Plaintiff papers which had been used in connection with said examination and which, the return of which defendant had demanded; that at that time Grand asked Grand whether Plaintiff's bill for their services would be paid, and that Grand replied that defendant "was now doing more business, that it was getting out of the hole and that as soon as possible the bill would be paid." Grand testified that any such statement or that he had ever received payment by defendant of Plaintiff's account.

Defendant's counsel further contends that the judgment should be reversed, (1) because Plaintiff failed to prove the making of any agreement by a duly authorized agent of defendant; (2) because Plaintiff failed to prove the full performance of the contract; and (3) because such services as Plaintiff rendered to defendant were of no value to it. Such and all of these contentions, in our opinion, are without substantial merit. As to the first contention it appears that the agreement for the examination and audit was made by Grand, acting for defendant, at a time when he was the general manager of the defendant's business. A said agreement was not intended to employ Plaintiff and to make the said agreement with them on behalf of defendant. (2) Plaintiff's Ex. Corp. No. 1104. Furthermore, it appears that before he made the agreement he consulted defendant's president, who was then ill and in a hospital, and obtained his verbal authorization to employ Plaintiff for the purpose of having an examination and audit of defendant's books, etc. made. It is possible

Cemetery Co. v. Dempster, 223 Ill. 567, 578, it is said that the rule "is now firmly established that an agent of a corporation can be appointed by parol for any proper corporate purpose, and the acts of agents thus appointed within the general scope of their authority are binding upon the corporation, and all services rendered or benefits conferred at the request of its agents raise an implied promise, to enforce which an action is maintainable against the corporation." As to the second contention, while it is true that plaintiff did not fully complete their examination and audit, it appears that the agreement was that they should be paid on account from time to time at the stipulated per diem rates, and that after plaintiffs had performed much work their demand for a payment on account was refused. Hence, defendant having first breached the agreement, plaintiffs were justified in ceasing to do any further work thereunder. Furthermore, it is the law that "where the part performance of a contract has been beneficial to the other party, and he has accepted and retained the benefits thereof, the party partially performing is entitled to recover either the reasonable value of such performance, or the contract price pro tanto, subject to the reciprocal right of the other party to recoup such damages as he has suffered from the failure of plaintiff to fully perform, or to recover such damages in a separate action." (13 Corpus Juris, sec. 787, p. 693; Turner v. Goodman, 90 Ill. App. 339, 342-3; Spiro v. Cable, 248 Ill. App. 343, 348-9.) As to the third contention it appears from the uncontradicted testimony that one of the results of plaintiffs' examination and audit was that it was discovered that defendant's bookkeeper had embezzled moneys of defendant to the extent of over \$3800, and that a bonding company, on its fidelity bond written for defendant's benefit, had paid to it the sum of \$2,000.

And we do not think that the trial court committed error in refusing to admit in evidence a certified copy of a certain bill

in chancery which said Lauder had filed in the circuit court against defendant and others shortly after he left defendant's employ as general manager. Defendant's counsel state in their brief here filed that said instrument was offered "for the purpose of showing his feelings towards defendant and, therefore, directly affected his credibility as a witness." It had no tendency to impeach the testimony which Lauder gave upon the trial of the instant case.

The judgment of the municipal court against defendant should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

in January 1941 when he was killed in the Soviet Union. His death was reported in the Soviet press and his body was buried in the Soviet Union. His death was reported in the Soviet press and his body was buried in the Soviet Union. His death was reported in the Soviet press and his body was buried in the Soviet Union.

1941

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1657
ELI WEINSTEIN, a minor, by
Sam Weinstein, his father and
next friend,

Appellee,

v.

CITY OF CHICAGO, a municipal
corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

2621A. 051³

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On the afternoon of June 4, 1927, plaintiff, a minor, about 12 years of age, was walking northerly on, or "skipping along," the public sidewalk on the east side of Turner avenue (a north and south street), near Douglas Boulevard, in the City of Chicago, when he stepped into, or tripped because of, a large hole or break in the sidewalk, causing him to fall and suffer a comminuted fracture of his left arm, near the elbow. At the time he was in the exercise of such care and caution as boys of his age, experience and intelligence usually exercise under similar circumstances. He was taken to a hospital and there, and afterwards at his home, received proper medical treatment. The charge in the declaration, to which the City filed a plea of the general issue, is to the effect that the City had negligently permitted the hole or break in the sidewalk to remain for several years, and that it had constructive notice of its defective and dangerous condition. This charge was sufficiently proved by the testimony of numerous witnesses for plaintiff, given upon the trial in November, 1930, and the City did not introduce any evidence to the contrary. As to plaintiff's injuries the testimony of his witnesses disclosed that they were of a serious and permanent character. One of his medical witnesses testified in substance as follows:

Page 2

ALL THIS BEING, a minor, by
her attorney, his father and
next friend,

appellee.

v.

CITY OF BOSTON, a municipal
corporation,

appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

2021.A.001

IN REMOVAL FROM THE CIRCUIT COURT OF COOK COUNTY.

On the afternoon of June 4, 1927, plaintiff, a minor,

about 12 years of age, was walking northward on "Michigan

avenue," the public sidewalk on the east side of Turner Avenue (a

north and south street), near Douglas Boulevard, in the City of

Chicago, when he stepped into, or tripped because of, a large hole

or crack in the sidewalk, causing him to fall and suffer a comminuted

fracture of his left arm, near the elbow. At the time he was in the

exercise of such care and caution as boys of his age, experience and

intelligence usually exercise under similar circumstances. He was

taken to a hospital and there, and afterwards at his home, received

proper medical treatment. The charge in the indictment, to which

the City filed a plea of the general issue, is to the effect that

the City had negligently permitted the hole or crack in the sidewalk

to remain for several years, and that it had constructive notice of

the defective and dangerous condition. This charge was sufficiently

proved by the testimony of numerous witnesses for plaintiff, given

when the trial in November, 1926, and the City did not introduce any

evidence to the contrary. As to plaintiff's injuries the testimony

of his witnesses disclosed that they were of a serious and permanent

character. One of his medical witnesses testified in substance that

the arm would never be normal and that there always would be a considerable limitation in its use. The jury returned a verdict for plaintiff in the sum of \$3,500, and the court entered judgment in that sum against the City.

After reviewing the present transcript we are of the opinion that the judgment should be affirmed. Counsel for the City do not here argue that the verdict is excessive. Their principal contentions are (a) that the negligence of the City as charged was not proven; (b) that the court erred in admitting in evidence certain photographs offered by plaintiff of the place of the accident; and (c) that plaintiff's testimony was unworthy of belief because he falsely testified that since the accident he had been unable to play basket ball or other games as formerly. We do not think there is any merit in the first two contentions. As to the last, while certain of the City's witnesses contradicted plaintiff's testimony as to his said inability, since the accident, to play at the games mentioned, the credibility of his entire testimony was for the jury to determine.

The judgment is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

34977

MIDWESTERN TOOL COMPANY,
a corporation,
Appellee,

v.

BROLL PATENTS CORPORATION,
Appellant.

166 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 L.A. 551⁴

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, based upon defendant's unwarranted cancellation of a contract as claimed and commenced March 20, 1930, and tried without a jury in December, 1930, the court found the issues in plaintiff's favor, assessed its damages at \$2,398.90, and entered judgment against defendant in that amount. The present appeal followed.

In the year 1929, and prior thereto, plaintiff operated a machine shop in Chicago, and defendant was engaged, also in Chicago, in the manufacture and sale of machinery and especially of a machine for the putting of a roll edge on mattresses. For several years, at intervals, plaintiff had manufactured for defendant certain parts for said machine. H. H. Swensen and Benjamin Bernsten were, respectively, president and vice president of plaintiff, and J. W. Broll and D. E. Haigh were, respectively, president and secretary of defendant.

Plaintiff alleged in its statement of claim that about May 13, 1929, defendant requested it to furnish quotations on certain complete needles for defendant's Model D machine, which request resulted in defendant's verbal order on July 16, 1929, and plaintiff's written confirmation of the same, dated July 18, 1929; and that said written confirmation, in the form of a letter addressed to defendant and signed by plaintiff, by said Bernsten, is as follows:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: THE ESTATE OF JAMES EARL RAY, JR.
Debtor.

CHIEF OF CHARGE
UNITED STATES MARSHAL

202 A.A. 001

1. THE DEBTS OF THE DEBTOR ARE AS FOLLOWS:

In a first class action in bankruptcy, based upon debts-
and a bankruptcy petition of a certain estate and commenced
March 20, 1970, and filed with a jury in January, 1970, the
court found the issues in plaintiff's favor, awarded the damages
of \$1,398.00, and entered judgment against defendant in that amount.
The present appeal follows.

In the year 1969, and prior thereto, plaintiff operated
a machine shop in Chicago, and defendant was engaged, also in
Chicago, in the manufacture and sale of machinery and especially
of a machine for the pulling of a coil rope on rollers. For
several years, at intervals, plaintiff had conducted the business
of a machine for the pulling of a coil rope on rollers. In
1969, respectively, plaintiff and the president of plaintiff, and
J. V. Hall and J. W. Hall were, respectively, president and
secretary of defendant.

Plaintiff alleged in its statement of claim that about
May 11, 1969, defendant requested it to furnish protection on
certain complete models for defendant's Hotel & Machine, which
request resulted in defendant's verbal order on May 11, 1969, and
plaintiff's written confirmation of the same, dated May 11, 1969,
and that said written confirmation, in the form of a letter addressed
to defendant and signed by plaintiff, by said letter, in an

"Confirming conversation with Mr. Droll we have entered your order for 5,000 complete needles at a price of \$1.90 each with an option of 5,000 more needle shafts only or complete needles if desired; price to be determined on the completion of the first lot of 5,000 complete needles.

We have ordered the needle wire sufficient for 10,000 needles and it is understood that in the event that this material is not used for the second lot of needles, this stock is to become your property at our cost price.

This needle wire as we advised is imported and we have cabled for it and we are advised it will take approximately 60 to 90 days to manufacture and deliver to Chicago and we expect to deliver at least 500 needles within 1 month after arrival of needle wire.

We wish that you would look up all of the tools that we delivered to you that were used on the first lot of these needles which we made for you. Get these fixtures together and we will send for them and go over them carefully to see what tools can be used on this order. We would like to have you confirm this order in your regular way."

Plaintiff further alleged that ^{on} July 13, 1929, it caused a cable message to be sent to England ordering the necessary needle wire; that on July 19th, defendant delivered to it the tools referred to; and that on August 6, 1929, a further written contract was entered into between the parties, enlarging the contract already entered into with blue print directions, as follows:

"Chicago, August 6, 1929.

Midwestern Tool Co.,

Chicago, Illinois.

We hereby place with you our order No. 9927 for 5,000 needles each completely assembled ready for use in our Droll Roll Edge Machine, Model D, said needles to be manufactured by you and delivered to us in accordance with the following specifications, and under the following terms:

1. Said needles are to be manufactured according to the sample needle delivered to you by us, and according to the blue prints for the parts of said needles, which said blue prints are numbered as follows: B 301 to B 307, inclusive. * *

2. Delivery of said needles to be as follows:

500 within four weeks from the receipt of material.

The balance to be delivered in monthly installments of 500 to 600 needles per month until the full amount has been delivered, beginning one month after delivery of first 500 needles.

3. We agree to pay you for each needle completely assembled, \$1.90, payment to be made to you on the 10th of each month for all needles delivered and accepted in the preceding month.

4. It is understood that you have ordered sufficient wire for 15,000 needles, and in the event that no further orders are received from us, we agree to purchase from you the unused material at the purchase price.

"Enclosed herewith is a copy of a letter of 11.00 dated your order for 1.000 needles. It is requested that you return the enclosed letter to the manufacturer of the needles at 1.000 needles. It is requested that you return the enclosed letter to the manufacturer of the needles at 1.000 needles."

"We have ordered the needles and the needles are being delivered to you. It is requested that you return the enclosed letter to the manufacturer of the needles at 1.000 needles. It is requested that you return the enclosed letter to the manufacturer of the needles at 1.000 needles."

"This needle wire is as ordered and we have ordered for it and we are advised it will take approximately 30 days to manufacture and deliver to Chicago and we expect to deliver to you within 1 month after arrival of needles."

Wires.

"We wish that you would look up all of the tools that we delivered to you that were used on the lines of these needles which we made for you. We have delivered together and we will send for them and go over them carefully to see what tools can be used on this order. We would like to have you confirm this order in your regular way."

on

"Plaintiff further alleged that July 18, 1939, it caused a

cable message to be sent to England ordering the necessary needles

and that on July 1939, defendant delivered to it the tools referred

to; and that on August 4, 1939, a further written contract was entered

into between the parties, enlarging the contract already entered into

with nine print directions, as follows:

"Chicago, August 4, 1939.

Witness my hand and seal this 4th day of August, 1939.

Chicago, Illinois.

"I hereby place with you my order No. 1000 for 1.000 needles, each completely assembled ready for use in our small ball type machine.

Model D, said needles to be manufactured by you and delivered to me in accordance with the following specifications, and under the following

terms:

1. Said needles are to be manufactured according to the

specifications delivered to you by me, and specifications in the letter which

you have received, and said nine print directions and under the following

terms: 1. I will pay to you \$1.00 per 1.000 needles, and said nine print

directions, and said nine print directions, and said nine print directions, and said nine print

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5. It is understood that you are to furnish all the necessary tools, dies, jigs, etc., necessary for manufacturing, and we are to deliver to you all tools which are our property and which were used by you in making up the previous lot of needles, these to be returned to us after completion of the order. Any additional dies that may be required are to be furnished by you at your expense.

6. It is further understood that time is of the essence of this contract.

Your signature under the words: 'Agreed to and Accepted' will constitute this a contract with us.

(Signed) Droll Patents Corporation

by J. S. Droll, Pres.

Agreed to and Accepted this 6th day of

August, 1929.

(signed) S. N. Swensen, Pres."

Plaintiff further alleged that upon the delivery of said tools it immediately ordered all materials necessary to carry out said contract, and began the manufacture of necessary tools, dies, etc., and that said English needle wire, cabled for as aforesaid, arrived and was received and paid for by plaintiff on November 13, 1929.

Plaintiff further alleged that on July 31, 1929, defendant by telephone ordered of it 5,000 needles to be made of domestic needle wire (Malcomb steel), and that on the same day, plaintiff by telegram ordered said domestic wire from Syracuse, New York.

Plaintiff further alleged that on September 17, 1929, defendant telephoned to it a rush order for "500 needle shafts only," to be "run through at the earliest possible moment on an overtime basis, - price to be determined later," which order plaintiff confirmed by letter, dated September 19th. (Confirmatory letter set out in full); that it immediately commenced work on the performance of said order, and on October 29th completed the manufacture and delivery of said 500 needle shafts, which defendant paid for; that thereafter it continued the manufacture and delivery of needles and needle shafts, made of domestic needle wire; and that it made the following deliveries to defendant: October 30th, 25 needle shafts; October 31st, 25 needle shafts; November 7th, 100 needle shafts; November 8th, 26 complete needles; November 12th, 38 complete needles; and that of these last

5. It is understood that you are to furnish all the necessary tools, dies, etc., necessary for manufacturing and we are to deliver to you all tools which are our property and which were used by you in making up the previous lot of needles. These to be returned to us after completion of the order. Any additional dies that may be required are to be furnished by you at your expense.

6. It is further understood that time is of the essence of this contract. Your signature under the words "Agreed to and Accepted" will constitute this a contract with us. (Signed) Royal Patent Corporation
By J. W. Davis, President

Agreed to and Accepted this 25th day of August, 1925.
(Signed) S. H. Swenson, President

Plaintiff further alleged that upon the delivery of said tools it immediately ordered all materials necessary to carry out said contract, and upon the manufacture of necessary tools, dies, etc., and that said tools and dies were, within ten or fifteen days, received and are received and paid for by plaintiff on November 12, 1925.

Plaintiff further alleged that on July 21, 1925, defendant by telephone ordered of it 2,000 needles to be made of Swedish steel (Swedish steel), and that on the same day, plaintiff by telegram ordered said needles wire from Syracuse, New York.

Plaintiff further alleged that on September 12, 1925, defendant and telephone to it a work order for "200 needles sharp only," to be "run through at the earliest possible moment on an existing basis."

Prior to the date aforesaid, which order plaintiff confirmed by letter, dated September 12th. (Explanatory letter set out in full); that it immediately commenced work on the performance of said order, and on October 25th completed the manufacture and delivery of said 200 needles sharp, which defendant paid for; that thereafter it continued the manufacture and delivery of needles and needle sharps, made of Swedish steel wire; and that it made the following deliveries to defendant: October 25th, 25 needles sharp; October 25th, 25 needles sharp; November 2nd, 25 needles sharp; November 2nd, 100 needles sharp; November 2nd, 25 complete needles; November 12th, 25 complete needles; and that of these last

mentioned deliveries defendant only paid for said 38 complete needles.

Plaintiff further alleged that on November 13, 1929, defendant, by its letter, by J. M. Broll, Pres., cancelled the contract of August 6, 1929, and verbally informed plaintiff's agent that it would not have anything further to do with plaintiff or its needle wire, and that said written cancellation is as follows:

"Chicago, November 13, 1929.

Midwestern Tool Co.,
Chicago, Illinois.

Under date of August 6, 1929, we placed with you an order for 5,000 needles, * * . The contract called for the delivery of 500 to 600 needles a month beginning within four weeks from the date of receipt of material. The material referred to in the contract was received by you on or prior to August 27, 1929. Under the terms of the contract, you were to have delivered to us 500 needles by October 27th. The contract also stated that time was the essence of the contract. * *

You have delivered to us under this contract 100 needle shafts only on the 7th day of November, 1929, and 26 complete needles. The 26 complete needles we have had to reject and these were on November 12 replaced by a shipment of 38 complete needles which are also not correct but which we are trying to make over suitable for our use. It is therefore apparent that you can not carry out the terms of your contract and on account of your breach of this contract, we hereby cancel said order and shall hold you responsible for damages for failure to live up to the terms of this contract."

Plaintiff further alleged up to the time of the receipt of said cancellation letter it had expended large sums of money for "labor, materials and merchandise necessary in the performance by it of the several contracts," and that six days later said English needle wire arrived and was paid for by it. (Here is set forth an itemized statement of said expenses, including the price paid for said English needle wire, aggregating \$5,065.32). And plaintiff further alleged that the prices paid for said items of materials were the reasonable and customary prices for like materials at Chicago during the year 1929; that the same is true as to the prices paid for said labor; and that "by reason of defendant's cancellation of said several contracts" plaintiff has suffered a loss of \$5,065.32, which sum defend-

mentioned deliveries (including only said 35 complete needles.

Plaintiff further alleged that on November 15, 1933,

Defendant, by its agent, J. A. Smith, telephonically contacted the plaintiff at Chicago, Illinois, and verbally informed plaintiff's agent that it would not have anything further to do with plaintiff as its needle wire, and that said alleged cancellation is as follows:

"Chicago, November 15, 1933.

Midwestern Tool Co.,
Chicago, Illinois.

When date of January 6, 1933, we placed with you an order for 3,000 needles. The contract called for the delivery of 3,000 needles a month beginning within four weeks from the date of receipt of material. The material ordered to be delivered was received by you on or prior to August 27, 1933. Under the terms of the contract, you were to have delivered to us 300 needles by October 27th. The contract also stated that this was the essence of the contract. It is

You have delivered to us under this contract 100 needles only on the 27th day of November, 1933, and 35 complete needles. The 35 complete needles we have had to reject and change were on November 12 replaced by a shipment of 35 complete needles which are not correct and which we are trying to make over suitable for our use. It is therefore agreed that you can not carry out the terms of your contract and we hereby cancel said contract. We hereby agree to have up to the terms of this contract.

Plaintiff further alleged as to the time of the receipt

of said cancellation letter it was supposed to have come at about 10:30 a.m. Defendant and representative testimony in the testimony by it of the several contracts, and that all said letter said "English needles" were cancelled and was paid for by it. (There is not forth an itemized statement of said expenses, including the price paid for said English needles with aggregating \$2,000.00). And plaintiff further alleged that the price paid for said items of needles was the reasonable and customary price for the material at Chicago during the year 1933; that the same is true as to the price paid for said items; and that "by reason of defendant's cancellation of said several contracts" plaintiff had suffered a loss of \$2,000.00, which was being

ant, although often requested, has refused to pay.

In defendant's affidavit of merits, sworn to by D. S.

Haigh, its secretary, it admits that about May 13, 1929, it requested plaintiff to furnish quotations on certain complete needles as alleged, but denies that it gave any verbal or written order for the manufacture of needles prior to August 6th; admits that "it received plaintiff's offer in writing, dated July 13, 1929," but denies that it confirmed this offer; alleges that said contract of August 6, 1929, "was the only contract between plaintiff and defendant;" neither admits nor denies that on July 18th plaintiff by cable ordered any needle wire from England, or that plaintiff received any imported needle wire on November 19, 1929, as alleged, and demands strict proof thereof; admits that plaintiff, "preparatory to the carrying out of the contract of August 6th," did order needle wire "from some company in the United States;" alleges that the needle wire, so ordered, was received by plaintiff on or before August 27, 1929, and that, under said August 6th contract, plaintiff "was required to deliver 500 needles, each completely assembled, * * and manufactured in accordance with the specifications stated in said contract, within four weeks from the receipt of the needle wire, to wit, within four weeks from August 27, 1929;" alleges that plaintiff "failed to deliver 500 needles, or any needles whatsoever, within the four weeks ending September 27, 1929;" alleges that plaintiff "also failed to deliver the 500 or 600 needles * * required by the terms of said contract, during the month beginning September 27th, and ending October 27th, 1929;" alleges that "up to November 13, 1929, the date said contract was cancelled by defendant on account of the breach thereof by plaintiff, plaintiff had only delivered 38 complete needles;" alleges that plaintiff knew that the needles were for use in defendant's machines and that it was imperative that plaintiff comply with the terms of said contract; admits that

and, although a sum requested, was returned to pay.

In defendant's affidavit of denial, sworn to by D. B.

Walt, it is necessary, it admits that about May 13, 1939, it requested

plaintiff to furnish specimens on certain complete needles as alleged,

but denies that it gave any verbal or written order for the manufacture

of needles prior to August 28th admits that "it received plaintiff's

offer in writing, dated July 18, 1939," but denies that it continued

this offer; alleges that said contract of August 8, 1939, "was the

only contract between plaintiff and defendant," neither admits nor

denies that on July 18th plain ill by cable ordered any needles wire

from England, or that plaintiff received any imported needles wire on

November 18, 1939, on alleged, and demands still great interest;

admits that plaintiff, "generously to the carrying out of the con-

tract of August 8th," did order needles wire "from some company in the

United States," alleges that the needles wire, no ordered, was received

by plaintiff on or before August 27, 1939, and that, under said contract

in contract, plaintiff "was required to deliver 600 needles, each

completely assembled, " and manufactured in accordance with the

specifications stated in said contract, within four weeks from the

receipt of the needles wire, to wit, within four weeks from August 27,

1939; alleges that plaintiff "failed to deliver 600 needles, to wit,

needles assembled, within the four weeks ending September 27, 1939;"

alleges that plaintiff "also failed to deliver the 600 or 600 needles

" required by the terms of said contract, during the month beginning

September 27th, and ending October 27th, 1939;" alleges that "up to

November 18, 1939, the date said contract was cancelled by defendant

on account of the breach thereof by plaintiff, plaintiff had only

delivered 36 complete needles;" alleges that plaintiff knew that the

needles were for use in defendant's machines and that it was imperative

that plaintiff comply with the terms of said contract; admits that

plaintiff, between October 30th and November 7th, 1929, delivered 150 needle shafts; alleges that the 26 complete needles, delivered on November 8th, were rejected by defendant, "as not being made in accordance with the sample and specifications," and returned to plaintiff; admits that on September 17, 1929, it placed with plaintiff an extra order for 500 needle shafts, to be paid for on a time and material basis, and that said order was completed by plaintiff and paid for by defendant; denies that plaintiff expended for labor, materials and merchandise, necessary in the performance of said contract, the sums of money as alleged; and denies that plaintiff suffered a loss of \$5,065.32, by reason of the cancellation of said contract, or that defendant is liable to plaintiff in that sum or any sum.

On the trial the parties stipulated and agreed in substance that the aggregate amount of money expended by plaintiff for labor, materials and merchandise, necessary for the performance by it of said contract, was \$2,393.90, and that if it was entitled to recover any sum from defendant in the present action as damages, said amount was the correct amount. On the trial, also, considerable oral and documentary evidence was introduced by the parties. Swensen and Bernstein testified at length for plaintiff and Droll and Haigh for defendant.

In urging the reversal of the judgment defendant's counsel contend (1) that the evidence shows that plaintiff was in default in failing to manufacture and deliver sufficient quantities of complete needles within the times required by the contract of August 6, 1929, and, hence, defendant was fully justified in cancelling said contract by its letter to plaintiff of November 13, 1929, and (2) that plaintiff, being in such default, cannot under the law recover any damages of defendant. Plaintiff's counsel, on the contrary, contend (1) that the evidence shows that when defendant cancelled said contract

plaintiff between October 20th and November 7th, 1933, delivered 150 wooden crates alleged that the 50 complete wheelbarrows, delivered on November 8th, were rejected by defendant, "as not being made in accordance with the sample and specifications," and returned to plaintiff; Exhibit 10 on September 17, 1933, is placed with plaintiff on this order for 500 wooden crates, to be paid for on a time and material basis, and this said order was completed by plaintiff and paid for by defendant; Exhibit 11 that plaintiff expended for labor, materials and wheelbarrows, necessary in the performance of said contract, the sum of money as alleged and Exhibit 12 that plaintiff collected a sum of \$5,000.00, by reason of the cancellation of said contract, or that defendant is liable to plaintiff in that sum or any sum.

On the trial the parties submitted and agreed in substance that the aggregate amount of money expended by plaintiff for labor, materials and wheelbarrows, necessary for the performance of its said contract, was \$2,308.75, and that it is now entitled to recover any sum in excess of that amount in the present action as damages, said amount was the net amount. On the trial, also, verifiable oral and documentary evidence was introduced by the parties, known and known to be correct as regards the plaintiff and Exhibit 13 and Exhibit 14.

In giving the reversal of the judgment defendant's counsel contended (1) that the evidence shows that plaintiff was in default in failing to manufacture and deliver sufficient quantities of complete wheelbarrows within the time required by the contract of August 4, 1933, and, hence, defendant was fully justified in cancelling said contract by its letter to plaintiff of November 12, 1933, and (2) that plaintiff, being in default, cannot recover the law reserve any damages of defendant. Plaintiff's counsel, on the contrary, contended (1) that the evidence shows that when defendant cancelled said contract

plaintiff was not in default under its terms or in default on any other of its contracts with defendant, and (2) that, defendant having unlawfully cancelled said contract and having repudiated all contracts with plaintiff, plaintiff is entitled under the law to recover for its expenses in preparation for fulfilling said contracts and for its labor actually performed on uncompleted needles made under the domestic wire order. After carefully considering the pleadings, the terms of the contract of August 6, 1929, and the entire evidence, we are of the opinion that the contentions of defendant's counsel are without merit, that those of plaintiff's counsel have substantial merit, and that the judgment appealed from should be affirmed.

It is clear from plaintiff's letter of July 18, 1929, confirming defendant's verbal order for the original 5,000 complete needles, that the agreement was that the needles were to be manufactured by plaintiff from imported wire, and that the delivery of the first 500 needles should be "within one month after the arrival" of said imported wire. It is also clear from the language of the formal contract, subsequently executed by the parties on August 6, 1929, that the agreement as to the kind of needle wire and the time of delivery of the first 500 needles, "completely assembled," was not substantially changed. In paragraph 1 of said contract it is provided that the needles were to be manufactured "according to the sample needle" delivered to plaintiff, and the evidence shows that said sample needle submitted by defendant was made of English wire. In paragraph 1, also, it is provided that said needles were to be manufactured "according to the blueprints for the parts of said needles." These blueprints were admitted in evidence as plaintiff's exhibits 4 to 11, and 14 to 18. On Exhibit 5, in the lower right hand corner, are the words "English Needle Wire, Harden & Draw," and on exhibit 16 are the same words. In paragraph 2 of said contract it is provided that "delivery of said needles to be as follows:

plaintiff was not in default under the terms of its contract with defendant, and (2) that, defendant having unlawfully cancelled said contract and having repudiated all contracts with plaintiff, plaintiff is entitled under the law to recover for its expenses in preparation for fulfilling said contract and for its labor actually performed on unsupplied needles made under the domestic wire order. After carefully considering the pleadings, the terms of the contract of August 8, 1932, and the entire evidence, we are of the opinion that the contention of defendant's counsel are without merit, that those of plaintiff's counsel have substantial merit, and that the judgment appealed from should be affirmed.

It is also from plaintiff's letter of July 18, 1932, containing defendant's verbal order for the original 8,000 complete needles, that the argument was that the needles were to be manufactured by plaintiff from imported wire, and that the delivery of the first 800 needles should be "within one week after the receipt of said imported wire. It is also clear from the language of the formal contract, unambiguously executed by the parties on August 8, 1932, that the agreement as to the kind of needle wire and the time of delivery of the first 800 needles, "completely assembled," was not substantially changed. In paragraph 1 of said contract it is provided that the needles were to be manufactured "according to the sample needle" delivered to plaintiff, and the evidence shows that said sample needle was submitted by defendant was made of English wire. In paragraph 1, also, it is provided that said needles were to be manufactured "according to the blueprints for the parts of said needles." These blueprints were admitted in evidence as plaintiff's exhibits 4 to 11, and 14 to 18. On Exhibit 5, in the lower right hand corner, are the words "English Needle Wire, Harden & Drew," and on Exhibit 18 are the same words. In paragraph 2 of said contract it is provided that "delivery of said needles to be as follows:

500 within four weeks from the receipt of material;" and the uncontradicted evidence shows that plaintiff did not receive the English needle wire, which it had cabled an order for on July 18, 1929, until six days after defendant had cancelled the contract by its letter of November 13, 1929. It also appears from a preponderance of the evidence that about the time of the execution of said contract of August 6, 1929, defendant gave to plaintiff a verbal order for additional needles to be made of domestic wire, without definite stipulations as to time of delivery, which order plaintiff accepted and commenced performance thereof; and that such needles as were delivered to defendant prior to November 13, 1929, were made of domestic wire and had nothing to do with said contract of August 6, 1929. It further appears from the uncontradicted evidence that in September, 1929, defendant gave to plaintiff a rush order for 500 needle shafts, to be made of domestic wire and on an overtime basis, which order plaintiff accepted, performed, delivered the shafts, and received its pay therefor. This order, also, had nothing to do with said contract of August 6, 1929.

As to plaintiff's right, under the law and the evidence, to recover the damages as assessed by the court by virtue of the stipulation above mentioned, we refer to the holdings in the following cases: Lake Shore, etc. R. Co. v. Richards, 152 Ill. 59, 80; Southern Pacific Co. v. American Well Works, 172 Ill. 9, 11-12; Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581, 583; Yorthington & Co. v. Gwin, 119 Ala. 44, 51; Cederberg v. Robison, 100 Calif. 93, 97.

The judgment of the municipal court should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

34989

L. FISH FURNITURE COMPANY,
a corporation,
Appellee,

v.

CLAUDE W. MORRIS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 25, 1929, plaintiff commenced an action in replevin against Claude W. Morris and other defendants to recover the possession of certain described furniture. The writ was returned unexecuted by the bailiff and the action was changed to trover. Subsequently there was a dismissal as to said other defendants. In its amended statement of claim, filed October 27, 1929, plaintiff alleged that on November 6, 1928, it sold and delivered to Morris (hereinafter referred to as defendant) the furniture in question for the sum of \$800, upon which defendant then paid \$200; and that to secure the payment of the balance of the purchase price defendant executed and delivered to plaintiff a contract of conditional sale (copy attached and marked exhibit A) wherein it was provided that the title to the furniture should be and remain in plaintiff until the total purchase price had been paid, which was "to be paid in thirty (30) equal monthly installments." (The copy of said contract, so attached, does not so provide, but states "1/4 cash - balance 30 months.") Plaintiff further alleged that on December 6, 1928, defendant defaulted in the payment of the monthly installment "due and payable on said date," and thereupon plaintiff, in pursuance of the terms of said contract, "became entitled to the possession" of said furniture; and that defendant, although often requested, has refused to allow plaintiff to recover and repossess the furniture and has converted the same to his own use. In defendant's

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

v.

CLARENCE W. KELLEY, Plaintiff.

CLARENCE W. KELLEY, Plaintiff.

2621A.652

NO. 17111 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

ON June 25, 1932, Plaintiff commenced an action in replevin against Claudi W. Kelley and other defendants to recover the possession of certain described furniture. The writ was returned returnable by the sheriff and the action was changed to trover. Subsequently there was a dismissal as to said other defendants. In the amended statement of claim, filed October 27, 1932, Plaintiff alleges that on November 6, 1928, he sold and delivered to Kelley (hereinafter referred to as defendant) the furniture in question for the sum of \$200, upon which defendant then paid \$200; and that to secure the payment of the balance of the purchase price defendant executed and delivered to Plaintiff a contract of conditional sale (copy attached and marked exhibit A). It is provided in said contract that the title to the furniture should be and remain in Plaintiff until the total purchase price had been paid. (The contract was to be paid in fifty (\$50) equal monthly installments.) The copy of said contract, so attached, does not so provide, but states "A cash - balance 20 months." Plaintiff further alleges that on December 6, 1928, defendant, retained in the payment of the monthly installments "due and payable on said date," and thereupon Plaintiff, in pursuance of the terms of said contract, "became entitled to the possession" of said furniture; and that defendant, although often requested, has refused to allow Plaintiff to recover and repossess the furniture and has converted the same to his own use. In defendant's

affidavit of merits, while admitting the purchase of the furniture under said contract and making the down payment of \$200, he denied that the contract provided that the balance of the purchase price was to be paid "in thirty equal monthly installments;" denied that he was in default in any manner on said contract; and denied that plaintiff was entitled to the possession of the furniture. On the issues thus formed the cause was tried before a jury on November 3, 1930, during which two witnesses gave testimony in plaintiff's behalf, and defendant and one witness for him also testified. Certain documentary evidence was introduced, including the said contract, signed by defendant on November 6, 1928, and containing said clause "1/4 cash - balance 30 months." The jury returned a verdict finding defendant guilty in manner and form as charged in plaintiff's amended statement of claim and assessing plaintiff's damages at \$600 in tort. Judgment was entered upon the verdict in said sum against defendant and he appealed.

Several contentions are made by counsel for defendant as grounds for a reversal of the judgment. We think it clear that the words "balance 30 months" mean that the balance (\$600) of the purchase price for the furniture (sold and delivered to defendant on November 6, 1928) was not to be paid until 30 months after that date, or May 6, 1931. There is nothing ambiguous in the language. Neither when the present action was commenced on June 23, 1929, nor when plaintiff filed its amended statement of claim in trover on October 27, 1930, was the balance of the debt (\$600) due under said conditional sale contract. And on neither of said last mentioned dates could it be considered that defendant was guilty of an unlawful conversion of the goods as charged. And we think that the court, in view of the plain provisions of the contract, committed reversible error in allowing one of plaintiff's witnesses, Louis Etshokin (secretary of plaintiff and

attitude of hostility, while admitting the purchase of the furniture under said contract and making the down payment of \$200, he denied that the contract provided that the balance of the purchase price was to be paid "in thirty equal monthly installments;" denied that he was in default in any manner on said contract; and denied that plaintiff was entitled to the possession of the furniture. On the issues thus framed the case was tried before a jury on November 1, 1930, during which two witnesses gave testimony in plaintiff's behalf, and defendant and two witnesses for him also testified. Documentary evidence was introduced, including the said contract, signed by defendant on November 4, 1929, and containing said clause "1/3 cash - balance 30 months." The jury returned a verdict finding defendant guilty in contract and that he was in default on the statement of claim and assessing plaintiff's damages at \$500 in tort. Verdict was entered upon the verdict in tort and against defendant and he appealed.

Several contentions are made by counsel for defendant on grounds for a reversal of the judgment. He claims that the words "balance 30 months" mean that the balance (\$200) of the purchase price for the furniture (cash and delivered to defendant on November 4, 1929) was not to be paid until 30 months after that date, or May 4, 1931. There is nothing ambiguous in the language. He claims that the present action was commenced on June 15, 1930, not when plaintiff filed the amended statement of claim in trover on October 27, 1930, was the balance of the debt (\$200) due under said conditional sale contract. And on either of said last mentioned dates could it be established that defendant was guilty of an unlawful conversion of the goods in question. And he claims that the court, in view of the plain provisions of the contract, committed reversible error in allowing and admitting the testimony of plaintiff's witnesses, Louis Stankovic and

in charge of sales and credits), to express his opinion, over defendant's objection, that the words "balance 30 months" mean "balance to be paid in thirty equal monthly payments."

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

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34996

1687
BELMONT LUMBER COMPANY,
a corporation,
Complainant and Appellee,

v.

WILLIAM MILLER et al.,
Defendants.

WILLIAM MILLER and FRIEDA MILLER,
Appellants.

262 I.A. 652²

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On October 8, 1929, complainant filed a bill to foreclose a mechanic's lien on improved property, owned by William Miller and Frieda Miller, his wife, and known as 2643 - 74th Court, Elmwood Park, Illinois. After the cause was at issue it was referred to a master in chancery and on October 23, 1930, he filed his report (together with a transcript of the evidence taken on the several hearings before him) recommending the entry of a decree for a mechanic's lien against the Millers in the sum of \$527.32, together with interest, costs, etc. Among the findings in the report are that on February 4, 1929, complainant entered into a written contract with the Millers whereby it agreed, for the price of \$527.32, to furnish material and labor for certain remodeling work on the building on the property; that complainant fully performed the work and completed the same on March 10, 1929; that the material and labor furnished enhanced the value of the premises; that in compliance with the statute complainant filed its statement of claim for lien for \$527.32 with the clerk of the circuit court on April 30, 1929; that on the hearings before the master the Millers, while admitting that most of the work

WILLIAM MILLER, Plaintiff,
v.
WILLIAM MILLER and WILLIAM MILLER, Defendants.

CIRCUIT COURT,

DOUG COUNTY.

WILLIAM MILLER and WILLIAM MILLER,
Defendants.

MR. PRESIDING JUSTICE BRILEY DELIVERED THE OPINION OF THE COURT.

On October 2, 1928, complainant filed a bill to foreclose a mortgage's lien on improved property, owned by William Miller and friends Miller, his wife, and known as 2245 - 4th Court, Lincoln Park, Illinois. After the same was at issue it was referred to a master in chancery and on October 25, 1928, he filed his report together with a transcript of the evidence taken on the several hearings before him) recommending the entry of a decree for a mortgage's lien against the Millers in the sum of \$27,344, together with interest, costs, etc. Among the findings in the report are that on February 14, 1925, complainant entered into a written contract with the Millers whereby it agreed, for the price of \$27,344, to furnish material and labor for certain remodeling work on the building on the property; that complainant fully performed the work and completed the same on March 10, 1927; that the material and labor furnished exceeded the value of the premises; that in compliance with the statute complainant filed its statement of claim for lien for \$27,344 with the clerk of the circuit court on April 30, 1928; that on the hearings before the master the Millers, while admitting that most of the work

was satisfactorily done, contended that certain parts of it were not performed in a workmanlike manner and that it would cost them approximately \$100 to adjust and repair said work; that said contentions are unwarranted and not well founded; that complainant's work was done on an old building and that under the circumstances the same was done in a good and workmanlike manner; and that the Millers did not within a reasonable time after the completion of the entire work make any complaint such as they now urge. On the hearing on the Millers' exceptions to the master's report the chancellor overruled them and confirmed the report. And the court, after making findings similar to those of the master, adjudged and decreed that, unless the Millers within three days caused to be paid to complainant the sum of \$564.66, together with certain interest, costs, and master's and reporter's fees as fixed and taxed as costs, the premises be sold in the usual manner, etc. From this decree the present appeal is prosecuted.

One of the grounds urged for a reversal of the decree is that the findings of the master and the court (that the entire work agreed to be performed by complainant was performed in a good and workmanlike manner) are not sustained by a preponderance of the evidence. After reviewing the entire testimony, we are unable to agree with the contention. We think that the evidence discloses that there was a substantial compliance with the contract by complainant and that, considering the fact that the house was an old one, all of the stipulated work was done in a workmanlike manner.

Another ground for reversal is that the master unduly limited the time within which the taking of evidence on behalf of the Millers should be concluded. We find no merit in the contention. Furthermore, there is nothing contained in the present transcript showing that the master's rulings resulted in any prejudice or injury

was satisfactorily done, contended that certain parts of it were not performed in a workmanlike manner and that it would cost them approximately \$100 to adjust and repair said work; that complainant's testimony was unconvincing and not well founded; that complainant's work was done on an old building and that under the circumstances the same was done in a good and workmanlike manner; and that the Miller did not within a reasonable time after the completion of the entire work make any complaint such as they now urge. On the hearing on the Miller's exceptions to the master's report the Chancellor overruled them and confirmed the report. And the court, after making findings similar to those of the master, adjudged and decreed that, unless the Miller within three days causes to be paid to complainant the sum of \$500.00, together with certain interest, and master's and reporter's fees as fixed and taxed as herein, the premises be sold in the usual manner, etc. From this decree the present appeal is prosecuted.

One of the grounds urged for a reversal of the decree is that the findings of the master and the court (that the entire work agreed to be performed by complainant was performed in a good and workmanlike manner) are not sustained by a preponderance of the evidence. After reviewing the entire testimony, we are unable to agree with the contention. We think that the evidence discloses that there was a substantial compliance with the contract by complainant and that, considering the fact that the house was an old one, all of the stipulated work was done in a workmanlike manner.

Another ground for reversal is that the master unduly limited the time within which the taking of evidence on behalf of the Miller should be concluded. We find no merit in the contention. Furthermore, there is nothing contained in the present findings showing that the master's rulings resulted in any prejudice or injury

to the Millers. If there was another witness whose testimony they desired should be heard, no offer was made as to what said witness would testify to.

The decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

to the effect. If there was another witness whose testimony they
should be heard, no other was made as to what said witness
could testify to.

The charges appearing from should be returned and it is
so stated.

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LEROY B. BOYLAN,
Complainant and Defendant
in Error,

v.

ANNA M. BOYLAN,
Defendant and Plaintiff
in Error.

ERROR TO SUPERIOR

COURT, COOK COUNTY.

262 I.A. 652³

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Defendant prosecutes this writ of error to reverse a decree of the superior court, entered April 25, 1930, wherein the court granted a decree of divorce in complainant's favor on the ground of defendant's desertion, and dismissed defendant's cross-bill for a separate maintenance for want of equity.

Complainant's bill was filed on February 8, 1921, more than nine years prior to the entry of the decree. He alleged that the parties were married at Chicago on April 17, 1901, and thereafter lived and cohabited together until January 6, 1917, when complainant "was compelled to cease living with her for reasons hereinafter set forth;" that two children were born of the marriage; that shortly after the marriage defendant "commenced a course of conduct which was calculated to and did make the home life of your orator intolerable and unbearable;" that she "indulged in needless and causeless fits of vexation and rage," directed against him "without any fault or provocation on his part;" that she "continually accused your orator of unchastity and infidelity;" that she "repeatedly indulged in fits of causeless silence, refusing to converse" with him, "making his home life disagreeable and unbearable;" that during the five years immediately preceding the separation she "continued with increasing intensity to indulge in conduct of

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WAXTON, N. CAROLINA
 DISTRICT OF COLUMBIA
 MAY 19 1917

212 .A.1325

Defendant procured this writ of error to reverse a decree of the superior court, entered April 22, 1933, wherein the court granted a decree of divorce in complainant's favor on the ground of defendant's desertion, and dissolved defendant's estate for a separate maintenance for each of said parties.

Complainant's bill was filed on February 8, 1931, more than nine years prior to the entry of the decree. He alleged that the parties were married at Chicago on April 17, 1921, and thereafter lived and cohabited together until January 8, 1914, when complainant "was compelled to leave living with her for reasons hereinafter set forth;" that two children were born of the marriage, first shortly after the marriage defendant "commenced a course of conduct which was calculated to and did cause the same life of your greater intellectual and unbecoming; that she "indulged in needless and senseless life of vacation and travel," directed against him "with out any fault or provocation on his part;" that she "continually accused your father of unchastity and infidelity;" that she "habitually indulged in life of senseless silliness, refusing to converse" with him, "making his home life disagreeable and unhappy;" that during the five years immediately preceding the separation she "continued with increasing intensity to indulge in conduct of

the character hereinbefore described, until your orator by reason thereof became and was in such a highly nervous condition that it became dangerous to his mental and physical well being longer to live and cohabit with defendant;" that she "repeatedly indulged in such rages and fits of anger in the presence of the children," which conduct was calculated to prejudice them against him without his fault; that "before finally being compelled to separate from her he expostulated with her repeatedly regarding her conduct and endeavored to induce her to amend the same, but to no effect;" that when finally he "was reduced to a condition bordering upon a complete nervous breakdown, he separated from her for the purpose of preserving his mental and nervous balance," continuing to provide for her wants and to support and maintain her, then as at all times prior thereto; and that since January 6, 1917, he has lived separate and apart from her without his fault.

In defendant's answer she admitted the marriage, the birth of her children, the separation and that he had since lived separate and apart from her, but she denied all other allegations.

On March 26, 1922, she filed a cross-bill for a separate maintenance, in which she alleged that since the marriage in 1901 the parties lived and cohabited together until January 7, 1917, when he, "without any cause therefor, wilfully deserted and absented himself from her;" that his desertion has continued uninterruptedly to the present time; that during all the time she lived with him she demeaned herself in a manner well becoming a kind, chaste and indulgent wife; that she has no income of her own, and no money or property save such small amounts as she is able to earn; that he is employed by the Illinois Bell Telephone Company and earns not less than \$250 per month; and that he is well able to provide for her the necessities of life. He filed an answer to the cross-bill, in which he denied that

the character described, until your order by reason thereof became and was in such a highly nervous condition that it became dangerous to his mental and physical well being longer to live and comply with defendant; that she "repeatedly indulged in such rage and fits of anger in the presence of the children," which conduct was calculated to prejudice them against him without his fault; that "before finally being compelled to separate from her he communicated with her repeatedly regarding her conduct and endeavored to induce her to amend the same, but to no effect;" that when finally he "was reduced to a condition bordering upon a complete nervous breakdown," he separated from her for the purpose of preserving his mental and nervous balance," continuing to provide for her wants and to support and maintain her, then as at all times prior thereto; and that since January 6, 1917, he has lived separate and apart from her without his fault.

That in defendant's answer and amended answer, the birth of her children, the separation and that he has since lived separate and apart from her, but she denied all other allegations. On March 20, 1920, she filed a cross-bill for a separate maintenance, in which she alleged that since the marriage in 1907 the parties lived and cohabited together until January 7, 1917, when he "without any cause therefor, willfully deserted and abandoned her from her;" that his desertion was continued uninterruptedly to the present time; that during all the time she lived with him she demonstrated herself in a manner well becoming a kind, gentle and industrious wife; that she has no income of her own, and no money or property save such small amounts as she is able to earn; that he is employed by the Illinois Bell Telephone Company and earns not less than \$280 per month; and that he is well able to provide for her the necessities of life. He filed answer to the cross-bill, in which he denied that

he had absented himself from her without any cause, that she had been a kind and indulgent wife, that she had no income or money or property of her own, that he earned \$250 per month, that he was well able to provide for her the necessities of life, or that she was entitled to any relief.

According to the present praecepte record no steps were taken for several years by either party to have a trial. On November 12, 1929, the cause having been stricken from the docket, the court ordered that it be re-docketed, and about this time, it appearing that complainant's solicitor had died, other solicitors were substituted. On December 30, 1929, the cause was placed upon the trial calendar as a contested case. On January 13, 1930, on defendant's motion it was ordered that he pay to her on account of solicitor's fees the sum of \$250. On April 8, 1930, the cause was called for trial before the chancellor and on that day considerable testimony was introduced by the parties. Complainant testified in his own behalf and called six witnesses. Defendant also testified and she called as a witness for her the then married daughter of the parties, - Mrs. Martha Hess. At the conclusion of the hearing the chancellor intimated that he would enter a decree in favor of complainant and directed the drafting of such a decree. On April 17, 1930, on complainant's motion, he was given leave to file an amendment to his bill instante, and the same was filed, and it was ordered that defendant's answer to the original bill stand as her answer to the bill as amended. The amendment (consisting of one clause and following the allegation that since January 6, 1917, he had lived separate and apart from her without his fault) is as follows:

"Your orator further represents that on January 6, 1917, said defendant wilfully deserted and absented herself from your orator without any reasonable cause therefor, and that she has persisted in said wilful desertion and absence for a space of two years and upwards."

On April 24, 1930, defendant filed a petition, supported

he had obtained himself from her without any cause, that she had been a kind and intelligent wife, that she had no income or property of her own, that he earned \$2000 per month, that he was well able to provide for her the necessities of life, or that she was entitled to any relief.

According to the present Marriage record no steps were

taken for several years by either party to have a trial. On

November 12, 1929, the cause having been withdrawn from the docket,

the court ordered that it be re-settled, and about this time, it

appearing that complainant's collector had died, other collectors

were appointed. On December 20, 1929, the cause was placed

upon the trial calendar as a contested case. On January 15, 1930,

on defendant's motion it was ordered that he pay to her on account

of collector's fees the sum of \$250. On April 9, 1930, the cause

was called for trial before the chancellor and on that day consid-

erable testimony was introduced by the parties. Complainant testified

in his own behalf and called six witnesses. Defendant also testified

and was called as a witness for him the two named collectors of the

parties. - Mrs. Martin Heger. As the conclusion of the hearing the

chancellor indicated that he would enter a decree in favor of com-

plainant and directed the drafting of such a decree. On April 17,

1930, on complainant's motion, he was given leave to file an amended

plea to his bill of complaint, and the case was filed, and it was ordered

that defendant's answer to the original bill stand as her answer to

the bill as amended. The amendments (including all new claims and

reliefs) the allegations that since January 2, 1929, he had lived

separately and apart from her without his family) is as follows:

"I, your orator further represents that on January 2, 1929, said defendant willfully deserted and abandoned herself from your orator without any reasonable cause therefor, and that she has persisted in said willful desertion and absence for a space of two years and upward."

On April 16, 1930, defendant filed a petition, supported

by the affidavits of herself, her son and daughter, and four others, stating that because of certain facts as set forth in the affidavits she "was prevented from obtaining a full, fair and complete hearing" and that the "decree proposed to be entered is not based upon a full knowledge of the facts." She asked that the court re-hear the cause. On the following day her solicitor, who had represented her since the inception of the cause and upon the hearing, withdrew as such, and another solicitor who now represents her in this court was substituted. After a hearing upon the petition the court dismissed it, defendant objecting to the ruling, and thereupon the court entered said decree of April 25, 1930.

In the decree the court adjudged (1) that the bonds of matrimony between the parties be dissolved; (2) that Mrs. Boylan's cross-bill be dismissed for want of equity; and (3) that he pay \$80 per month for her support until further order, and also \$500, as additional solicitor's fees. Many of the findings in the decree are identical with the charges in complainant's bill as to her actions and conduct and their effect upon him. And the court further found that "finally, on January 6, 1917, defendant ordered and forced complainant to leave their home;" that on said day she "wilfully deserted and absented herself from complainant without any reasonable cause," and that she has persisted in such desertion and absence for more than two years prior to the filing of the bill; and that complainant "voluntarily agreed" to support and maintain defendant and to pay her the sum of \$80 per month.

On the hearing complainant testified on direct examination in substance that he is fifty years of age; that defendant is about the same age; that the two children, Lee and Martha, aged respectively 26 and 24 years, are self-supporting; that Martha is married to one Hess; that defendant is now living at the Hess home in Chicago; that complainant lived with defendant in Chicago as her husband until

by investigation of records, but was not conducted, and the records
showing that because of certain facts as set forth in the affidavits
the "was provided from obtaining a full, fair and complete hearing"
and that the "deceit proposed to be entered is not based upon a full
knowledge of the facts." The court said that the court is bound to
on the following day by the affidavits, and the court said that the
inspection of the cases and upon the hearing, whether as such, and
another affidavit was now presented her in this court was submitted.
After a hearing upon the petition the court dismissed it, returning
objecting to the ruling, and thereupon the court entered said decree
of April 22, 1930.

In the decree the court adjudged (1) that the bonds of
matrimony between the parties be dissolved; (2) that Mrs. Boylan's
cross-bill be dismissed for want of equity; and (3) that she pay \$500
per month for her support until further order, and also \$500, as
additional solicitor's fees. Many of the findings in the decree were
identical with the charges in complainant's bill as to her conduct
and conduct and their effect upon him. And the court further found
that "initially, on January 8, 1927, defendant signed and sealed
complainant to leave their home; that on said day she 'voluntarily'
deserted and absented herself from complainant without any reasonable
cause, and that she has persisted in such desertion and absence for
more than two years prior to the filing of the bill; and that com-
plainant 'voluntarily agreed' to support and maintain defendant and
to pay her the sum of \$10 per month.

On the hearing complainant testified on direct examination
in substance that he is fifty years of age; that defendant is about
the same age; that the two children, Lee and Marie, aged respectively
12 and 14 years, are well-developed; that Marie is married to one
John; that defendant is now living at the same home in Chicago; that
complainant lives with defendant in Chicago; he has worked until

January 6, 1917, when they separated; that he has been in the employ of the Illinois Bell Telephone Co. in Chicago in various capacities for 31 years (except a period when he was in the United States Army with the rank of captain); that while he lived with defendant, prior to the separation, his conduct towards her was "all right"; that he "always provided for her;" that formerly defendant had a great fondness for him; that trouble commenced early in 1913, when defendant was obliged to go to a hospital; that thereafter and frequently defendant charged him with having illicit relations with other women; that they frequently quarreled; that on January 6, 1917, after a quarrel, she said: "Go out and stay out. From this moment you are free;" that he then left her and has "not been back"; that although he frequently and regularly visited the children, who thereafter lived in the same house with her, he "has not talked to her" since, and she never has come to any of the places where he has been living; that he has an income of \$364 per month; and that since 1917 he has been paying her at the rate of \$80 per month, except that, during the war and when both children were with her, he paid her \$100 per month. On cross-examination he testified that "his arguments with her consisted of everything and anything that might come up;" that "the trouble was she thought I was going with other women, but I did not;" that from 1916 to 1920 he did not go out with any other women; that "there was some correspondence with another woman in 1928;" and that he is now, and has been since October, 1929, living in Chicago at the home of a Mrs. Hoffman and her daughter, Joan.

Complainant's witness, Esther Cloyd, testified that she had known both parties for 32 years; that before the separation she frequently called on them; that as far as she observed he "conducted himself all right" towards her; that after the first baby came defendant "became an extremely poor housekeeper;" that defendant frequently talked to her about complainant and his going with other women; that

January 6, 1917, when they separated; that he has been in the employ of the Illinois Bell Telephone Co. in Chicago in various capacities for 22 years (except a period when he was in the United States Army with the rank of captain); that while he lived with defendant, prior to the separation, his conduct towards her was "all right"; that he "always provided for her"; that formerly defendant had a Great Dane named for him; that trouble commenced early in 1915, when defendant was obliged to go to a hospital; that thereafter and frequently defendant charged him with having illicit relations with other women; that they frequently quarreled; that on January 6, 1917, after a quarrel, she said: "Go out and stay out. From this moment you are free"; that he then left her and has "not been back"; that although he frequently and regularly visited her children, who thereafter lived in the same house with her, he was not allowed to talk to her, and she never has come to any of the places where he has been living; that he has an income of \$364 per month; and that since 1917 he has been paying her at the rate of \$300 per month, except that, during the war and when both children were with her, he paid her \$100 per month. On cross-examination he testified that "his arguments with her consisted of everything and anything that might come up"; that "the trouble was she thought I was going with other women, but I did not"; that from 1915 to 1920 he did not go out with any other woman; that "there was some correspondence with another woman in 1919"; and that he is now, and has been since October, 1922, living in Chicago at the home of a Mrs. Selman and her daughter, Jean.

Complainant's witness, Robert Joyce, testified that she had known both parties for 22 years; that before the separation she frequently called on them; that as far as she observed he "conducted himself all right" towards her; that after the first baby came defendant was "going on extremely poor housekeeper"; that defendant frequently talked to her about complainant and his going with other women; that

after the separation defendant told her what had occurred; and that she said she had "ordered him out" and that she "never wanted to see him again."

Complainant's witness, Captain Elmer Churchill, a co-worker with him in the telephone company's employ and afterwards in military service with him, testified that before the separation defendant frequently telephoned him to inquire as to her husband's whereabouts and to relate some of his "escapades"; and that he always "tried to relieve her mind and patch things up." Another of complainant's witnesses, Yagle, testified that before the separation he lived next door to the parties; that he never observed "anything irregular" about the way complainant conducted himself; and that, as to defendant, he only observed that "she was a very untidy housekeeper." The testimony of complainant's three other witnesses had no particular bearing on the issues.

Defendant in her own behalf testified in substance that during her married life she never had any serious quarrels or arguments with her husband, except over "other women"; that she complained about his going with other women to the officials of a lodge of which he was a member; that on the day of the separation in January, 1917, they had a quarrel concerning other women; that he finally said that "he was tired of living in the house" and that he "was going to board somewhere else;" that upon one of the children asking "Where is papa going?", she (defendant) replied: "He is going with a lady barber;" that this remark angered him and he "chased me into the basement" and as far as a next door neighbor's house; that thereupon he left the home and never returned; that neither on this occasion, nor on any other, did she say to him, "Go out and stay out, you are free;" and that she still loves him and the children, and if he would come back to her, she "would take him back today". She denied ever having made the statements to Mrs. Cloyd, as testified by that witness.

after the separation defendant said that had occurred; and that she said she had "quarrelled him out" and that she never wanted to see him again."

Complainant's witness, Captain James Cunningham, a co-veteran with him in the telephone company's service and afterwards in military service with him, testified that before the separation defendant frequently telephoned him to inquire as to her husband's whereabouts and to relate some of his "eccentricities" and that he always "tried to relieve her mind and patch things up." Another of complainant's witnesses, Taylor, testified that before the separation he lived near fear to the parties; that he never observed "anything irregular" about the way complainant conducted herself; and that, as to defendant, he only observed that "she was a very easily humbugger." The testimony of complainant's three other witnesses had no particular bearing on the issues.

Defendant in her own behalf testified in substance that during her married life she never had any serious dispute or quarrel with her husband, except over "other women"; that she complained about his going with other women as the violation of a ledge of which he was a member; that on the day of the separation in January, 1917, they had a quarrel concerning other women; that he finally said that "he was tired of living in the house" and that he "was going to board some-where else"; that upon one of the earlier sittings "there is page twenty", she (defendant) testified: "he is going with a lady called"; and this remark angered him and he "threw me into the basement" and as far as a week later defendant's house; that thereafter he left the home and never returned; that neither on this occasion, nor on any other, did she say to him "Go out and stay out, you are free"; and that she still loves him and the children, and if he would come back to her, she "would take him back today". She denied ever having read the statements of Mrs. Cloud, as testified by that witness.

Martha Hese, the daughter, corroborated defendant as to what occurred on the day of the separation. On cross-examination she testified that about eight weeks before the hearing and without her mother's knowledge, she talked with her father about the present action and made threats to take his life in case he went on with the case and obtained a divorce. The cross-examination was lengthy and concerned rather the witness' actions and conversations with her father than the issues involved.

As to the issue of defendant's willful desertion of complainant, as made by the allegations of the bill as amended and defendant's answer, we do not think that said allegations, or the findings of the decree following them, are sufficiently sustained by the evidence to warrant the entry of the decree in question in complainant's favor. We believe it to be the law of this State that, to justify a husband in leaving his wife, on the theory of constructive desertion on her part, her misconduct must be such as would entitle him to a divorce. (Fritz v. Fritz, 138 Ill. 436, 442; Carter v. Carter, 62 Ill. 439, 447; Walton v. Walton, 114 Ill. App. 116, 118; Frank v. Frank, 178 Ill. App. 557, 558; Frankenberg v. Frankenberg, 190 Ill. App. 444, 447.) We find nothing in the evidence showing that, at the time complainant left defendant, she had been guilty of such misconduct as would entitle him to a divorce. It is true that she had several times accused him of having illicit relations with other women, but we are not aware that such accusations are grounds for a divorce in this State. (Lindsay v. Lindsay, 226 Ill. 309, 313; Farnham v. Farnham, 73 Ill. 497, 500.) and in Hoffman v. Hoffman, 330 Ill. 413, 421, it is said: "A woman may be living separate and apart from her husband, not without fault on her part, without having willfully deserted or absented herself from him. Under such circumstances she would not be entitled to a decree for separate maintenance and he would not be entitled to a decree for divorce."

Martha Jones, the daughter, corroborated defendant as to what occurred on the day of the separation. On cross-examination she testified that about eight weeks before the hearing and without her mother's knowledge, she talked with defendant about the hearing and made threats to take his life in case he went on with the case and obtained a divorce. The cross-examination was lengthy and occurred rather late in the afternoon and conversation with her father then the hearing continued.

As to the issue of defendant's willful desertion of complainant, as made by the allegations of the bill as amended and defendant's answer, as he has said with all allegations, as the findings of the court following them, are substantially sustained by the evidence as against the entry of the decree in question in complainant's favor. It is believed that the law of this State that, to justify a husband in leaving his wife, he has the duty of constructive desertion on his part, but defendant must be made to admit that he is a divorcee. (Hill v. Hill, 100 Ill. 436, 441; Taylor v. Taylor, 100 Ill. 447; Taylor v. Taylor, 111 Ill. 111, 112, 113; Frank v. Frank, 111 Ill. 121, 122, 123; Frank v. Frank, 111 Ill. 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

On the issue, as made by defendant's cross bill and complainant's answer thereto, as to whether she was entitled to a separate maintenance, it is urged that the court erred in dismissing her petition (supported by the affidavits of herself, the two children and four other persons, but filed after the chancellor had indicated that he would enter a decree in favor of complainant), wherein she prayed that further evidence be heard in her behalf.

In her own affidavit supporting said petition she first makes statements tending to show that her former solicitor was remiss at the time of the hearing in that he did not fully cross-examine complainant and the witnesses presented by him, did not elicit full testimony from her, and did not arrange for the attendance of other witnesses whom she had indicated she desired should be subpoenaed as witnesses for her. And she further states that "she believes and charges it to be true that the plaintiff has on many and various occasions been guilty of gross misconduct with other women; that she can establish such misconduct on his part by the testimony of many witnesses, if given an opportunity * *; that she believes and charges it to be true that the plaintiff is even now living in adultery with a woman by the name of Johanna Hoffman, and that he lives with this woman and not only supports her but supports her daughter."

In the affidavit of Erlene Essig she states that she has known Mr. and Mrs. Boylan for about 25 years; that before the separation she frequently visited at their home as a friend and neighbor; that during February, 1915, she saw Mr. Boylan "entertaining a woman other than his wife and eating a meal with this woman" at a Chicago restaurant; and that affiant learned the name of the woman to be Lucille Hewell, and that she was then unmarried and that "her occupation was that of a female barber."

In the affidavit of Mrs. Martha Hess (daughter of the parties) she states that on the hearing she testified in open court;

On the issue, as made by defendant's cross bill and
complaint, a answer thereto, as to whether she was entitled to
a separate maintenance, it is urged that the court erred in dis-
missing her petition (supported by the affidavits of herself, the
two children and four other persons, and filed after the chancellor
had indicated that he would enter a decree in favor of complainant).
Wherein she stated that further evidence be heard in her behalf.
In her own affidavit supporting said petition she stated
certain statements pending to show that her former husband was residing
at the time of the hearing in that he did not fully cross-examine
complainant and the witnesses presented by him, did not elicit full
testimony from her, and did not arrange for the attendance of other
witnesses whom she had indicated she desired should be subpoenaed as
witnesses for her. And she further stated that "the defendant and
charges it to be true that the plaintiff has on many and various
occasions been guilty of gross misconduct with other women; that she
has established such misconduct on his part by the testimony of many
witnesses, it given an opportunity to call the witnesses and charges
it to be true that the plaintiff is even now living in adultery with
a woman by the name of Johanna Hoffman, and that he lives with this
woman and not only supports her but cohabits her daughter."
In the affidavit of defense being the state that she has
known Mr. and Mrs. Boylan for about 25 years; that before the
petition she frequently visited at their home as a friend and
neighbor; that during February, 1915, she saw Mr. Boylan "cohabiting
a woman other than his wife and eating a meal with this woman" at
a Chicago restaurant; and that witness learned the name of the woman
to be Lucille Howell, and that she was then married and that "her
cohabitation was that of a female worker."
In the affidavit of Mrs. Esther Kane (daughter of the
parties) she states that on the hearing she testified in open court;

that she did not at that time "tell or testify about many facts which are true to her knowledge and that the reason she did not is that she was not asked about them, and that she did not understand that she had any right at that time to volunteer any information about any fact about which she was not asked;" that on the day of the separation of her father and mother, in January, 1917, "she saw her father attempt to attack her mother, and saw her mother run from him and escape from the house through a door in the basement, and that after this happened her father became enraged and left the home;" that before said separation her father went with a woman named Lucille Newell and "named his automobile for her;" that she has seen her father many times since said separation, that he is now living in an apartment at 1121 East 64th street, Chicago, and that she knows that a woman, named Johanna Hoffman, and her daughter, live in the same apartment; and that affiant learned that her father contracted for two policies of insurance on his life in the total sum of \$15,000, and that said Johanna Hoffman is named in each policy as beneficiary.

In the affidavit of Lee Boylan (son of the parties) he states that prior to the separation he went with his mother, about 10 o'clock at night, to the corner of Clark and Maple streets, Chicago, where a woman whose name is unknown to him kept and lived in an apartment; that affiant and his mother watched the apartment from across the street and saw Le Roy Boylan and said woman enter the apartment together and saw that the lights were turned on, and that they continued to watch for about an hour, during which time neither said Le Roy Boylan nor said woman came out of the apartment; that in October, 1916, affiant went with his mother and sister to Fort Sheridan, where they met his father with another woman in an automobile, and when the woman recognized affiant and his mother and sister she (the woman) ran from the car; that affiant's father is now living, and has lived for several months, in an apartment with Johanna Hoffman and her

daughter; that said apartment has two bedrooms in it, occupied by said three people, that the bedroom furniture in the apartment is new and was purchased by his father; that said Johanna Hoffman has no estate or income of her own and does not work for a living, and that affiant's father supports her and her daughter; that in the summer of 1929, when his father attended for two weeks a camp of the Illinois National Guard of which he is a member, said Johanna Hoffman accompanied his father and remained with him in the camp the entire time until both returned to said apartment.

While it is the general rule that after testimony by both parties has been heard in a cause and both parties rest it is largely in the discretion of the trial court whether he will allow the cause to be reopened and further evidence taken (Weir v. Weir, 287 Ill. 495, 504), we are of the opinion, in view of the evidence heard and the statements made in said affidavits presented by defendant, that the court in the instant case abused its discretion in not allowing the hearing of further evidence, especially as bearing upon the questions whether defendant has been living separate and apart from complainant without her fault and whether she is entitled to a separate maintenance as prayed in her cross-bill.

Our conclusion is that the decree of April 25, 1930, in question, be reversed and the cause be remanded with directions to the superior court to dismiss complainant's bill for want of equity, and to hear evidence anew on the issues made by defendant's cross-bill and complainant's answer thereto, and in the meantime to make provision for the payment of reasonable alimony and solicitor's fees to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner and Scanlan, JJ., concur.

time until both returned to said apartment.

accompanied his father and remained with him in the camp the entire Illinois National Guard of which he is a member, said Johannes Holman summer of 1929, when his father attended for two weeks a camp of the last illness's father supports her and her daughter; that in the an estate of income of her own and does not work for a living, and was purchased by his father; that said Johannes Holman has said these people, that the apartment is the apartment in

business; that said apartment has two bedrooms in it, occupied by

While it is the general rule that after testimony by both parties has been heard in a case and both parties rest it is usually in the discretion of the trial court whether he will allow the case to be reopened and further evidence taken (Call v. Call, 207 Ill. 488, 1904), we are of the opinion, in view of the evidence heard and the statements made in said affidavits presented by defendant, that the court in the instant case should in discretion in not allowing the hearing of further evidence, especially on matters upon the questions whether defendant has been living separate and apart from complainant without her fault and whether she is entitled to a separate maintenance allowance in her own right.

On October 10, 1960, at 11:00 a.m., the following was received from the Bureau of the Federal Bureau of Investigation, Washington, D.C.:

1964-1965

35112

MOE I. SCHIFFMAN,
Appellant,

vs.

PARKER M. MATHEWS,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

262 I.A. 852⁴

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a replevin action commenced August 14, 1930, and tried without a jury in December, 1930, the court found that the right to the possession of the property replevied was in defendant and assessed his damages for the detention thereof at one cent. And the court, on December 16, 1930, after overruling plaintiff's motions for a new trial and in arrest of judgment, adjudged that defendant recover of plaintiff the possession of the property and also his damages as assessed together with costs, and that a writ of retorno habendo issue. Plaintiff appealed.

The sheriff's return on the writ discloses that he replevied all of the goods in question on August 15, 1930, and delivered them to plaintiff.

In the first count of the declaration it is averred that on July 14, 1930, defendant unlawfully took and unjustly detains the following goods and chattels, of the value of \$350, viz:

"One (1) 5 chair glass combination case.
One (1) 2 chair glass combination case.
Seven (7) white steel barber chairs.
One (1) glass combination, 4 seat bench and hat rack.
One (1) 2 bowl porcelain wash stand."

In the second count it is averred that on the same day defendant unlawfully detained the goods. Defendant filed pleas of non cepit and non detinet and a special plea of ownership and right to the possession of the goods in him.

In plaintiff's replication to the special plea he averred that he had the right to the possession of the replevied

U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK
JULY 1, 1930
JAMES M. BARTON
Plaintiff
vs.
JAMES I. BENTLEY
Defendant

LOCAL COURT
LOCAL COURT

10113

1. The plaintiff is the owner of the goods.

In a previous action commenced August 14, 1929, and

tried without a jury in December, 1929, the court found that the

right to the possession of the property involved was in dispute

and assessed his damages for the defendant thereof at one

cent. And the court, on December 18, 1929, after overruling

plaintiff's motion for a new trial and its award of judgment,

advised that defendant's recovery of plaintiff's possession of

the property and also his damages as assessed together with costs,

and that a writ of replevin should issue. Plaintiff appealed.

The court's return on the writ of replevin that he

replevied all of the goods in question on August 18, 1929, and

delivered them to plaintiff.

In the first count of the declaration it is averred

that on July 14, 1929, defendant unlawfully took and wrongfully

detained the following goods and chattels, of the value of \$350, viz:

- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.
- One (1) 2 chair glass combination case.

In the second count it is averred that on the same

day defendant unlawfully detained the goods. Defendant filed

pleas of non assent and non detinere and a special plea of error

and right to the possession of the goods in him.

In plaintiff's replication to the special plea he

averred that he had the right to the possession of the replevied

goods by virtue of a certain chattel mortgage on them executed by defendant on July 26, 1928, and duly acknowledged and recorded, which mortgage "was given to secure the rent under a lease," executed on July 25, 1928, wherein plaintiff had demised to defendant certain premises known as 308 East Garfield Boulevard, Chicago, to be occupied by defendant "as a barber shop and beauty parlor," from August 1, 1928, to July 31, 1931, (copies of mortgage and lease attached) and that defendant had failed to pay the monthly rent of \$150 for the months of July and August, 1930.

In defendant's rejoinder (entitled "plea to replication") he admitted the execution of the lease and his occupancy of the premises as a barber shop, etc., until July 14, 1930, but alleged that on July 9, 1930, plaintiff served upon him a five days' notice, terminating the lease and term on July 14, 1930; admitted the execution and delivery of the chattel mortgage, but alleged that the same was given, as stated therein, "as a guaranty of the payment of the rent of the last two months or any part thereof," of said lease (i. e., June and July, 1931); alleged that he had paid all rents due under the lease up to July 1, 1930; and further alleged in substance that under the terms of the lease plaintiff agreed, during the usual business and working hours of the entire term, to furnish hot water for said barber shop, etc., and also to keep the premises in suitable condition for defendant's business and the proper comfort of his patrons and customers; that up to about December 15, 1929, plaintiff regularly furnished during said working hours sufficient hot water and also kept and maintained the premises in proper condition; that repeatedly thereafter, however, and during the months from December, 1929, up to and including June, 1930, and the first part of July, 1930, plaintiff wrongfully failed to furnish any hot water for said barber shop, etc., or to

...by virtue of a certain check ... on them executed by
... on July 24, 1930, and duly acknowledged and recorded,
... which mortgage "was given to secure the rent under a lease,"
... executed on July 20, 1930, wherein plaintiff had agreed to de-
... defendant certain premises known as 308 East Garfield Boulevard,
... Chicago, to be occupied by defendant "as a barber shop and beauty
...", from August 1, 1930, to July 31, 1931, (copies of mortgage
... and lease attached) and that defendant had failed to pay the monthly
... rent of \$110 for the months of July and August, 1930.
... In defendant's rejoinder (attached) "it is to be noted
... tion" he admitted the execution of the lease and his occupancy of
... the premises as a barber shop, etc., until July 24, 1930, but al-
... leged that on July 9, 1930, plaintiff served upon him a five days'
... notice, terminating the lease and term on July 14, 1930; admitted
... the execution and delivery of the check mortgage, but alleged
... that the same was given, as stated herein, "as a security of the
... payment of the rent of the last two months of my past tenancy,"
... of said lease (i. e., June and July, 1930); alleged that he had
... paid all rent due under the lease up to July 1, 1930; and further
... alleged in substance that under the terms of the lease plaintiff
... agreed, during the usual business and working hours of the entire
... term, to furnish hot water for said barber shop, etc., and also to
... keep the premises in suitable condition for defendant's business
... and the proper comfort of his patrons and customers; that up to
... about December 15, 1930, plaintiff regularly furnished during said
... working hours sufficient hot water and also kept and maintained the
... premises in proper condition; that repeatedly thereafter, however,
... and during the months from December, 1930, up to and including
... June, 1931, and the first part of July, 1931, plaintiff repeatedly
... failed to furnish any hot water for said barber shop, etc., or to

repair or stop the leaks of water through the ceiling and into the shop, after repeated notices, etc.; that on June 21st, 27th, and July 1st, 4th and 8th, 1930, there was no hot water furnished and water leaked through said ceiling from above and into the barber shop, of which facts plaintiff was repeatedly notified and promised to remedy the trouble but did not do so; and that by reason of the foregoing defendant was constructively evicted from the premises and that on July 14, 1930, and after the service of plaintiff's said five-days' notice defendant vacated the premises and removed therefrom all his fixtures and property, including the goods and chattels replevied in this action.

On the trial plaintiff was the only witness called in his behalf. He introduced in evidence the lease and chattel mortgage and also a letter written by his attorneys at his request, addressed to defendant and dated August 6, 1930, (i. e., eight days before the beginning of the present action). In the letter, after referring to said lease and chattel mortgage and the property mentioned in the mortgage, it is stated: "The rent for the months of July and August, 1930, being the sum of \$300, is now past due and, on behalf of Mr. Schiffman, we demand of you the aforesaid personal property given under said chattel mortgage as security for the payment of the aforesaid rent. Unless the said property is returned to said premises at 308 East Garfield Boulevard, Chicago, or placed in a public warehouse and a warehouse receipt issued in the name of ^{all} Max I. Schiffman, we will take steps that the law provides to obtain possession of the property." On the trial, also, defendant and five witnesses for him testified. Their testimony disclosed that plaintiff was guilty of such acts and omissions, and such violations of the provisions of the lease, as amounted to a constructive eviction of defendant from the premises.

repair or stop the leak of water through the ceiling and into the shop, after repeated notices, etc.; that on June 21st, 1930, and July 1st, 4th and 5th, 1930, there was no hot water furnished and water leaked through said ceiling from above and into the shop, of which facts plaintiff was repeatedly notified and promised to remedy the trouble but did not do so; and that by reason of the foregoing defendant was constructively evicted from the premises and that on July 14, 1930, and after the service of plaintiff's said "five-days' notice" defendant vacated the premises and removed therefrom all his fixtures and property, including the goods and chattels revealed in this action.

On the trial plaintiff was the only witness called in his behalf. He introduced in evidence the lease and chattel mortgage and also a letter written by his attorney at his request, addressed to defendant and dated August 2, 1930, (i. e., eight days before the beginning of the present action). In the letter, after referring to said lease and chattel mortgage and the property mentioned in the mortgage, it is stated: "The rent for the months of July and August, 1930, being the sum of \$200, is now past due and, on behalf of Mr. Schiltman, we demand of you the aforesaid personal property given under said chattel mortgage as security for the payment of the aforesaid rent. Unless the said property is returned to said premises at 808 East Garfield Boulevard, Chicago, or placed in a public warehouse and a warehouse receipt issued in the name of Mr. I. Schiltman, we will take steps that the law provides to obtain possession of the property." On the trial, also, defendant and five witnesses for him testified. Their testimony disclosed that plaintiff was guilty of such acts and omissions, and such violations of the provisions of the lease, as amounted to a constructive eviction of defendant from the premises.

After a review of the evidence we are of the opinion that the finding and judgment of the court are amply sustained by the evidence and the law. It appears that all rent under the lease was paid by defendant up to and including the month of June, 1930; that the June, 1930, rent was paid at a time when the provision of the lease as to the furnishing of hot water by plaintiff was not being complied with, and was paid because of plaintiff's promises that said hot water would be furnished and certain defects remedied; that no hot water was furnished nor were said defects remedied; that defendant refused to pay the July, 1930, rent unless said hot water was furnished and said defects remedied and stated to plaintiff that if this was not done he would move out; that plaintiff thereupon elected, by the service of said five days' notice on defendant on July 9, 1930, to terminate the lease and tenancy; and that defendant vacated the premises on July 14, 1930. Clearly, defendant could not be held liable for the August, 1930, rent, as claimed by plaintiff; and while, even under defendant's theory of constructive eviction, he could be held liable for the July, 1930, rent, or a portion thereof, he having remained in possession until July 14, 1930, (Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 201-2) yet this is not an action for the recovery of rent claimed to be due. It further appears that said chattel mortgage was given "as a guaranty of the payment of the rent of the last two months, or any part thereof", of the lease (i. e., June and July, 1931). And we do not think that, by reason of said provision in the mortgage and considering the facts disclosed, plaintiff had any such special property interest in the chattels mentioned in the mortgage as warranted the maintaining by him of the present replevin action.

The judgment of the circuit court of December 16, 1930, first above mentioned, is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

After a review of the evidence we are of the opinion that the finding and judgment of the court are amply sustained by the evidence and the law. It appears that all rent under the lease was paid by defendant up to and including the month of June, 1930; that the June, 1930, rent was paid at a time when the provision of the lease as to the furnishing of hot water by plaintiff was not being complied with, and was paid because of plaintiff's promise that said hot water would be furnished and certain defects remedied; that no hot water was furnished nor were said defects remedied; that defendant refused to pay the July, 1930, rent unless said hot water was furnished and said defects remedied and stated to plaintiff that if this was not done he would move out; that plaintiff thereupon elected, by the service of said five days' notice on defendant on July 9, 1930, to terminate the lease and tenancy; and that defendant vacated the premises on July 14, 1930. Plaintiff claims that defendant could not be held liable for the August, 1930, rent, as claimed by plaintiff; and while, even under defendant's theory of negative election, he could be held liable for the July, 1930, rent, as a matter of fact, he having remained in possession until July 14, 1930, (plaintiff's Exhibit C, 7, Return-Execution Note, 1930, 111, 186, 187-188) this is not an action for the recovery of rent claimed to be due. It further appears that said chattel mortgage was given "as a security of the payment of the rent of the last two months or any part thereof," of the lease (i. e., June and July, 1930). And we do not think that, by reason of said provision in the mortgage and considering the facts disclosed, plaintiff had any such special property interest in the chattels mentioned in the mortgage as warranted the maintaining by him of the present replevin action.

The judgment of the circuit court of December 14, 1930, is affirmed. As written.

ATTESTED.

Isaac and Benjamin, Jr., Clerk.

35168

OTTO HERRM,
Appellee,

v.

H. ROY BERRY COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

262 I.A. 653'

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 22, 1930, and on the day after plaintiff became of legal age, he commenced a 4th class action in contract in the municipal court against defendant to recover back moneys which, during his minority, he had paid on a certain written contract signed by him, and also by another for him, during said minority. Following a trial without a jury in December, 1930, at which oral and documentary evidence was introduced by both parties, the court found the issues against defendant, assessed plaintiff's damages at \$701.70, and entered judgment in that sum against defendant. The present appeal followed.

In plaintiff's amended statement of claim, as subsequently amended on its face by leave of court, he alleged that on October 1, 1928, he entered into a contract (copy attached) with defendant for the purchase by him of a vacant lot, known as lot 230 in "H. Roy Berry Company's Landymont Terrace," etc.; that under the terms of the contract, and in reliance upon it, he paid \$290, cash down to defendant, and also paid, for defendant's account, at the Chicago Trust Co., and at the county collector's office for taxes and special assessments, the further total sum of \$413; that when the contract was entered into he was a minor; that he became of legal age on July 21, 1930; that both before and after obtaining his majority

OTTO HERR,
Appellee.

FEDERAL DISTRICT COURT

OF CHICAGO.

262 I.A. 653

H. ROY BERRY, Plaintiff,
vs.
OTTO HERR, Appellee.

MR. JUSTICE JUDITH WHITE delivered the opinion of the court.

On July 22, 1930, and on the day after plaintiff became of legal age, he commenced a civil action in contract in the municipal court against defendant to recover back money which, during his minority, he had paid on a certain contract signed by him, and also by another for him, during said minority. Following a trial without a jury in December, 1930, at which oral and documentary evidence was introduced by both parties, the court found the issues against defendant, entered plaintiff's demand of \$701.70, and entered judgment in that sum against defendant. The present appeal follows.

In plaintiff's amended statement of claim, as subsequently amended on his leave of court, he alleged that on October 1, 1928, he entered into a contract (copy attached) with defendant for the purchase by him of a vacant lot, known as lot 230 in "N. 2nd City Block," a landmark "lot," etc.; that under the terms of the contract, and in reliance upon it, he paid \$250. cash down to defendant, and also paid, for defendant's account, of the Chicago Trust Co., and of the county collector's office for taxes and special assessments, the number being \$412; that when the contract was entered into he was a minor; that he became of legal age on July 22, 1930; that both before and after attaining his majority

he notified defendant that he disaffirmed the contract and demanded the return to him of said sums of money; but that defendant refused and still refuses to return said sums, aggregating \$703, or any part thereof.

In defendant's affidavit of merits it denied the making of the contract; denied that plaintiff paid to it said sum of \$290, or for its account said further total sum of \$413; denied that it had received any moneys from plaintiff for or on account of the contract; and alleged that it has no knowledge as to plaintiff's age on October 1, 1928, or at the present time, and demands strict proof thereof.

On the trial plaintiff testified in his own behalf and he introduced in evidence one of the original duplicates of the contract of October 1, 1928, which had been in defendant's possession and which was produced by it at the trial, - plaintiff having testified that his original duplicate had been lost by the Chicago Trust Co. while temporarily in its possession. Plaintiff also introduced certain receipts given to him at various times when he made monthly payments on the contract, and also a letter, written to him by defendant and dated September 29, 1930 (hereinafter referred to). And it was sufficiently disclosed by plaintiff's evidence, not contradicted, that when the contract was executed and delivered on October 1, 1928, plaintiff was a minor; that he made a down payment of \$290, as it was stipulated he should do; that thereafter and during his minority he for about a year and a half made the stipulated monthly payments to the Chicago Trust Co., and also certain payments at the county collector's office for taxes and special assessments, as required; that the monthly payments and the payments for taxes and special assessments amounted in the aggregate to \$411.70 (or a total including said down payment of \$701.70); and that plaintiff reached his majority on July 21, 1930, and immediately notified defendant that he disaffirmed the

he notified defendant that he disaffirmed the contract and demanded
the return to him of said sum of money; but that defendant refused
and still refuses to return said sum, aggregating \$700, or any
part thereof.

In defendant's affidavit of denial it is stated the making of
the payment denied that plaintiff paid to it said sum of \$200, or
for its account said further total sum of \$400; denied that it had
received any money from plaintiff for or on account of the contract;
and alleged that it was no knowledge as to plaintiff's age on October
1, 1928, or of the present time, and demands strict proof thereof.

On the trial plaintiff testified in his own behalf and
he introduced in evidence one of the original duplicates of the con-
tract of October 1, 1928, which had been in defendant's possession
and which was produced by it at the trial. - Plaintiff having testified
that his original duplicate had been lost by the Chicago Trust Co.
while transporting it in its possession. Plaintiff also introduced sev-
eral receipts given to him at various times when he made monthly pay-
ments on the contract, and also a letter, written to him by defendant
and dated September 20, 1930 (hereinafter referred to), and it was
affirmatively disclosed by plaintiff's witness, not contradicted,
that when the contract was executed and delivered on October 1, 1928,
plaintiff was a minor; that he made a down payment of \$200, as it was
stipulated he should do; that thereafter and during his minority he
for some a year and a half made the stipulated monthly payments to
the Chicago Trust Co., and also certain payments at the county
collector's office for taxes and special assessments, as required; that
the monthly payments and the payments for taxes and special assessments
mentioned in the contract to \$41.70 (or a total including said down
payment of \$701.70); and that plaintiff reached his majority on July
21, 1931, and immediately notified defendant that he disaffirmed the

contract and demanded of defendant the return to him of said moneys, which demand defendant refused.

The theory of defendant upon the trial was in substance that it was not a party as principal to the contract of October 1, 1928; that it did not actually receive any of the moneys sued for; that no one of the parties, to whom plaintiff paid the moneys received the same for defendant's benefit or account; and that, in short, it was not liable to plaintiff in any sum. Defendant endeavored to establish its theory (unsuccessfully, in our opinion) by the testimony of Carl L. Bernau and Lawrence Hough and by the introduction of a certain written agreement (hereinafter referred to), dated September 4, 1928, "between H. Roy Berry Co., an Illinois corporation" (thereinafter called the Berry Co.) "and Ralph S. Elliott, doing business under the firm name of Home Owner's Realty Co., not incorporated" (thereinafter called the Realty Co.)

Plaintiff further testified that during September, 1928, he was approached by Carl L. Bernau who "represented himself to be an agent or salesman of the H. Roy Berry Co." and who further stated that he "was taking the place of Ralph S. Elliott, who was the sales-manager of H. Roy Berry Co.;" that Bernau urged him (plaintiff) to buy a lot in the Berry Co.'s "Laudymont Terrace" subdivision; that together they went and viewed the subdivision and certain lots therein; that as a result plaintiff agreed to enter into a written contract for the purchase of lot No. 230 in said subdivision; that he paid \$30 to Bernau as earnest money and was given a receipt signed by Bernau; that shortly thereafter he was requested to sign a contract, and did so, and at the time made a further payment of \$265; and that subsequently he received his duplicate original of the contract, signed by defendant. The original duplicate copy of the contract, introduced in evidence by plaintiff as aforesaid, is partly printed and partly in typewriting, and portions thereof are as follows:

contracts and demands of defendant the present to him at said meeting, which contracts defendant refused.

The theory of defendant upon the trial was in substance that it was not a party to the contract of October 1, 1932; that it did not actually receive any of the money sent then; that no one of the parties, so when plaintiff paid the money received the same for defendant's benefit or account and that, in short, it was not liable to plaintiff in any way. Defendant answered to establish its theory (unnecessarily, in our opinion) by the testimony of Carl L. Brown and Lawrence Brown and by the introduction of a certain written agreement (hereinafter referred to), dated September 4, 1932, "between H. Roy Berry Co., an Illinois corporation" (hereinafter called the Berry Co.), and Ralph A. Elliott, doing business under the firm name of James O'Connor's Realty Co., not incorporated" (hereinafter called the Realty Co.).

Plaintiff further testified that during September, 1932, he was approached by Carl L. Brown who "represented himself to be an agent or salesman of the H. Roy Berry Co." and who further stated that he "was taking the place of Ralph A. Elliott, who was the salesman of H. Roy Berry Co.," and Brown signed him (plaintiff) to buy a job in the Berry Co.'s "Development Towns," subdivisions; that they went and viewed the subdivision and certain lots therein; that as a result plaintiff agreed to enter into a written contract for the purchase of lot No. 222 in said subdivision; that he paid \$200 therefor he was represented to sign a contract, and his name and earnest money and was given a receipt signed by Brown; that and at the time made a further payment of \$250; and that subsequently he received his duplicate original of the contract, signed by defendant. The original duplicate copy of the contract, introduced in evidence by plaintiff as aforesaid, is partly printed and partly in typewriting, and purports thereof are as follows:

"THIS CONTRACT, made this first day of October, 1928, by and between H. ROY BERRY COMPANY, a corporation organized under the laws of the State of Illinois as agent, for the Bergeland Realty Trust, of which Chicago Trust Co. is trustee under their Land Trust Number 1638, first party, and Hans Lehmann, a bachelor friend of Otto Henna, a minor, second party.

WITNESSETH: That first party agrees that if second party shall first make the payments and perform the agreements hereinafter mentioned on his part to be made and performed, first party will cause to be conveyed to second party, in fee simple, * * Lot Two Hundred Thirty (230) in H. Roy Berry Co.'s 'Laudymont Terrace,' being a subdivision * * in Cook county, Illinois.

And second party hereby agrees to pay to first party, at Chicago Trust Co., Chicago, Illinois, * * the sum of \$1450, in the following manner: \$290 on the execution of this contract, and the remainder as follows: \$18, or more, on or before November 1, 1928, and \$18, or more, on or before the 1st day of each and every month thereafter until November 1, 1933, - the balance then remaining unpaid to be paid on or before December 1, 1933, including interest at six (6%) per cent per annum, payable monthly on the whole sum remaining from time to time unpaid, and to pay all taxes and assessments that may be levied or imposed upon said land after the year 1927."

Then follow numerous paragraphs, in small printed type, containing various agreements usual in such contracts, including provisions for forfeiture in case of default in payments. The signatures to the contract are:

"H. ROY BERRY COMPANY (SEAL)
as agent aforesaid.
HOME OWNERS REALTY CO. (not inc.)
By Ralph S. Elliott
Hans Lehmann (SEAL)
Otto Henna (SEAL)."

On the back of the contract is the written indorsement of the payment of \$290 on "10-1-28;" a statement that future payments are to be made each month of \$18, on the first day of the month; and indorsements of numerous monthly payments of \$18 each, separated as to what is for principal and what for interest, and showing balance of the principal sum yet to be paid. The last of these indorsed payments of \$18 each is dated "3-8-30."

The agreement, above referred to and introduced by defendant, between defendant and said Ralph S. Elliott, dated September 4, 1928 (about one month prior to the execution of said contract) is in part as follows:

"First: The Berry Co. (defendant) hereby grants and gives to the Realty Co. (Elliott) the exclusive right to sell any or all of the unsold lots in that part of Laudymont Terrace Sub-division at Arlington Heights, which is bounded by Fairview avenue, State road, Harvard street and Chestnut avenue, such unsold lots being numbered as follows: (Here follow certain numbered lots, including said lot No. 230)

Second. All lots sold by the Realty Co., pursuant to the terms of this agreement, shall be sold at prices not less than those shown on the plat attached and made a part of this agreement, and on the terms as shown on said plat, - a new plat with higher prices to be used after December 31, 1928, to be prepared by Berry Co. (defendant). * * All contracts for the sale of the above lots, which shall be sold by the Realty Co., shall be drawn up and prepared by the Berry Co. upon its regular form of contract, and such contracts of sale are to be signed by the Berry Co."

In the letter of September 29, 1930, above referred to and written by defendant to plaintiff (about two months after the present action was commenced and after defendant had received notice that plaintiff disaffirmed the contract in question and demanded back the moneys he had paid thereunder) defendant writes:

"Your payments on lot 230 in Laudymont Terrace Sub-division are so delinquent that the Chicago Trust Co. has referred your account to us with the recommendation that the contract be forfeited.

We do not wish to take such drastic action without giving you one more opportunity. If you will call on the writer personally * * it may be possible to make a satisfactory adjustment.

We are holding this offer open until October 4, 1930.

Very truly yours,

H. Roy Berry Company

by R. B. Bartels."

Think of the Future!

It is contended that the finding and judgment against defendant is contrary to the evidence and the law applicable thereto. We cannot agree with the contention. It appears that the contract of October 1, 1930, was signed by plaintiff, when a minor, for the purchase of the lot in question, and that it was also signed by Elliott on behalf of defendant under sufficient authority so to do; that at that time defendant was the real owner of the lot and the party to be benefitted by the transaction; and that defendant never repudiated the making of the contract, but, on the contrary, subsequently ratified the making of it in its behalf. And it further appears that plaintiff, after making monthly payments for about one

"Plaintiff The Dairy Co. (defendant) hereby grants and gives to Defendant Co. (plaintiff) the exclusive right to sell any or all of the milk in that part of Laramie County, Wyoming, within the limits of the State of Wyoming, which is bounded by the following lines, to-wit: the north line of the State of Wyoming, the east line of the State of Wyoming, the south line of the State of Wyoming, and the west line of the State of Wyoming. (The following is a list of the land in the State of Wyoming, which is bounded by the following lines, to-wit: the north line of the State of Wyoming, the east line of the State of Wyoming, the south line of the State of Wyoming, and the west line of the State of Wyoming.)

It is the duty of the court to determine the rights of the parties to the contract. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

"Your payment on lot 200 in Laramie County, Wyoming, and the balance due on the contract, is hereby acknowledged. The contract is hereby acknowledged as being in full payment of the contract. The contract is hereby acknowledged as being in full payment of the contract.

It is not the duty of the court to determine the rights of the parties to the contract. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

It is recommended that the court find in favor of the plaintiff and award judgment accordingly. The court has determined that the contract is valid and enforceable. The court has also determined that the contract is not in violation of any law. The court has further determined that the contract is not in violation of any public policy. The court has finally determined that the contract is not in violation of any other law or public policy.

year and a half during his minority to defendant's designated agent (Chicago Trust Co.), and also the payments for taxes and special assessments as required, disaffirmed the contract upon reaching his majority and demanded of defendant the return of all payments made by him on the contract during his minority, which were to the total amount of \$701.70. The law gave him the right to take such action. In 14 R. C. L. p. 243-3, sec. 23, it is said: "When the infant exercises his privilege to avoid his contract, whether during infancy or upon arrival at full age, the contract it is often said becomes void ab initio, and the rights of the parties are as if it never existed. Not only may the infant defeat efforts to impose on him liability for so much of the contract as is executory, but he may reclaim any property that passed from him, or recover any money that he paid out under the contract, * * *." In Waller v. Chase Grocery Co., 241 Ill. 398, 400-1, it is said: "The exercise of his right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned. * * If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and cheats. Such voluntary payment may be recovered upon the avoidance of the contract."

Our conclusion is that the judgment was right and should be affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

[illegible]

35231

PETER STEPAN,
Appellee,

v.

CRANE CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 653²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in tort to recover damage to plaintiff's automobile occasioned by its collision with defendant's motor truck on the afternoon of June 2, 1928, there was a trial without a jury, resulting in the court, on March 18, 1931, finding defendant "guilty in manner and form as charged in plaintiff's statement of claim," assessing plaintiff's damages at \$150, and entering judgment in said sum against defendant. The present appeal followed.

In plaintiff's statement of claim, filed November 23, 1928, it is alleged in substance that on June 2, 1928, while plaintiff was driving his automobile "with due care" northerly upon and along Keezie avenue, Chicago, at or near its intersection with 42nd street, defendant, by its servant, so carelessly and negligently drove and operated its motor truck that it collided with plaintiff's automobile, and that as a result of the collision the automobile was greatly damaged, and plaintiff was obliged to and did expend a large sum of money, to-wit, \$300, in having it repaired, etc.

In defendant's affidavit of merits, it is alleged that plaintiff's automobile "was not operated with due care" and that the collision was caused by his negligence; and it is denied that at the time and place defendant's servant was driving the motor truck in a careless or negligent manner as charged, or that plaintiff

STATE OF ILLINOIS
COUNTY OF CHICAGO

v.

JOHN J. ...
...
...

2021A.003

IN SENIOR COURT OF THE COUNTY OF CHICAGO, ILLINOIS

In a civil action in and to recover damages to

plaintiff's automobile sustained by the collision with defendant's

motor truck on the afternoon of June 2, 1933, there was a trial

without a jury, resulting in the court, on March 18, 1934, finding

defendant "guilty in manner and form as charged in plaintiff's

statement of claim," assessing plaintiff's damages at \$150, and

entering judgment in said suit against defendant. The present

appeal follows.

In plaintiff's statement of claim, filed November 25, 1933,

1933, it is alleged in substance that on June 2, 1933, while plaintiff

was driving his said motor truck "with due care" northerly upon and

along Kaslo avenue, Chicago, at or near the intersection with 42nd

street, defendant, by his servant, so carelessly and negligently

drove and operated the motor truck that it collided with plaintiff's

automobile, and that as a result of the collision the automobile was

greatly damaged, and plaintiff was obliged to and did expend a large

sum of money, to-wit, \$250, in having it repaired, etc.

In defendant's affidavit of denial, it is alleged that

plaintiff's automobile "was not operated with due care" and that

the collision was caused by his negligence; and it is denied that

as the law and place defendant's servant was driving the motor

truck in a careless or negligent manner as charged, or that plaintiff

had expended for repairs the sum of \$300, or any such sum.

On the trial plaintiff was his only witness as to the happening of the accident. Defendant's principal witness was Thomas Quinlan, the driver of its truck. His testimony was corroborated in essential particulars by the deposition (taken by stipulation at Battle Creek, Michigan) of Jack Primack, who saw the accident, and by the testimony of two other witnesses called by defendant. It appears that the accident occurred on a Saturday afternoon shortly before 3 o'clock; that Kedzie avenue is a north and south street; that 42nd street is an east and west street; that north of 42nd street and on the west side of Kedzie avenue defendant has a plant and garage; that about 100 feet north of 42nd street there is a gate or entrance to the plant; and that there are two street car tracks in Kedzie avenue.

Plaintiff's testimony in its entirety is confusing, contradictory and unsatisfactory. On direct examination he testified in substance that he had attended a funeral at Ashland avenue and 57th street; that after the services a funeral procession was formed consisting of about 13 automobiles, and that the automobile (which plaintiff was driving and in which two of his acquaintances were passengers) became a part of the procession; that from 59th street the procession moved north on Kedzie avenue; that his car was "the fourth car behind the hearse;" that just after his car had crossed 42nd street, and was "going north on the east side of the street (Kedzie)," defendant's truck, also going north, turned suddenly towards the west (left) and "ran into me;" that the truck, "without stopping, ran through the funeral procession;" that "when I seen him coming close to me I swung over to the left, but he hit me and smashed in the motor;" and that "the remainder of the funeral procession was going on after I turned to the left." On cross-examination he testified that the procession

had expended for repairs the sum of \$200.00, or any such sum.
On the trial plaintiff was his only witness as to the

operation of the machine. Defendant's principal witness was

Thomas Allen, the driver of the truck. His testimony was

contradicted on material points by the testimony of

plaintiff at Mobile Creek, Michigan) at Jack Elmick, who saw the

accident, and by the testimony of the other witnesses called by

defendant. It appears that the accident occurred on a Sunday

afternoon shortly before 3 o'clock; that Mobile Avenue is a north

and south street; that Elmick Street is an east and west street; that

west of Elmick Street and on the east side of Mobile Avenue defendant

has a plant and garage; that about 100 feet north of Elmick Street

there is a gate or entrance to the plant; and that there are two

streets that cross in Mobile Avenue.

Plaintiff's testimony in the entirety is contained, together

with the cross-examination, in the following examination as testified in

examination that he had observed a funeral procession was formed

about 100 feet after the service a funeral procession was formed

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about 100 feet after the service a funeral procession was formed

was moving north in Kedzie avenue at "about 10 or 12 miles per hour;" that he was driving on the east side of the street, "straddling the outer rail of the northbound street car track;" that when the collision occurred the "left front side of the truck hit my car on its right front side;" that when the truck turned to the left on Kedzie avenue, "in front of me" * *, "I swung to the left to try to make it;" that the occurrence was "about fifty feet south of the gate;" that when he "first saw the truck, it was right on my car in the middle of the street;" that it "was going on a slant towards the gate," and he (plaintiff) "swung to the left" to avoid a collision, but he couldn't make it because the truck was going too fast;" and that the truck was going on a slant "at a rate of about 15 or 20 miles an hour."

Quinlan, the driver of defendant's truck, testified in substance that he had been to a railroad freight house and was driving the truck, then empty, back to defendant's garage; that he travelled west on 42nd street and upon reaching Kedzie avenue stopped and looked to the south and to the north; that he did not see any "funeral procession" approaching 42nd street, but did see a truck (being driven by the witness Primack) in Kedzie avenue, approaching 42nd street from the south and being about 75 feet away from the intersection; that he did not see any other automobiles or street car approaching from the south; that he turned to the right into Kedzie avenue and moved north in the northbound street car track for about 100 feet until he was about abreast of the gate or entrance into defendant's plant; that he looked to the north but saw no vehicles of any kind coming from that direction; that he extended out his left hand to indicate he was about to turn, and, moving at the rate of about 5 miles per hour, he crossed Kedzie avenue, and was about to pass through the gate when the collision occurred; that he heard and felt the crash, stopped the truck and got out; that he saw that plaintiff's car "was up against the left hind end of my truck," and was damaged

was moving north in Kabbie avenue at about 10 or 15 miles per hour, that he was driving on the east side of the street, "approaching the center of the northbound street and looking" that when the collision occurred the "left front side of the truck hit my car on the right front side." That when the truck turned to the left on Kabbie avenue, "in front of me" "I saw to the left in my line of vision that the occurrence was "about fifty feet south of the gate." That when he "first saw the truck, it was right on my car in the middle of the street." That it "was going on a slight towards the gate," and he "possibly" "coming to the left" to avoid a collision, but he "was not aware it because the truck was going too fast" and that the truck was going on a slight "at a rate of about 15 or 20 miles an hour."

Question, the driver of defendant's truck, testified in evidence that he had been for a long time driving north and was driving the truck, then empty, back to defendant's garage; that he travelled west on 42nd street and upon reaching Kabbie avenue stopped and looked to the south and to the north; that he did not see any "taxi cab" approaching 42nd street, and did not see a truck (being driven by the witness witness) in Kabbie avenue, approaching 42nd street from the south and being about 75 feet away from the intersection; that he did not see any other automobiles or street cars approaching from the south; that he turned to the right into Kabbie avenue and moved north in the northbound street car track for about 10 feet until he was about halfway of the gate or entrance into defendant's plant; that he looked to the north but saw no vehicles of any kind coming from that direction; that he expected out the left hand to indicate he was about to turn, and, moving at the rate of about 3 miles per hour, he passed Kabbie avenue, and was about to pass through the gate when the collision occurred; that he heard and felt the crash, stopped the truck and got out; that he saw that plaintiff's car "set up against the left hand end of my truck," and was damaged

"across its front;" that it had hit the truck "head on;" that its radiator "was shoved back and the hood was bent;" that defendant's truck is 27 feet long; that when the collision occurred its front end was over the sidewalk and partially west of the gate, and its rear end extended 4 or 5 feet east of the west curbstones into Kedzie avenue; and that the tail light, "which is on the left hand rear side of the truck," was cut off from the truck by the collision. The extent of the damage to the truck, as testified to by Guinan, which was all at its left, rear end, was corroborated by the testimony of defendant's witnesses, Fletzke and Kucera, the latter testifying that the "left, rear panel of the body of the truck was marked, the tail light broken off, the license bracket bent, and the rear license plate broken so that it had to be rewelded." In the deposition of Primack, not an employee of defendant and a disinterested witness, he testified in substance that he saw the collision from the seat of a truck, driven by him and going north in Kedzie avenue on the east side of the street; that he saw defendant's truck, which was ahead of him, turn sharply to the left and cross the street; that plaintiff's automobile, coming from the south and travelling at a high rate of speed on the west side of the street and near the west curb, struck defendant's truck "after it was more than half-way over the curb going into the gateway;" that plaintiff unsuccessfully tried to pass to the left of defendant's truck, but because of the rapid speed plaintiff could not stop his automobile in time, and it ran "into the rear end of defendant's truck;" and that plaintiff's automobile "was damaged in its front" - its radiator being "driven clear back."

On the trial also, plaintiff, to show prima facie the extent of the damage to his automobile, was allowed to introduce in evidence (and properly, Byales v. Matheson, 328 Ill. 269, 272) an itemized bill for repairs on his automobile, amounting to

\$280.19, made by a business firm engaged in automobile repairing, and which bill was marked "paid." and plaintiff testified that he had paid the amount of the bill and that "no repairs were made on his car that were not the result of the accident." Some of the larger items of the bill tended to show that the damage to the automobile was to its entire front and the result of a "head on" collision, and also tended to corroborate the testimony of defendant's witnesses, Quinlan and Primack, as to how the accident happened. Said larger items of repairs were "one hood, one radiator, one bumper, two head lamps and two front fenders."

After reviewing the present transcript we are of the opinion that the court's finding and judgment are against the manifest weight of the evidence and that the judgment cannot stand. We think it clearly appears that the collision was not the result of any negligence on the part of the driver of defendant's truck, but that it was caused solely by plaintiff's negligence. Accordingly the judgment will be reversed with findings of fact. All costs will be paid by plaintiff.

REVERSED WITH FINDINGS OF FACT.

Kerner and Seanlan, JJ., concur.

35231.

FINDINGS OF FACT.

We find as ultimate facts in this case that defendant was not guilty of any negligence, and that plaintiff was guilty of negligence, which proximately contributed to the damage to his automobile.

SECRET

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

Project 22, 1944, 1945, 1946

35288

PAULA FAGAN,
Appellant.

v.

I. LOCKSON,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 553

MR. PRESIDING JUSTICE ORIDLEY DELIVERED THE OPINION OF THE COURT.

On February 17, 1931, Paula Fagan, plaintiff, the owner of a building at No. 425 So. Central avenue, Chicago, caused a distress warrant to issue, directing Joseph Bada to distrain the personal property of Nathan Levitzsky and I. Lockson, in Chicago, for the sum of \$290, being the amount claimed to be due to her, as landlord, on February 15, 1931, for rent for the basement store of the building. Under the warrant, on the same day, a considerable amount of personal property was distrained and a return made. On February 18th the warrant and return (to which was attached plaintiff's affidavit of claim) were filed in the office of the clerk of the municipal court and a summons was issued. On February 25th the summons was returned "not found" as to the defendants, Levitzsky and Lockson. On March 3rd, Lockson entered his appearance and demanded a jury trial. On March 9th, on plaintiff's motion, the action was dismissed as to Levitzsky, and Lockson (hereinafter called defendant) was given leave to file, and filed, a set-off (the same to stand as an affidavit of merits to plaintiff's claim). On March 10th there was a trial before a jury, resulting in the return of a verdict "finding the issues against plaintiff on her statement of claim as to the distress and merits, and against plaintiff on defendant's set-off, and assessing defendant's damages at \$436." On March 13th the court granted a new trial. Shortly thereafter the cause was again tried before the same judge and a jury, resulting in the return at the

12345

PAUL F. FAGAN,
Appellant.

APPEAL FROM NORTHERN

COURT OF CHICAGO.

262 I.A. 653

I. JACKSON,
Appellee.

MR. PRESIDING JUSTICE GRIMM DELIVERED THE OPINION OF THE COURT.

ON FEBRUARY 17, 1931. PAUL F. FAGAN, Plaintiff, the owner

of a building at No. 425 So. Central Avenue, Chicago, caused a

district warrant to issue, directing Joseph Fagan to deliver the

personal property of Nathan Levinsky and I. Jackson, in Chicago.

For the sum of \$200, being the amount claimed to be due to her.

on January 12, 1931, for rent for the basement store

of the building. Under the warrant, on the same day, a considerable

amount of personal property was distrained and a return made. On

February 12th the return and return (to which was attached plain-

tiff's affidavit of claim) were filed in the office of the clerk of

the municipal court and a summons was issued. On February 23rd the

summons was returned "not found" as to the defendants, Levinsky

and Jackson. On March 2nd, Jackson entered his appearance and

demanded a jury trial. On March 9th, on plaintiff's motion the

action was dismissed as to Levinsky, and Jackson (hereinafter called

defendant) was given leave to file, and filed, a set-off (the same is

stated as an affidavit of merits to plaintiff's claim). On March 10th

there was a trial before a jury, resulting in the return of a verdict

"finding the amount against plaintiff on her statement of claim as to

the distress and return, and against plaintiff on defendant's set-off.

and assessing defendant's damages at \$400." On March 11th the court

granted a new trial. Shortly thereafter the cause was again tried

before the same judge and a jury, resulting in the return of the

court's direction of two verdicts. In one the jury found "the issues as to the right to levy a distress warrant ^{against} plaintiff, and the issues as to the merits of the action against defendant, and assess plaintiff's damages at the sum of \$80." In the other the jury found "the issues against plaintiff on defendant's claim of set-off, and assess defendant's damages at the sum of \$440.50." During the second trial defendant filed, by leave of court, an "amended statement and affidavit of claim of set-off." Following the return of the two verdicts plaintiff made three motions in succession (1) "for judgment in her favor non obstante veredicto;" (2) for a new trial and (3) in arrest of judgment. All these motions were denied. The common law record discloses that on March 17, 1931, the court entered "judgment non obstante veredicto against plaintiff as to distrain and against plaintiff on defendant's set-off and assessed damages, \$360.50, and costs," and that plaintiff prayed and was allowed the present appeal. It will be noticed that the amount mentioned in the judgment, \$360.50, is the difference between the amount of damages assessed in defendant's favor in one verdict (\$440.50) and the amount of damages assessed in plaintiff's favor in the other verdict (\$80); and that the jury assessed damages in the last named verdict in plaintiff's favor, notwithstanding that they found therein the issues against her "as to the right to levy a distress warrant."

In defendant's "amended statement and affidavit of claim of set off" he alleges that on December 13, 1929, he purchased "the store" for \$3975 from Levitzsky, who then was plaintiff's tenant under a written lease; that on that day Levitzsky assigned all of his right, title and interest in the premises and the lease to defendant, who "became the sub-lessee of Levitzsky;" that plaintiff "was holding the sum of \$400, belonging to Levitzsky;" that for a

court's direction of the verdict. In one the jury found "the
defendant liable to pay a damages of \$1000.00" and in the other
the jury found "the defendant liable to pay a damages of \$1000.00".
In the other
and the issue as to the merits of the action against defendant
was decided. The jury found "the defendant liable to pay a damages of \$1000.00".
of cost, and answer defendant's damages at the sum of \$1000.00".
During the second trial defendant filed, by leave of court, an
"amended statement and affidavit of claim of cost". Following
the return of the two verdicts plaintiff made three motions in
connection (1) "for judgment in her favor and (2) for costs".
(1) for a new trial and (2) for costs of judgment. All these motions
were denied. The common law rules of practice then on March 17, 1911,
the court entered "judgment for plaintiff against defendant
as to liability and against plaintiff on defendant's cost" and
assessed damages, \$1000.00, and costs, and that plaintiff pay and
was allowed the present appeal. It will be noticed that the amount
mentioned in the judgment, \$1000.00, is the difference between the
amount of damages assessed in defendant's favor in the verdict
(\$1000.00) and the amount of damages assessed in plaintiff's favor in
the other verdict (\$1000.00); and that the jury assessed damages in the
last named verdict in plaintiff's favor, notwithstanding that they
found therein the issue against her "as to the right to pay a dis-
count warrant".
In defendant's "amended statement and affidavit of claim
of cost" he alleges that on December 10, 1909, he purchased "the
store" for \$1000 from Levinsky, who then was plaintiff's tenant
under a written lease; that on that day Levinsky assigned all of
his right, title and interest in the premises and the lease to
defendant, who became the one-lessor of Levinsky; that plaintiff
"was holding the sum of \$1000, belonging to Levinsky," that for a

valuable consideration Levitzsky sold and assigned all his right, title and interest in said sum to defendant, which sum is now due to him, together with interest thereon of \$24; that there is now due from plaintiff to defendant the further sum of \$12 for goods and merchandise sold and delivered to plaintiff during February, 1931, and at her request; and that defendant is not indebted to plaintiff in the sum of \$290 for rent, as stated in her statement of claim, or in any sum.

On the trial plaintiff called defendant as a witness under section 33 of the Municipal Court Act, who testified that he occupied the store as plaintiff's tenant during the months of December, 1930 and January, 1931, and a part of the month of February, 1931, viz., "until the closing of the store" on February 17th, - the day said distress warrant was levied.

On the trial, also, a certain written lease was introduced, signed by plaintiff, as lessor, and Levitzsky, as lessee, dated December 2, 1929, wherein plaintiff demised to Levitzsky said store, to be occupied for a grocery, etc., from December 15, 1929 until December 14, 1934 (a period of five years) for a monthly rental of \$125. The lease is on a printed form and in addition to the usual covenants had a rider attached thereto, also signed by plaintiff and Levitzsky, with the following provisions in typewriting:

"Lessor hereby agrees that Lessee shall have the right to transfer, assign, or sub-lease said premises subject to lessor's approval, and that said sub-lessee shall have the same rights as lessee herein.

It is further agreed that the \$400, deposited with the lessor by the lessee as security for the faithful performance of the covenants of this lease, the receipt whereof is hereby acknowledged, shall bear interest at the rate of 6 per cent per annum; said interest shall be payable to lessee annually."

Plaintiff testified in substance that on December 15, 1929, Levitzsky, as tenant, took possession and occupied the store for a short time; that he and defendant are relatives; that prior to January 1, 1930, Levitzsky, in accordance with the provisions of said Rider

valuable consideration. Plaintiff said she assigned all her right, title and interest in said sum to defendant, which sum is now due to him, together with interest thereon of \$200; that there is now due from plaintiff to defendant the further sum of \$125 for goods and merchandise sold and delivered to plaintiff during February, 1931, and as her request; and that defendant is not indebted to plaintiff in the sum of \$325 for rent, as stated in her statement of claim, or in any sum.

On the trial plaintiff called defendant as a witness under section 33 of the Municipal Court Act, who testified that he occupied the store as plaintiff's tenant during the month of December, 1930, and January, 1931, and a part of the month of February, 1931, viz., "until the closing of the store" on February 17th, - the day said witness' warrant was issued.

On the trial, also, a certain written lease was introduced, signed by plaintiff, as lessor, and defendant, as lessee, dated December 2, 1930, wherein plaintiff covenanted to defendant said store to be occupied for a grocery, etc., from December 12, 1930 until December 12, 1931 (a period of five years) for a monthly rental of \$125. The lease is on a printed form and in addition to the usual covenants has a clause whereby plaintiff, also signed by plaintiff and

defendant, with the following provisions is appended:

"Lessor hereby agrees that lessee shall have the right to transfer, assign, or sub-lease said premises subject to lessor's approval, and that said sub-lease shall have the same rights as lease herein.

It is further agreed that the \$400, deposited with the lessor by the lessee as a security for the faithful performance of the covenants of this lease, the receipt whereof is hereby acknowledged, shall bear interest at the rate of six per cent per annum, said interest shall be payable to lessee annually."

Plaintiff testified in evidence that on December 12, 1930, defendant, as tenant, took possession and occupied the store for a short time; that he and defendant and plaintiff had prior to January 1, 1931, plaintiff, in accordance with the provisions of said lease

and with her knowledge and approval sub-leased the store to defendant, and the latter took possession, conducted a grocery, etc. business therein and paid rent to her at the rate of \$125 per month; that all rent up to and including December 14, 1930, was paid by defendant; that he did not pay in full the rent due for the month from December 15, 1930 to January 14, 1931, but only paid the sum of \$85, leaving a balance due for said month of \$40; that he did not pay any rent for the month beginning January 15, 1931, or for the month beginning February 15, 1931; that plaintiff's frequent demands for the payment of the stipulated rent for said two months, and for the payment of said balance of \$40 for rent for said month ending January 14, 1931, were all refused by defendant, and that on several occasions, when the demands were made he said "he was moving and would not pay;" and that on February 17, 1931, plaintiff instituted the present distress proceedings.

Defendant testified in his own behalf, on direct and cross-examination, and also introduced in evidence (1) a certain receipt, signed in plaintiff's name by an agent who at times collected rent for her, (2) a certain written assignment to defendant, signed by Levitzsky, and (3) a portion of a private account book kept by defendant. Defendant's testimony is most unsatisfactory. By it he endeavored (unsuccessfully, in our opinion) to show that about December 15, 1930, he and plaintiff entered into a verbal agreement whereby plaintiff waived the payment of the monthly rent under the lease in cash, and agreed that it might be paid in groceries, etc. received by plaintiff from defendant, and that all rent claimed to be due had been paid in groceries, etc. received by plaintiff. Plaintiff, on the contrary, denied that any such verbal agreement was made or understanding had, and, while admitting that she on occasions purchased groceries, etc. of defendant, testified that for all such purchases she paid cash. The said receipt, signed by plaintiff by said agent, is dated December 15, 1930, and is as follows:

"Received of Nathan Levitzsky \$85, for rent on account of store rent,

and with her knowledge and approval, and in the presence of the witnesses, and the latest book possession, contained a receipt, dated January 1911, and paid to her at the rate of \$100 per month; and all the money was paid to her in full the same day for the same time January 1911, and up to and including January 1911, 1912, and paid by the witnesses, and in the year 1911, 1912, and only paid the sum of \$50, leaving a balance due for said month of \$50; that he did not pay any more for the same beginning January 1911, 1912, or for the month beginning February 1911, 1912; that Plaintiff's husband, however, for the payment of the balance due for said two months, and for the payment of said balance of \$100 for the said month January 1911, 1912, was all returned by defendant, and that on several occasions, when the same was made, he said "he was paying and would not pay," and that on January 1911, 1912, Plaintiff insisted the payment of the same was made. Defendant testified in his own behalf, on direct and cross-examination, and also introduced in evidence (1) a certain receipt, signed in Plaintiff's name by an agent who at that time claimed that for her (2) a certain written agreement as defendant, signed by Plaintiff, and (3) a portion of a private account book kept by defendant, which Plaintiff's testimony is that defendant kept. It is also introduced (introduced) in evidence (4) a receipt for the same dated January 1911, 1912, and which Plaintiff stated that a verbal agreement whereby Plaintiff received the payment of the money and that the same was paid, and that it was paid in full, etc., signed by Plaintiff from defendant, and that all was claimed to be the full and complete payment, etc., received by Plaintiff, the testimony, which said any verbal agreement was made on understanding and, while admitting that on occasions purchased groceries, etc. of defendant, testified that for all such purchases she paid cash. The said receipt signed by Plaintiff by said agent is dated January 1911, 1912, and is as follows: received of Nathan Levinson \$50, for rent on account of above rent.

No. 425 S. Central ave., for one month ending January 15, 1931.

Bal. \$40." The said assignment signed by Levitzsky, is dated December 13, 1929, and is as follows:

"For and in consideration of the sum of one dollar and other good and valuable considerations, I hereby transfer, assign and set over to Israel Lockson, all my right, title and interest in and to the sum of Four Hundred Dollars held by Mrs. Fagan, the owner of the premises located at 425 S. Central Avenue in the City of Chicago, and State of Illinois, which money is now only being held as security by the said Mrs. Fagan for the payment of rent on the premises above described."

After reviewing the entire evidence we are of the opinion that those portions of the jury's verdict wherein they in effect found that plaintiff had no right to levy the distress warrant, and wherein they in effect found that defendant had a good and valid claim of set-off against plaintiff in the sum of \$440.50, are manifestly against the weight of the evidence. Defendant's theory in his claim of set-off was in substance that he was entitled, as assignee of Levitzsky, to the sum of \$400, which had been deposited by Levitzsky as security for the faithful performance of the covenants in the lease, but the evidence clearly shows that such covenants had not been performed as to payment of rent for certain months as above mentioned, and, hence, defendant was not entitled, at the time his set-off was filed, or at the time of the trial, to recover from plaintiff said \$400, even though he then might have been entitled to recover the interest on said sum (\$24) and also the further sum of \$12 for merchandise, as alleged.

The judgment of the municipal court of March 17, 1931, is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

Mr. J. E. C. ... for the month ending January 15, 1911.
The said assignment of the said property, is dated January 15, 1911, and is as follows:

"For and in consideration of the sum of one dollar and other good and valuable considerations, I hereby transferred, assign and set over to James Johnson, all my right, title and interest in and to the sum of Four Hundred Dollars held by Mrs. Johnson, the owner of the premises located at 422 N. Central Avenue in the City of Chicago, and State of Illinois, which money is now only being held as security by the said Mrs. Johnson for the payment of rent on the premises above described."

After reviewing the entire evidence we are of the opinion that those portions of the jury's verdict wherein they in effect found that plaintiff had no right to levy the distress warrant, and wherein they in effect found that defendant had a good and valid claim of set-off against plaintiff in the sum of \$400.00, are manifestly against

the weight of the evidence. Defendant's theory is one claim of set-off was in substance that he was entitled, as assignee of plaintiff, to the sum of \$400, which had been deposited by plaintiff as security for the faithful performance of the covenants in the lease, and the evidence clearly shows that such covenants had not been performed as to

payment of rent for certain months as above mentioned, and, hence, defendant was not entitled, at the time his set-off was filed, or at the time of the trial, to recover from plaintiff said sum, even though he then might have been entitled to recover the interest on said sum

(24) and also the further sum of \$15 for miscellaneous, as alleged. The judgment of the municipal court of March 17, 1911, is reversed and the cause remanded.

REVEREND AND HONORABLE

James and William, J.L. ...

35306

BUILDERS AND MERCHANTS BANK
AND TRUST COMPANY, a corporation,
Complainant and Appellee,

v.

LOUIS O. RUNNER et al.,
Defendants.

On Appeal of AUSTIN HOTEL COMPANY,
a corporation,
Appellant.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

By this appeal the Austin Hotel Company, a corporation, seeks to reverse an interlocutory order, entered by the Superior Court in a foreclosure proceeding on April 1, 1931, appointing a receiver.

Complainant's bill was filed on March 30, 1931, and prayed for a partial foreclosure of a second trust deed on certain improved premises in Chicago and for the appointment of a receiver pendente lite. On the same day notice was served on the defendants, Louis O. Runner, Julia G. Runner, his wife, and Austin Hotel Company, that on the following day, March 31st, complainant would move the court for such an appointment. On April 1st, there was a hearing on the motion, based solely upon the allegations of complainant's verified bill, and resulting in the court entering an order appointing the North Town State Bank, a trust company, as receiver "to receive and collect the rents, issues and profits from the property described in the bill of complaint herein, * *, with authority to operate the same and pay the necessary current operating expenses and to rent and lease for such rental as shall seem advisable any vacant room or apartment in or upon said premises, and to do such other acts as the

ALLIANCE AND ASSOCIATED BANK
AND TRUST COMPANY, a corporation,
Complainant and Appellee.

v.

JOHN E. WATKINS et al.,
Defendants.

ON APPEAL OF JOHN E. WATKINS, et al.,
a corporation,
Appellant.

IN SENATE
JANUARY TERM
SUPREME COURT,
GOOD COUNTRY.

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

By this appeal the appellee bank, a corporation,
seeks to reverse an order of the court, entered in the
case in a judgment rendered on July 1, 1911, sustaining a
verdict.

Complainant's bill was filed on March 22, 1911, and prayed
for a partial typewritten of a second trust deed on certain improved
premises in Chicago and for the enforcement of a receiver's
order.

On the same day notice was served on the defendants, John
O. Watson, John E. Watson, his wife, and American Hotel Company, that
on the following day, to-wit: that, complainant would move the court
for such an appointment. On April 1st, there was a hearing on the
motion, after which upon the affidavit of complainant's verified
bill, and recitals in the report entered on order appointing the
receiver, the court made, a trust company, as trustee, to receive and
collect the rents, issues and profits from the property described in
the bill of complaint herein, with authority to operate the same
and pay the necessary current operating expenses and in that and
issue for such rental as shall seem advisable any vacant room or
apartment in or upon said premises, and to do such other acts as the

court may from time to time order, said Receiver to have the usual power and authority of receivers in chancery in like cases." On April 6th, complainant's bond in the sum of \$1,000, approved by the court, was filed, and said receiver filed its acceptance of the appointment and took possession of the premises.

On April 14th, the court of its own motion entered an order, adjudging that said North Town State Bank be removed as receiver, and that the Straus National Bank and Trust Company of Chicago be appointed as receiver in its stead and "forthwith take possession of the premises involved with all of the rights, duties and powers heretofore exercised by said North Town State Bank as receiver." In the recitals of the order it is stated that "said North Town State Bank has on this day been closed upon order of the Auditor of Public Accounts of the State of Illinois," and "is no longer operating as a going concern," and that "it is for the best interests of all parties to this proceeding and necessary to the orderly administration of the orders of this court that said North Town State Bank be removed as receiver." On the following day, April 15th, said Straus Bank filed its acceptance of its appointment as receiver and took possession of the premises.

On April 30th, within apt time and in accordance with provisions of section 123 of the Practice Act, the Austin Hotel Co. filed its appeal bond with the clerk of the superior court, appealing from the order of the court of April 1st, appointing a receiver, and on May 29th, within apt time, here duly perfected its appeal.

In its bill complainant alleged that it is a banking corporation, duly organized under Illinois laws, having its principal place of business on North Clark street, Chicago; that on February 15, 1926, the defendants, Kanner and wife, being indebted in the sum of \$100,000, executed and delivered their 204 bonds of different denominations, bearing interest as evidenced by coupons at 6% per annum payable semi-annually, all dated February 15, 1926, and payable

court may from time to time order, said receiver to have the usual power and authority of receiver in summary in like cases." On April 25th, complainant's bond in the sum of \$1,000, approved by the court, was filed, and said receiver filed the acceptance of the appointment and took possession of the premises.

On April 12th, the court of its own motion entered an order, adjudging that said North Town State Bank be removed as receiver, and that the Western National Bank and Trust Company of Chicago be appointed as receiver in its stead and "forthwith take possession of the premises involved with all of the rights, duties and powers heretofore exercised by said North Town State Bank as receiver." In the recitals of the order it is stated that "said North Town State Bank has on this day been closed upon order of the auditor of public accounts of the State of Illinois," and "is no longer operating as a going concern," and that "it is for the best interests of all parties to this proceeding and necessary to the orderly administration of the estate of this court that said North Town State Bank be removed as receiver." On the following day, April 13th, said Western Bank filed the acceptance of its appointment as receiver and took possession of the premises.

On April 20th, within one day and in accordance with provision of section 123 of the Practice Act, the Austin Hotel Co. filed its appeal bond with the clerk of the superior court, appealing from the order of the court of April 12th, appointing a receiver, and on May 25th, within one day, have duly perfected its appeal. In its bill complainant alleged that it is a banking corporation, duly organized under Illinois laws, having its principal place of business on Main Street, Chicago, and on February 12, 1926, the 6th day of February, 1926, being included in the sum of \$100,000, accepted and delivered their 200 bonds of different denominations, bearing interest as evidenced by coupons at 6% per annum payable semi-annually. All dated February 12, 1926, and payable

to bearer at different dates at the office of Standard Trust and Savings Bank, Chicago, - the last on August 15, 1930; that to secure the payment thereof said defendants executed and delivered their trust deed (Exhibit A), in the nature of a second mortgage, dated and acknowledged February 15, 1926, and recorded March 2, 1926, conveying to said Standard Trust and Savings Bank, as trustee, the improved premises here involved, "and all rents, issues and profits thereof;" that all of said bonds, except 79 thereof aggregating the principal sum of \$39,600, were paid at their respective maturities; that of said unpaid bonds some matured on August 15, 1927, and some on August 15th in the years 1928, 1929 and 1930, respectively; that on August 15, 1930, the National Bank of the Republic of Chicago, trustee, (successor by consolidation to said Standard Trust and Savings Bank, trustee) entered into a written agreement (Exhibit B) with said Austin Hotel Company (then the owner and holder of the legal title to the premises) whereby said trustee, for and on behalf of the owners and holders of said bonds remaining unpaid, agreed with said Austin Hotel Co. to extend the time of payment of said unpaid bonds for 2-1/2 years from August 15, 1930, (i.e., until February 15, 1933), provided, however, that said Austin Hotel Co. "shall promptly pay all interest due on said bonds on this date, and all interest accruing on said bonds from and after this date, * * and shall further keep and perform all and singular the covenants and agreements in said bonds and trust deed contained;" that in the extension agreement said Austin Hotel Co. agreed to accept the same upon the conditions mentioned, and further agreed that "in case of default in the payment of any one of said interest coupons, and in case of a failure to keep or perform any one of the covenants and agreements in said bonds or trust deed contained, said agreement * * shall at once become null and void, and the entire balance, including principal and interest on each of the above mentioned bonds,

to be paid at different dates at the office of Standard Trust
and Savings Bank, Chicago. - The last on August 15, 1930; that
to secure the payment thereof said Standard Trust executed and delivered
certain trust deed (Exhibit A), in the nature of a second mortgage,
dated and acknowledged February 15, 1928, and recorded March 2, 1928,
conveying to said Standard Trust and Savings Bank, as trustee, the
improved premises here involved, "and all rents, issues and profits
thereof," that all of said bonds, except 75 thereof representing the
principal sum of \$10,000, were paid at their respective maturities;
that of said unpaid bonds some matured on August 15, 1927, and some
on August 15th in the years 1928, 1929 and 1930, respectively; that
on August 15, 1930, the National Bank of the Republic of Chicago,
trustee, (successor by consolidation to said Standard Trust and
Savings Bank, trustee) entered into a written agreement (Exhibit B)
with said Austin Hotel Company (then the owner and holder of the
legal title to the premises) whereby said trustee, for and on behalf
of the owner and holders of said bonds remaining unpaid, agreed
with said Austin Hotel Co. to extend the time of payment of said
unpaid bonds for 2-1/2 years from August 15, 1930, (i.e., until
February 15, 1933). provided, however, that said Austin Hotel Co.
"shall promptly pay all interest due on said bonds on said date, and
all interest accruing on said bonds from and after said date,"
and shall further keep and perform all and singular the covenants
and agreements in said bonds and trust deed contained; that in
the extension agreement said Austin Hotel Co. agreed to accept the
same upon the conditions mentioned, and further agreed that "in
case of default in the payment of any one of said interest coupons,
and in case of a failure to keep or perform any one of the covenants
and agreements in said bonds or trust deed contained, said agreement
shall be null and void, and the entire balance, in-
cluding principal and interest on each of the above mentioned bonds,

shall at once become due and payable and may be collected by a suit at law or in equity, without notice and with interest at 7% per annum after such default, and the owners and holders of said bonds shall have the right to proceed by foreclosure or otherwise, as in said trust deed provided;" and that under the provisions of the trust deed and extension agreement, if any of said bonds or interest coupons should fall due and remain unpaid for 3 days beyond maturity, the lien of said trust deed might be foreclosed by the owners and holders of the then overdue bonds or coupons, subject, however, to the continuing lien of the trust deed as security for all bonds and coupons not due at the time of the institution of such foreclosure proceedings.

Complainant further alleged that said Austin Hotel Co., at the time of the execution of the extension agreement and to evidence and secure the interest on said then unpaid bonds, also executed and delivered extension coupon notes evidencing the semi-annual installments of interest maturing on each of said bonds on February and August 15th, in each year, during the period covered by said agreement. (Copy of one of the extension coupon notes is attached as Exhibit D.)

Complainant further alleged that said Austin Hotel Co. has defaulted in the payment of the extended interest coupon notes maturing February 15, 1931, evidencing interest of \$300 due on 10 certain bonds (giving their numbers and aggregating \$10,000 at face value); that said default has continued for a period of more than 3 days, and still continues; that complainant is the owner and holder of said 10 bonds and interest coupons, having acquired them for value in the usual course of business; that by reason of said default "said extension agreement has become null and void in so far as the rights of complainant is concerned;" and that complainant files its bill for the purpose of securing payment of said 10 bonds, together with

shall at once receive the full proceeds and may be collected by a
bill of lading or bill of exchange, without notice and with interest at 7%
per annum after such default, and the owner and holder of said
bonds shall have the right to proceed by law or otherwise,
as in said trust deed provided, and that under the provisions of
the trust deed and extension agreement, if any of said bonds or
interest coupons should fall due and remain unpaid for 3 days beyond
maturity, the lien of said trust deed might be foreclosed by the
owner and holder of the then overdue bonds or coupons, subject,
however, to the continuing lien of the trust deed as security for all
bonds and coupons not due at the time of the institution of such
foreclosure proceedings.

Complainant further alleged that said Austin Hotel Co.,
at the time of the execution of the extension agreement and to
obtain and secure the interest on said then unpaid bonds, also
executed and delivered extension coupon notes evidencing the same
annual installments of interest maturing on each of said bonds on
February and August 1921, in each year, during the period covered
by said agreement. (Copy of one of the extension coupon notes is
attached as Exhibit D.)

Complainant further alleged that said Austin Hotel Co.
has defaulted in the payment of the extended interest coupon notes
maturing February 18, 1921, evidencing interest of \$200 due on 10
certain bonds (giving their numbers and aggregating \$10,000 as face
value); that said default has continued for a period of more than
3 days, and still continues; that complainant in the owner and holder
of said 10 bonds and interest coupons, having neglected them for value
in the usual course of business; that by reason of said default "said
extension agreement has become null and void in so far as the rights
of complainant is concerned"; and that complainant files this bill
for the purpose of securing payment of said 10 bonds, together with

all interest coupons falling due on February 15, 1931, subject, however, to the continuing lien of said trust deed and extension agreement as security for the remaining outstanding bonds.

Complainant further alleged that the premises involved are located in Chicago, are commonly known as 321 North Central avenue, and are improved with a 3-story brick hotel apartment building, containing a large number of rooms and apartments; that the premises are in the possession of and being operated by the Austin Hotel Co.; that under the terms of the trust deed the two Runners, husband and wife, agreed that upon the commencement of any foreclosure proceeding the court might, without notice and without regard to the value of the mortgaged property, or the solvency or insolvency of any person liable for the debt secured thereby, appoint a receiver of the premises for the benefit of the holders of bonds whose rights are being foreclosed in this proceeding, with power to take possession of and to operate and lease the mortgaged premises, to collect the rents, issues and profits thereof during the pendency of such foreclosure suit, and to pay taxes, insurance and other liens, etc.; and that unless a receiver be appointed with such powers the rents, issues and profits of the premises "may be dissipated and said building be permitted to become dilapidated and in disrepair, and said rents and profits not be applied to the payment of prior incumbrances, taxes and other expenses, and the security of your orator's bonds be jeopardized and diminished."

Complainant further alleged that the premises are subject to the lien of a prior trust deed (first mortgage), dated January 25, 1926, and recorded January 27, 1926, securing an aggregate indebtedness of \$325,000, maturing February 1, 1933, upon which there remains due and unpaid approximately \$251,000; that the Austin Hotel Co. holds the fee simple title to the premises, subject to said two mortgages, and is now in possession as such holder and owner; that parts of the

All interest coupons falling due on February 1, 1911, subject
however, to the continuation of said first bond and mortgage
agreement as security for the remaining outstanding bonds.
Complainant further alleges that the premises involved
are located in Chicago, are approximately 100,000 square feet in area,
and are improved with a 2-story brick hotel apartment building,
containing a large number of rooms and apartments; that the
premises are in the possession of and being operated by the Austin
Hotel Co.; that under the terms of the lease and the two mortgages
mentioned and with, agreed that upon the commencement of any foreclosure
proceeding the court might, without notice and without regard to the
value of the mortgaged property, or the equity or interest of any
person liable for the debt secured thereby, appoint a receiver of the
premises for the benefit of the holders of bonds whose rights are
thereby affected in this proceeding, with power to take possession of
and to operate and lease the mortgaged premises, to collect the rents,
issues and profits thereof during the pendency of such foreclosure
suit, and to pay taxes, insurance and other liens, etc.; and that
unless a receiver be appointed with such powers the rents, issues and
profits of the premises may be dissipated and said building be per-
mitted to become dilapidated and in disrepair, and said rents and
profits not be applied to the payment of prior incumbrances, taxes and
other expenses, and the security of your estate's bonds be jeopardized
and dissipated."

Complainant further alleges that the premises are subject
to the lien of a prior first bond (first mortgage), dated January 25,
1904, and recorded January 27, 1904, securing an aggregate indebted-
ness of \$250,000, maturing February 1, 1911, upon which there remains
due and unpaid approximately \$201,000; that the Austin Hotel Co. holds
the fee simple title to the premises, subject to said two mortgages,
and is now in possession as such holder and owner; that parts of the

premises are occupied by divers persons as its guests or possessors; that the premises "have been appraised by competent real estate appraisers, and that it appears from such appraisements that said premises are scant security for the payment of the encumbrances against said premises;" and that a receiver should be appointed immediately to take possession of the premises and to operate and maintain the same, etc.

After the printed briefs of counsel for the respective parties had here been filed, appellee (complainant) moved to dismiss the appeal on the ground that it had been taken from the wrong order. Counter suggestions were filed. On June 16, 1931, it was ordered that the motion be reserved to the hearing. It will now be denied. The present appeal was properly taken under the provisions of section 123 of the Practice Act from the order of April 1, 1931, appointing a receiver. The effect of the order of April 14, 1931, entered on the court's own motion, was merely to substitute another bank as receiver in place of the bank originally appointed as such. It would have been improper to have taken the appeal from said order of April 14, 1931, as the scope of the receivership was not enlarged and no other or further powers were given to the substituted receiver, Straus National Bank and Trust Co. (See, International, etc. Union v. McGonigle, 72 Ill. App. 399, 401; Mechanics etc. Ass'n v. People, 72 Ill. App. 160, 170.)

On the main question, as to whether the allegations of complainant's verified bill warranted the court in appointing a receiver of the premises with the powers and authority mentioned, we are of the opinion that they did not, and that the order appointing the receiver was improvidently issued and should be reversed. It has been decided by appellate courts of this district that, even where the rents are pledged in the trust deed, a receiver pendente lite will not be appointed at the instance of a mortgagee unless it appears that the

promises are assigned by direct persons as the trustee or assignee; that the promises "have been assigned by competent real estate appraisers, and that it is their duty to assign them to the receiver; and that the receiver is to take possession of the premises and to operate and maintain the same, etc.

After the printed briefs of counsel for the respective parties had been filed, appellee (complainant) moved to dismiss the appeal on the ground that it had been taken from the wrong order. Counter suggestions were filed. On June 18, 1931, it was ordered that the motion be reserved to the hearing. It will now be denied. The present appeal was properly taken under the provisions of section 103 of the Practice Act from the order of April 1, 1931, appointing a receiver. The effect of the order of April 14, 1931, entered on the court's own motion, was merely to substitute another bank as receiver in place of the bank originally appointed as such. It would have been improper to have taken the appeal from said order of April 14, 1931, as the scope of the receivership was not enlarged and no other or further power was given to the designated receiver, Citizens National Bank and Trust Co. (See, International, etc. Union v. National Bank and Trust Co., 201 Ill. App. 302, 401; Wheat v. People, 73 Ill. App. 180, 170.)

On the main question, as to whether the allegations of complainant's verified bill warranted the court in appointing a receiver of the premises with the powers and authority mentioned, we are of the opinion that they did not, and that the order appointing the receiver was improvidently issued and should be reversed. It has been decided by appellate courts of this district that, even where the facts are pleaded in the same bill, a receiver appointed in will not be appointed at the instance of a mortgagee unless it appears that the

premises are inadequate security and that it is not inequitable to make the appointment. (Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, 283, and cases cited; Bothman v. Lindstrom, 221 Ill. App. 262, 270; Davis v. Blair, 252 Ill. App. 417, 421; Grabowski v. MacLaskey, 257 Ill. App. 484, 486; Thomas v. Diamond, No. 35,311, unpublished opinion filed June 24, 1931.) We do not think that in the present bill the allegations as to inadequate security are sufficiently definite. No facts are stated showing such inadequacy. It is only alleged that the premises "have been appraised by competent real estate appraisers, and that it appears from such appraisements that the premises are scant security for the payment of the encumbrances against said premises." The appraisements are not set forth, nor is the purport of them stated, nor is it shown who the appraisers were. As said in Grabowski v. MacLaskey, supra, the bill "does not even plead the conclusion that it (the property) is scant security." Furthermore, it affirmatively appears from the bill that the prior indebtedness of \$325,000, as evidenced by the first mortgage as originally given, has been reduced to "approximately \$251,000," and that the indebtedness of the second mortgage sought to be foreclosed, originally \$100,000, has been reduced to \$39,600. And it appears that the sole default under said second mortgage, by its terms and those of the extension agreement, is in the non-payment of \$300 of interest coupons, held by complainant, which matured on February 15, 1931, about 45 days before the receiver was appointed. And we think that it was highly inequitable to appoint a receiver, based solely upon the allegations of the bill, and thereby take from the present owner of this apartment hotel building the management and control thereof. It is not charged in the bill that the property is being mismanaged, or that taxes have not been paid, or that the income is not being properly applied to the reduction of the indebtedness, or that waste is being committed. It is only

averred that, unless a receiver be appointed pendente lite with usual powers, the income of the property, "may be dissipated and said building be permitted to become dilapidated and in disrepair, and said rents and profits not be applied to the payment of prior incumbrances, taxes and other expenses, and the security of your orator's bonds be jeopardized and diminished."

For the reasons indicated the interlocutory order of the superior court of April 1, 1931, appointing a receiver of the premises, is reversed.

REVERSED.

Kerner and Scanlan, JJ., concur.

reverted back, unless a receiver be appointed pursuant to this will
actual power, the income of the property, "may be distributed and
said holding be permitted to become liquidated and in discharge
and said rents and profits may be applied to the payment of prior
incumbrances, taxes and other expenses, and the security of your
creditor's bonds be jeopardized and diminished."

For the reasons indicated the interlocutory order of
the superior court of April 1, 1931, appointing a receiver of
the premises, is reversed.

REVEREND.

Kearns and Norman, Attorneys.

32798

E. J. PAULER,
(Plaintiff),

Appellant,

v.

ROBERT F. BATES,
(Defendant),

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

26274.653⁵

MR. JUSTICE KEEFER DELIVERED THE OPINION OF THE COURT.

December 12, 1927, plaintiff, E. J. Pauler, caused a judgment by confession for \$210.90 to be entered in his favor against the defendant, Robert F. Bates, on a promissory note for \$360, with the usual power of attorney to confess judgment, executed by the defendant, dated October 20, 1927, payable to the order of plaintiff in ten monthly installments of \$36 each. Subsequently on defendant's petition the judgment was opened and he was given leave to plead, - the judgment to stand as security. Thereafter the cause was tried before the court with a jury, resulting in a verdict and judgment in favor of the defendant, from which plaintiff appealed.

October 11, 1928, (Pauler v. Bates, 250 Ill. App. 636) this division of the appellate court filed an opinion in the instant case, holding that while there was in the record a statement submitted to and certified by the trial judge as a correct statement of facts appearing on the trial and of all questions of law involved in the case, it did not comply with section 23 of the Municipal court Act so as to furnish a record for review authorized by the section, and accordingly on motion this court struck out that portion of the record, and, as all assignments of error were considered to be predicated on the rulings of the court and the admission and exclusion

R. J. FARMER,
(Plaintiff),

Appellant,

v.

ROBERT E. BATES,
(Defendant),

Appellee.

MR. JUSTICE KENNEDY delivered the opinion of the court.

December 12, 1937. Plaintiff, R. J. Farmer, caused a

judgment by confession for \$210.00 to be entered in his favor

against the defendant, Robert E. Bates, on a promissory note for

\$250, with the usual power of attorney to confess judgment, executed

by the defendant, dated October 20, 1937, payable to the order of

plaintiff in ten monthly installments of \$25 each. Subsequently

on defendant's petition the judgment was opened and he was given

leave to plead, - the judgment to stand as acquittal. Thereafter

the cause was tried before the court with a jury, resulting in a

verdict and judgment in favor of the defendant, from which plain-

tiff appealed.

October 11, 1938. (Farmer v. Bates, 280 Ill. App. 636)

This division of the appellate court filed an opinion in the instant

case, holding that while there was in the record a statement submitted

to and certified by the trial judge as a correct statement of facts

appearing on the trial and of all questions of law involved in the

case, it did not comply with section 22 of the Municipal Court Act

so as to furnish a record for review authorized by the section, and

accordingly an order was entered and that portion of the

record, and, as all assignments of error were considered to be

precluded on the rulings of the court and the admission and exclusion

of evidence, and upon various motions which were included in the portion of the record stricken, affirmed the judgment. On writ of error our Supreme court in Pauler v. Bates, 334 Ill. 338, held that the certificate of the trial judge was sufficient to constitute a certificate to a bill of exceptions and, accordingly, reversed the judgment of this court and remanded the cause, with directions that we hear it on its merits.

Plaintiff has assigned and argued five grounds why the judgment should be reversed. The only question necessary to be now considered presented by this record is, did the court err in denying the plaintiff's motion for a nonsuit. At the close of the examination in chief of the defendant, as a witness in his own behalf, and before the jury had retired from the bar, plaintiff moved the court to vacate the judgment entered on December 12, 1927, and to grant a nonsuit at plaintiff's costs, but the court refused plaintiff's request, and overruled said motions and plaintiff excepted and now contends the court erred.

The right to take a nonsuit is a substantial right.

(Daube v. Kuppenheimer, 195 Ill. App. 99, 107.) At common law a plaintiff was permitted to take a nonsuit at any time before the verdict was rendered in court. (Berry v. Savage, 2 Scam. (Ill.) 261; Daube v. Kuppenheimer, 272 Ill. 350.) Section 70 of the Practice Act, Cahill's Stats., ch. 110, par. 70, provides:

"Every person desirous of suffering a nonsuit shall be barred therefrom, unless he do so before the jury retire from the bar, or if the case is tried before the court without a jury, before the case is submitted for final decision."

Section 30 of the Municipal Court Act, ch. 37, Cahill's Revised Stats., par. 418, is in part as follows:

"Every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

In Gordon v. Goodell, 34 Ill. 429, the court said, page 435:

of evidence, and upon a view of the evidence which was introduced in the
portion of the record submitted, affirmed the judgment. On this
of error our review leads us to People v. DeLoe, 128 Ill. 418, 1894,
that the certificate of the trial judge was sufficient to constitute
a certificate to a bill of exceptions and, accordingly, reversed the
judgment of this court and remanded the cause, with directions that
we hear it on its merits.

Plaintiff has assigned and argued five grounds why the
judgment should be reversed. The only question necessary to be now
considered presented by this record is, did the court err in denying
the plaintiff's motion for a new trial. At the close of the examination
in chief of the defendant, as a witness in his own behalf, and before
the jury had retired from the box, plaintiff moved the court to vacate
the judgment entered on December 12, 1907, and to grant a new trial as
plaintiff's court, but the court refused; plaintiff's request, and
overruled said motions and plaintiff excepted and now contends the

The right to take a new trial is a substantial right.
People v. Luppens, 128 Ill. App. 30, 1907. It is common law a
plaintiff was permitted to take a new trial at any time before the
verdict was rendered in court. People v. Luppens, 128 Ill. App. 30, 1907.
See People v. Luppens, 128 Ill. App. 30, 1907. Section 70 of the
Evidence Act, Cahill's Stat., ch. 110, par. 70, provides:
"Every person desiring to set aside a verdict shall do
so before the jury retires from the box, or before the jury retires
from the box, or before the jury retires from the box, or before the jury
retires from the box is admitted for final decision."

Section 70 of the Evidence Act, Cahill's Stat., ch. 110, par. 70, provides:
"Every person desiring to set aside a verdict shall do
so before the jury retires from the box, or before the jury retires
from the box, or before the jury retires from the box, or before the jury
retires from the box is admitted for final decision."

"A judgment had previously been confessed on the cause of action then on trial, and the pleas put in by the favor of the court on the petition of the defendant, without however, vacating the judgment for which the defendant had also petitioned. This judgment was held for the benefit of the plaintiff, as his security, as is the usual practice. The plaintiff, when he entered the motion for leave to take a nonsuit, also entered his motion to vacate this judgment, which the court also denied. The judgment being for the plaintiff's benefit, we see no reason why the court should not have vacated it on his motion, and by allowing the nonsuit remit the parties to their original positions. The motion to take a nonsuit being in time should have been allowed, notwithstanding the judgment."

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to grant the request of the plaintiff for a nonsuit.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Scanlan, J., concur.

34561

CHARLES J. COSTELLO,
Defendant in Error.

v.

JOSEPHINE RANES and
JOHN G. RANES,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

262 I.A. 654

MR. JUSTICE KAMMER DELIVERED THE OPINION OF THE COURT.

The defendant in error, Charles J. Costello (herein called plaintiff), brought an action against John G. Ranes, Josephine Ranes and H. Robert Ranes, to recover \$741.60. H. Robert Ranes was not served with summons and the cause proceeded to trial against the other two defendants before a jury, and a verdict and judgment was rendered in favor of plaintiff and against the defendants Josephine Ranes and John G. Ranes for \$741.60. To reverse said judgment John G. Ranes sued out this writ of error.

The statement of claim sets forth that plaintiff claimed a balance of \$393.53 for funeral services rendered by him in the burial of Albert R. Ranes at the request of the defendants and in addition the sum of \$348.07 for money loaned and expended by one Helen C. Thoern to the defendants at their request for the removal of the body of Albert R. Ranes from Denver, Colorado, to Chicago, Illinois; that the claim of Helen C. Thoern had been assigned to plaintiff on July 12, 1929. By the affidavit of merits filed by John G. Ranes he denied that any services were rendered at his request or that he was indebted to plaintiff for any sum whatever.

Plaintiff's evidence discloses that he is an undertaker, and on July 6, 1928, he had a conversation with the defendant John G. Ranes regarding the burial of Albert R. Ranes, his son, who had

CHAS. J. BOWEN,
Attorney at Law,
Chicago, Ill.

ORDER TO RETURN TO COURT

BY WRITING

2621.A.654

JOSEPHINE RAMES and

JOHN S. RAMES,

Defendants in Error.

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

The defendant in error, Charles J. Bowen (hereinafter

called plaintiff), brought an action against John S. Rames,

Josephine Rames and E. Robert Rames, to recover \$741.60. A

verdict was not entered with summons and the cause proceeded

to trial against the other two defendants before a jury, and a

verdict and judgment in favor of plaintiff and

against the defendants Josephine Rames and John S. Rames for

\$741.60. To reverse said judgment John S. Rames and his

wife of error.

The statement of claim sets forth that plaintiff claimed

a balance of \$275.83 for funeral services rendered by him in the

burial of Albert E. Rames at the request of the defendants and in

addition the sum of \$465.97 for money loaned and expended by one

John E. Thorne to the defendants as their request for the removal

of the body of Albert E. Rames from Denver, Colorado, to Chicago,

Illinois; that the claim of John E. Thorne had been assigned to

plaintiff on July 12, 1922. By the affidavit of motion filed by

John S. Rames he denied that any services were rendered at his

request or that he was indebted to plaintiff for any sum whatever.

Plaintiff's evidence discloses that he is an undertaker.

and on July 6, 1922, he had a conversation with the defendant John

S. Rames regarding the burial of Albert E. Rames. His son, who had

been killed in Denver, Colorado, in which conversation the defendant informed plaintiff he desired the plaintiff to conduct the funeral and that he, the defendant, would pay the expenses connected therewith. Plaintiff secured the body the following day at the Beck Island depot and conveyed it to his establishment; that evening he again called at the home of defendant and spoke to him regarding the selection of a casket and was informed that the defendant Josephine Ranes, who was the widow of the deceased, and Mrs. John Ranes, the mother of the deceased, would select the casket; it was selected by the women and paid for by the plaintiff. At the first meeting of the plaintiff and the defendant John G. Ranes, the parties discussed the payment of the undertaker's bill incurred in Denver and the necessary railroad fare to bring the body and the widow to Chicago, and plaintiff was told to go ahead and render his bill after it was over. Defendant John G. Ranes stated he did not have the cash with which to pay the undertaker in Denver and to advance sufficient funds to the widow to enable her to return to Chicago with the body, but if Helen Thoern would advance it he would return it to her as he had an insurance policy on his son's life payable to himself. Helen Thoern thereupon advanced \$348.07. The funeral expenses in Chicago amounted to \$550 upon which there had been paid by the United States Government \$107, leaving a balance of \$393.53. Helen Thoern assigned her claim for the money advanced by her to the plaintiff. It further appears that Helen Thoern had known John G. Ranes for four years prior to Albert's death and had known the deceased for some sixteen years and that she recommended plaintiff to defendant. In the trial court defendant did not dispute the amount claimed by plaintiff, the defense being that he had never ordered the services rendered and had not agreed to pay for same, nor authorized the advancement of the money by Helen Thoern.

been killed in 1907, defendant, in which conversation the defendant
and informant plaintiff he desired the plaintiff to contact the
funeral and that he, the defendant, would pay the expenses connected
therewith. Plaintiff secured the body the following day at the
Black Island depot and conveyed it to his establishment; that evening
he again called at the home of defendant and spoke to him regarding
the selection of a casket and was informed that the defendant
Josephine Jones, who was the widow of the deceased, and Mrs. John
Hansen, the mother of the deceased, would select the casket; it was
selected by the women and paid for by the plaintiff. At the first
meeting of the plaintiff and the defendant John E. Hansen, the parties
discussed the payment of the undertaker's bill incurred in Denver
and the necessary railroad fare to bring the body and the widow to
Chicago, and plaintiff was told to go ahead and render his bill
after it was over. Defendant John E. Hansen stated he did not have
the cash with which to pay the undertaker in Denver and to advance
plaintiff funds to the widow to enable her to return to Chicago with
the body, but if Helen Thorne could advance it he would return it to
her as he had an insurance policy on his son's life payable to him-
self. Helen Thorne thereupon advanced \$548.47. The funeral
expenses in Chicago amounted to \$250 upon which there had been paid
by the United States Government \$107, leaving a balance of \$393.85.
Helen Thorne advanced her claim for the money advanced by her to the
plaintiff. It further appears that Helen Thorne had known John E.
Hansen for four years prior to Albert's death and had known the de-
ceased for some sixteen years and that she recommended plaintiff to
defendant. In the trial court defendant did not dispute the amount
claimed by plaintiff, the defense being that he had never ordered
the services rendered and had not agreed to pay for same, nor
authorized the advancement of the money by Helen Thorne.

The defendant's version was that he had no conversation with Helen Thoern about arranging for the funeral and that he had not asked her to help out and advance any money, and that he did not tell her if she did advance the money to bring the widow and the body to Chicago he would repay the money; that plaintiff did come to his home and inquired what arrangements he wished to make regarding the funeral and was informed that defendant did not desire to make any arrangements; "that the boy did not belong to us any more, he belongs to his wife; whatever she does is perfectly all right." That because of the relationship existing between Helen Thoern and the deceased it was she who ordered the funeral and agreed to pay for the services.

The defendant contends that the verdict and judgment is against the manifest weight of the evidence. We have carefully considered the testimony of all the witnesses and are of the opinion that we would not be warranted in holding that the verdict is against the manifest weight of the evidence.

Defendant further contends that there was no evidence to hold John G. Ranes, and the action having been brought on a joint contract the evidence must be such as to warrant a judgment against all the defendants or none. We find no merit in this contention. Josephine Ranes was the widow of the deceased and was liable for the funeral expenses connected with his burial and she admitted she received the money forwarded by Helen Thoern for the railroad expenses in coming to Chicago and that \$285 was paid to the undertaker in Denver, and in her testimony in the trial court she admitted her liability.

It is next contended that the judgment entered is not based on the plaintiff's statement of claim but is based on a claim that the plaintiff had against Josephine Ranes upon her promissory note for \$754.96. The verdict of the jury was for \$754.96 and the court,

The defendant's version was that he had no conversation with Helen Thayer about arranging for the funeral and that he had not asked her to help out and advance any money, and that he did not tell her if she did advance the money to bring the widow and the body to Chicago he would repay the money; that plaintiff did come to his home and inquired what arrangements he wished to make regarding the funeral and was informed that defendant did not desire to make any arrangements; "that the boy did not believe in an any more, he belonged to his wife; whoever she does is perfectly all right." That because of the relationship existing between Helen Thayer and the deceased it was she who ordered the funeral and agreed to pay for the services.

The defendant contends that the verdict and judgment is against the manifest weight of the evidence. We have carefully considered the testimony of all the witnesses and are of the opinion that we would not be warranted in holding that the verdict is against the manifest weight of the evidence.

Defendant further contends that there was no evidence to hold John G. Hanson, and the action having been brought on a joint contract the evidence must be such as to warrant a judgment against all the defendants or none. We find no merit in this contention.

Josephine Hanson was the widow of the deceased and was liable for the funeral expenses connected with his burial and she admitted and received the money furnished by Helen Thayer for the funeral expenses in coming to Chicago and that \$250 was paid to the undertaker in answer, and in her testimony in the trial court she admitted her liability.

It is next contended that the judgment entered is not based on the plaintiff's statement of claim but is based on a claim that the plaintiff had against Josephine as to whom her promise only note for \$750.00. The verdict of the jury was for \$750.00 and the court,

on motion of plaintiff, permitted a remittitur of \$13.38. It appears from the evidence that after the funeral plaintiff requested John G. Ranes and Josephine Ranes to sign a note which he drafted for \$754.96. This note was signed by Josephine Ranes but not by John G. Ranes.

The fact that the court permitted the remittitur in the instant case is not cause for reversal. Defendant has had a fair and impartial trial and the excessive allowance was not caused by any improper influence of plaintiff or his counsel and under such circumstances an excessive allowance of damages may be cured by a remittitur. (Wabash Ry. Co. v. Billings, 213 Ill. 37, 42.)

The defendant next contends that it was error to enter a judgment against him, because it appears from the evidence that the claim of the plaintiff was the joint obligation of John G. Ranes, Josephine Ranes, H. Robert Ranes and Mrs. John Ranes, and that Mrs. John Ranes was not made a party to the suit. The point is not well taken. There was no evidence sustaining any liability on the part of Mrs. John Ranes.

It is also contended that the court erred in instructing the jury. The court instructed the jury orally. After the reading of the instructions the bill of exceptions shows that defendant's counsel excepted to the giving of all the instructions. He did not make any specific objections. A general exception to the whole charge is not sufficient. (Haskins v. Haskins, 67 Ill. 446; The Baldwin Co. v. Paley, 161 Ill. App. 300; Howe v. Fulton, 225 Ill. App. 589; Pecararo v. Halberg, 246 Ill. 95.)

It is also assigned as error that the court refused to instruct the jury as requested by counsel. We have examined the refused instructions and find no error in the ruling of the court.

It is also argued that the conduct, remarks and arguments of counsel were inflammatory and prejudicial. It is not necessary

on motion of plaintiff, permitted a remittitur of \$12.50. It appears from the evidence that after the funeral plaintiff received from John B. Jones and Josephine Jones a note which he signed for \$12.50. This note was signed by Josephine Jones but not by John B. Jones.

The fact that the court permitted the remittitur in the instant case is not cause for reversal. Plaintiff had a fair and impartial trial and the excessive allowance was not caused by any improper influence of plaintiff or his counsel and under such circumstances an excessive allowance of damages may be cured by a remittitur. (Kane v. Williams, 111 Ill. 27, 42.)

The defendant next contends that it was error to enter a judgment against him, because it appears from the evidence that the claim of the plaintiff was the joint obligation of John B. Jones, Josephine Jones, H. Robert Jones and Mrs. John Jones, and that Mrs. John Jones was not made a party to the suit. The point is not well taken. There was no evidence establishing any liability on the part of Mrs. John Jones.

It is also contended that the court erred in instructing the jury. The court instructed the jury exactly. After the reading of the instructions the bill of exceptions shows that defendant's counsel excepted to the giving of all the instructions. He did not make any specific objections. A general exception to the whole charge is not sufficient. (Kane v. Williams, 111 Ill. 27, 42.)

Kane v. Williams, 111 Ill. 27, 42. Kane v. Williams, 111 Ill. 27, 42.

It is also assigned as error that the court refused to instruct the jury as requested by counsel. We have examined the relevant instructions and find no error in the ruling of the court. It is also argued that the conduct, remarks and arguments of counsel were inflammatory and prejudicial. It is not necessary

to discuss these remarks and arguments. We have examined and considered them and find no error that would cause a reversal of the cause.

Finally it is argued, that the court unduly limited the time of argument to the jury to fifteen minutes. It is discretionary with the court as to how much time shall be allowed for argument. The discretion exercised by the trial court, however, must be reasonable. If the time had been so limited as to prevent a presentation of the case made by the evidence such limitation would be unreasonable and an abuse of judicial discretion. In the instant case each side was allowed fifteen minutes. Defendant's attorney used all of his fifteen minutes and was allowed five minutes additional by the court and five minutes of the plaintiff's time. We are of the opinion that defendant's counsel was given sufficient time in which to present all necessary and legitimate argument.

Finding no reversible error in the record the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

to discuss those remarks and arguments. To have examined and

considered them and find no error there would have been a reversal

of the verdict.

Finally it is argued, that the court unduly limited the

time of argument to the jury to fifteen minutes. It is discretionary

with the court as to how much time shall be allowed for argument.

The discretion exercised by the trial court, however, must be reason-

able. If the time had been so limited as to prevent a presentation

of the case made by the evidence such limitation would be unreasonable

and an abuse of judicial discretion. In the instant case each side

was allowed fifteen minutes. Defendant's attorney used all of his

fifteen minutes and was allowed five minutes additional by the court

and five minutes of the plaintiff's time. We are of the opinion

that defendant's counsel was given sufficient time in which to pre-

sent all necessary and legitimate argument.

There being no reversible error in the record the judgment

of the trial court is affirmed.

APPROVED,

Attorney, P. J. and Counsel, J. J. COURT.

34906

J. V. DeLaney and
Walter P. Altenburg,
copartners doing business
as DeLaney and Altenburg,
Appellants,

v.

EDWARD R. ADAMS and
CLARA D. ADAMS,
Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

262 I.A. 654²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

The plaintiffs, J. V. DeLaney and Walter P. Altenburg, copartners, doing business as DeLaney and Altenburg, seek by this appeal to reverse an order of the Circuit court of Cook county, dismissing plaintiffs' suit at plaintiffs' cost.

The plaintiffs sued defendants for legal services. The declaration consisted of the common counts and a special count averring that plaintiffs were attorneys and were hired by defendants jointly to defend a creditor's bill and that the services were reasonably worth \$3000. Plaintiffs filed an affidavit of claim in which it is alleged that they were employed by defendants to perform professional services and that they performed the services and that there is due them \$3000. The affidavit of claim, however, did not state what was the reasonable value of the services. The defendants separately filed non assumpsit, and that they were not jointly liable with each other to the plaintiffs and that plaintiffs were not employed jointly together. The defendants did not deny the extent of the damages claimed by plaintiffs. Replications were filed, a jury was selected, and the cause proceeded to trial.

The plaintiffs' evidence consisted of proofs tending to show joint liability of defendants and joint right to sue. No proof, however, was made of the reasonableness of their charges.

J. V. Delaney and
Robert L. Alderson,
appellants,
vs.
Delaney and Alderson,
appellants.

EDWARD F. ADAMS and
CLARA D. ADAMS,
appellants.

MR. JUSTICE KENNETH KELLY, THE CHIEF OF THE COURT.

The plaintiffs, J. V. Delaney and Robert L. Alderson,
co-partners, doing business as Delaney and Alderson, seek by this
appeal to reverse an order of the Circuit Court of Cook County,
dissolving plaintiffs' joint and several liability.
The plaintiffs own defendants for legal services. The
decision consisted of the common counts and a special count
averring that plaintiffs were attorneys and were hired by defendants
jointly to defend a creditor's bill and that the services were
reasonably worth \$2000. Plaintiffs filed an affidavit of claim in
which it is alleged that they were employed by defendants to perform
professional services and that they performed the services and that
there is due them \$1000. The affidavit of claim, however, did not
state what was the reasonable value of the services. The defendants
separately filed non assumpsit, and that they were not jointly liable
with each other to the plaintiffs and that plaintiffs were not employ-
ed jointly together. The defendants did not deny the extent of the
damages claimed by plaintiffs. Replications were filed, a jury was
selected, and the cause proceeded to trial.

The plaintiffs' evidence consisted of proofs tending to
show joint liability of defendants and joint right to sue. No
proof, however, was made of the reasonableness of their charges.

2821.A.654

COOK COUNTY.

ATTEST: CLERK OF THE COURT.

At the conclusion of the plaintiffs' evidence, the defendants asked leave to file amended affidavits of merit and after hearing from counsel the court stated he would permit defendants to file amended affidavits of merit. These amended affidavits of merit raised the issue as to the amount due by denial of the value of the services of plaintiffs and alleged that plaintiffs' services were not worth to exceed \$500. Plaintiffs excepted to the ruling of the court in allowing the defendants to file the amended affidavits of merit. The defendants made no motion for a continuance on the ground of surprise, nor was any offer made of further evidence on the reasonable value of their services, plaintiffs' counsel stating that they would "offer no further proof." The court thereupon stated, "On the attitude of plaintiffs, they not proceeding any further in the trial of this cause, it is ordered by the court that the suit be dismissed at plaintiffs' costs."

It is contended that the court erred in allowing the amended affidavits of merit to be filed and in dismissing the suit. These amended affidavits of merit denied that the services rendered were of the value of \$3000 and raised the issue as to the amount due, if any. The defendants had the right to interpose such a defense and that right could not lawfully be denied them unless the defendants by their own actions and conduct afforded a justification for the denial. The statute on amendments and joinders is very liberal in authorizing amendments by any pleading or proceeding, in form or substance, at any time before judgment, and section 39 of the Practice act authorizes amendments at any time before final judgment in any pleading which may enable the plaintiff to sustain the action or the defendant to make a legal defense. It is within the sound discretion of the court to allow the filing of amended affidavits of merit. (Ch. 7, sec. 1, and ch. 110, sec. 39, Cahill's Ill. Stat. 1929.) We cannot say, under the circumstances in the

at the conclusion of the plaintiff's evidence, the defendant asked leave to file amended affidavits of merit and after hearing from counsel the court stated he would permit defendant to file amended affidavits of merit. These amended affidavits of merit raised the issue as to the amount due by denial of the value of the services of plaintiff and alleged that plaintiff's services were not worth so much as \$5000. Plaintiff excepted to the ruling of the court in allowing the defendant to file the amended affidavits of merit. The defendant made no motion for a continuance on the ground of surprise, nor was any other made of further evidence on the reasonable value of their services. Plaintiff counsel stating that they would "after no further proof." The court thereupon stated, "On the affidavits of plaintiff, they not proceeding any further in the trial of this cause, it is ordered by the court that the suit be dismissed at plaintiff's costs."

It is contended that the court erred in allowing the amended affidavit of merit to be filed and in dismissing the suit. These amended affidavits of merit stated that the services rendered were of the value of \$5000 and raised the issue as to the amount due, it says. The defendant had the right to introduce such evidence and that right could not lawfully be denied them unless the defendant by their own action and conduct afforded a justification for the denial. The statute on amendments and joinder is very liberal in authorizing amendments by any pleading or proceeding, in form or substance, at any time before judgment, and section 20 of the Practice and Procedure amendments at any time before trial judgment in any pleading which may enable the plaintiff to obtain the action or the defendant to make a legal defense. It is within the sound discretion of the court to allow the filing of amended affidavits of merit. (C.R. 7, sec. 1, and Ch. 120, sec. 22, Civil's Act, 1922.) We cannot say, under the circumstances in the

instant case, there was any abuse of discretion in allowing the filing of the amended affidavits of merit, and in view of the fact that plaintiffs refused to proceed further with the case there was no error in dismissing the suit.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

instant case, there was no issue of distinction in allowing the
: link of the amendment of 1917, and in view of the
fact that plaintiff refused to proceed further with the case
there was no error in dismissing the suit.
The judgment of the Circuit court of Cook County is

affirmed.

APPROVED:

WILLIAM J. J. and JEROME J. J. J.

THE JUDICIAL DEPARTMENT

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34916

GORDON A. RAMSAY, administrator
of the estate of Abraham Potter,
deceased,

Appellee,

v.

BOOTH FISHERIES COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

262 I.A. 654³

MR. JUSTICE KNAUER DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estate of Abraham Potter, deceased, sued Booth Fisheries Company, a corporation, to recover damages for the benefit of the next of kin for the wrongful death of Abraham Potter. The case was tried before the court with a jury, verdict and judgment against defendant for \$5,000, and this appeal followed.

The declaration consisted of four counts. The first alleged in substance that April 15, 1920, the defendant operated and controlled an automobile being driven on Twelfth street, Chicago; that plaintiff's intestate, while in the exercise of due care and caution for his own safety, was crossing Twelfth street not far from Blue Island avenue; that it was the duty of defendant to exercise ordinary care in the management, operation and control of its automobile; that it failed in its duty; that defendant carelessly and negligently managed, operated and controlled the automobile so that it ran into, against and upon the plaintiff's intestate, so that he was killed on April 15, 1920. The second count alleges that it was the duty of defendant not to drive its motor vehicle on a public highway in the State of Illinois at a speed greater than was reasonable and proper having regard for the traffic and use of the highway or so as to endanger the life and limb of any person; that defendant drove said automobile at a high rate of speed and at a speed

24112

ADMINISTRATOR
OF THE ESTATE OF
DECEASED.

APPELLEE.

IN THE CIRCUIT COURT

COUNTY, COOK COUNTY.

2621.A. 374

BOOTH FISHING COMPANY,
A CORPORATION.
APPELLANT.

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Plaintiff, an administrator of the estate of Abraham
Tetter, deceased, sued Booth Fishing Company, a corporation,
to recover damages for the benefit of the next of kin for the
wrongful death of Abraham Tetter. The case was tried before the
court with a jury, verdict and judgment against defendant for
\$8,000, and this appeal followed.

The decision consisted of four counts. The first

alleged in substance that April 15, 1930, the defendant operated
and controlled an automobile being driven on Twelfth street,

Chicago, that plaintiff's intestate, while in the exercise of

due care and caution for his own safety, was crossing Twelfth street
not far from Blue Island avenue; that it was the duty of defendant to

exercise ordinary care in the management, operation and control of
its automobile; that it failed in its duty; that defendant carelessly

and negligently managed, operated and controlled the automobile so

that it ran into, against and upon the plaintiff's intestate, so that

he was killed on April 15, 1930. The second count alleges that it

was the duty of defendant not to drive its motor vehicle on a public
highway in the State of Illinois at a speed greater than was reason-

able and proper having regard for the traffic and use of the highway
or so as to endanger the life and limb of any person; that defendant

drove said automobile at a high rate of speed and at a speed

greater than was reasonable, contrary to the statute. The third that defendant drove the automobile upon a public highway where the same passed through a closely built up business portion of an incorporated city at a rate of speed in excess of ten miles an hour; and the fourth, that contrary to the statute, defendant drove said automobile through the residence portion of Chicago, an incorporated city, over Roosevelt road, a public highway, at a rate of speed in excess of fifteen miles an hour. The defendant pleaded the general issue, and that it did not own, operate, manage or control the automobile alleged to have caused the death of the deceased.

Only two witnesses testified to the occurrence. Mrs. Annie Walker, for the plaintiff, testified that on April 15, 1920, between 6 and 7 o'clock in the evening, she was walking north on the east side of Blue Island avenue, crossing Twelfth street, and noticed a man preceding her, walking briskly north across Twelfth street. He had an umbrella and book under his arm. Before proceeding north across the street, upon arriving at the south curb of Twelfth street, this man turned his head both ways; that when this man arrived at the south side of Twelfth street she saw a truck on Twelfth street coming from the east approaching Blue Island avenue. There were no vehicles to obstruct the view of either party. The driver of the truck did not blow his horn. This truck struck the man when he was four or five feet from the north curb. At the time he was struck she was ten feet from him and she was in the middle of the street. It was dark and raining. At the time she started across the street the truck she saw coming from the east was about half a block away. She further testified that she had occasionally ridden in automobiles and had an idea as to the speed of automobiles; that this automobile was approaching at about twenty miles an hour.

William G. Moxley testified that April 15, 1920, at about 6:45 p. m., he was driving a Ford sedan truck for Booth Fisheries

greater than was reasonable, contrary to the statute. The third
 that defendant drove the automobile upon a public highway where
 the same passed through a closely built up business portion of an
 incorporated city at a rate of speed in excess of ten miles an
 hour; and the fourth, that contrary to the statute, defendant drove
 said automobile through the residence portion of Chicago, an incor-
 porated city, over a public road, a public highway, at a rate of
 speed in excess of fifteen miles an hour. The defendant pleaded the
 general issue, and that it did not own, operate, manage or control
 the automobile alleged to have caused the death of the deceased.

Only two witnesses testified to the occurrence. One, Annie
 Baker, for the plaintiff, testified that on April 15, 1920, between
 6 and 7 o'clock in the evening, she was walking north on the east
 side of Lake Island avenue, crossing Twelfth street, and noticed a
 man proceeding east, walking briskly north across Twelfth street. He
 had an umbrella and back pocket bag and. Before proceeding north
 across the street, upon arriving at the north curb of Twelfth street,
 this man turned his head back westward when this man arrived at the
 north side of Twelfth street and saw a truck on Twelfth street coming
 from the east carrying this Island avenue. There were no vehicles
 to obstruct the view of either party. The driver of the truck did
 not slow his horse. This truck struck the man when he was about
 five feet from the north curb. At the time he was struck the man
 was facing him and she was in the middle of the street. It was dark
 and raining. At the time she started across the street the truck
 was coming from the east and about half a block away. She further
 testified that she had occasionally ridden in automobiles and had an
 idea as to the speed of automobiles; that this automobile was approach-
 ing at about twenty miles an hour.

William A. Baker testified that April 15, 1920, at about
 6:15 p. m., he was driving a Ford sedan truck for Joseph Flickner

Company, upon which was the name, Booth Fisheries Company, west upon Twelfth street. It was a rainy evening and he had on dim lights. As he approached Blue Island avenue he stopped to let a truck from the north pass in front of him to the south upon Blue Island avenue. The truck for which he waited, however, made a right turn upon Twelfth street and proceeded westward. Whereupon, the witness started to cross Blue Island avenue in first speed. As he started to cross he observed an eastbound street car standing west of the southwest corner of Blue Island avenue and Twelfth street. This street car was in the more southerly of the double tracks running east and west on Twelfth street. Fearing that passengers might get off the front, or east, end of the street car and pass in front of him, he pulled a wire operating a whistle on the truck he was driving and kept the whistle in operation until he reached a point just beyond the end of the street car. As the truck proceeded westerly the south edge of the truck was about three feet north of the street car. As the front end of the truck was about even with the northwesterly end of the street car, and at a point one hundred to one hundred and ten feet west of the northwest corner of Twelfth street and Blue Island avenue, a small man, head down and coat collar turned up, an umbrella under his arm, without looking where he was going, ran like a flash out from behind the street car across Twelfth street from south to north; that the witness immediately threw in his brakes and swerved the front of the truck to the north, but collided with the man, striking him with the south light and fender of the truck and knocking him backward. The man with whom he thus collided Hoxley later discovered was Abraham Petter. The truck was stopped within a foot or two of the point at which the collision occurred. The witness further testified that he was unable to lift the man who had been knocked down; that the street car had gone on east and that there was no one upon the street; that he hailed a passing truck, which did not stop; that he later

company, upon which was the name, South Western company, was upon Twelfth street. It was a rainy evening and he was on his knees. As he approached Nine Island avenue he stopped to let a truck from the north pass in front of him to the south upon Nine Island avenue. The truck for which he waited, however, made a right turn upon Twelfth street and proceeded westward. Thereupon, the witness started to cross Nine Island avenue in first speed. As he started to cross he observed an eastbound street car standing west of the southeast corner of Nine Island avenue and Twelfth street. This street car was in the north lane of the double tracks running east and west on Twelfth street. Seeing that passengers might get off the lamp, or road, and of the street car and pass in front of him, he pulled a wire operating a whistle on the truck he was driving and kept the whistle in operation until he reached a point just beyond the end of the street car. As the truck proceeded westerly the south side of the street was about three feet north of the street car. At the front end of the truck was about even with the northwestern end of the street car, and at a point one hundred to one hundred and ten feet west of the northern corner of Twelfth street and Nine Island avenue, a small car, dark blue and red wheels turned up, an umbrella under his arm, without looking where he was going, ran like a flash and true heading the street car across Twelfth street from south to north; that the witness immediately turned in his tracks and swerved the front of the truck to the north, but collided with the man, striking him with the front light and tender of the truck and injuring his backside. The man with whom he thus collided, Holey Jader discovered was Abraham Jader. The truck was stopped within a few feet of the point at which the collision occurred. The witness further testified that he was unable to like the man who had been knocked down; that the street car had gone on east and that there was no one upon the street; that he failed a passing truck, which did not stop; that he later

succeeded in stopping a Checker cab which was approaching from the east. The driver of this cab assisted the witness to carry the injured man into a drug store upon the southwest corner of Twelfth street and Blue Island avenue. When the cab driver and the witness picked up the man who had been struck the truck was standing in the position and location in which the witness had stopped it at the instant of the collision. The left wheel was outside the north rail of the westbound car tracks and the two front wheels were over away from the tracks. The car was headed in a northwesterly direction, mainly to the north. The truck was not moved from this position until the witness came out of the drug store later to pull it out of the car tracks to permit street car traffic to continue. From the drug store at the southwest corner of Twelfth street and Blue Island avenue the witness called a police station for an ambulance, and then proceeded to call a doctor. This doctor upon arrival at the drug store found the injured man dead.

On cross-examination ^{Moxley} testified that Twelfth street runs east and west and that Blue Island avenue crosses it at about a half a right angle; that the southwest corner of Twelfth street at Blue Island avenue was west of the northwest corner, and that the west end of an eastbound street car stopping at the southwest corner of Blue Island avenue would be about even with an alley on the north side of the street, approximately 100 feet west of the northwest corner of Twelfth street at Blue Island avenue.

At the close of plaintiff's case and at the close of all the evidence defendant requested the court to direct a verdict in its favor. This motion was denied. It is not contended that the court erred in denying the motion, the defendant insisting that there is no competent evidence in the record upon which the jury could find the defendant was guilty of any negligence. The rule which should be applied is well settled in this State. If there

succeeded in stopping a truck and which was approaching from the east. The driver of this car assisted the witness to carry the injured man into a drug store upon the southwest corner of Twelfth street and Nine Island avenue. When the car driver and the witness alighted the man who had been struck the truck was standing in the position and location in which the witness had stopped it at the instant of the collision. The left wheel was outside the north rail of the westbound car tracks and the two front wheels were over away from the tracks. The car was headed in a northwesterly direction, mainly to the north. The truck was not moved from this position until the witness came out of the drug store later so that it was at the car tracks to permit direct car traffic to continue. From the drug store at the southwest corner of Twelfth street and Nine Island avenue the witness called a police station for an ambulance, and then proceeded to call a doctor. This doctor upon arrival at the drug store found the injured man dead.

On cross-examination Mooley testified that Twelfth street runs east and west and that 11. Island avenue crosses it at about a half a right angle; that the southwest corner of Twelfth street and Nine Island avenue was west of the northwest corner, and that the west end of an eastbound street car stopping at the southwest corner of Nine Island avenue would be about even with an alley on the north side of the street, approximately 100 feet west of the northwest corner of Twelfth street and Nine Island avenue.

At the close of Plaintiff's case and at the close of all the evidence defendant requested the court to direct a verdict in his favor. This motion was denied. It is not contended that the court erred in denying the motion, the defendant insisting that there is no competent evidence in the record upon which the jury could find the defendant was guilty of any negligence. The rule which should be applied is well settled in this state. It there

is in the record any evidence from which, if it stood alone, the jury could find, without acting unreasonably in the eye of the law, that all the material averments of the declaration have been proven, a verdict should not be directed. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Devine v. Melano, 272 id. 166; Wilcox v. International Harvester Co., 278 id. 465, and Vail v. Graham, 259 Ill. App. 172, and cases cited.) All that the evidence tends to prove and all just inferences to be drawn from it in plaintiff's favor must be conceded to him. The evidence most favorable to plaintiff must be taken as true. The credibility of the witnesses, the weight of the testimony and the inferences to be drawn from facts proved are all questions for the jury to pass upon and not for the court to decide. (Kelly v. Chicago City Ry. Co., 283 Ill. 640; Molloy v. Chicago Rapid Transit Co., 335 id. 164.) There was evidence that the truck was being driven at the rate of twenty miles an hour, without warning, on a slippery street in the rain; that said truck struck the deceased on a cross walk, while crossing the street, and that the deceased before crossing looked to the east, and that the truck was then half a block away. Contrary evidence was introduced by the defendant, but that contrary evidence could not be considered on its motion to direct a verdict. If the condition of the evidence at the close of the plaintiff's case does not justify an instruction for a verdict in favor of the defendant, no evidence which the defendant may introduced later will justify such instruction except uncontradicted evidence of an affirmative defense. Evidence contrary to the plaintiff's will not do it. (Shannon v. Nightingale, 321 Ill. 168, 176.) The evidence in the instant case tended to prove the negligence charged, and it was the duty of the court to submit the case to the jury and no error was committed in the refusal of the court to direct a verdict.

It is next contended that there is no competent evidence in

in the record any evidence from which it is shown alone, the
 jury could find, without acting reasonably in the eye of the
 law, that all the material elements of the accusation have been
 proven, a verdict should not be directed. (Albany, 100 Ill. 2d 100)

M. Cook, 228 Ill. 2d 100; Davis v. Wilson, 278 Ill. 2d 100; Wilson v.
International Insurance Co., 278 Ill. 2d 100, and Wilson v. 278 Ill. 2d 100

(Ill. App. 178, and cases cited.) All that the evidence tends to
 prove and all that inferences to be drawn from it in plaintiff's
 favor must be conceded to him. The evidence must establish as
 plaintiff must be taken as true. The credibility of the witnesses,
 the weight of the testimony and the inferences to be drawn from those
 proved are all questions for the jury to pass upon and not for the
 court to decide. (Albany v. Chicago, 278 Ill. 2d 100; 278 Ill. 2d 100)

Heller v. Chicago, 278 Ill. 2d 100. There was evi-
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 truck struck the deceased on a storm walk, while crossing the street,
 and that the deceased before striking looked to the east, and that the
 truck was then half a block away. Contrary evidence was introduced
 by the defendant, but that contrary evidence could not be considered
 on its motion to direct a verdict. If the condition of the evidence
 at the close of the plaintiff's case does not justify an instruction
 for a verdict in favor of the defendant, no evidence which the defend-
 ant may introduce later will justify such instruction except upon
 the basis of evidence of an affirmative defense. Evidence contrary to
 the plaintiff's will not do it. (Albany v. Chicago, 278 Ill. 2d 100)

(Ill. App. 178.) The evidence in the instant case tends to prove the negligence
 charged, and it was the duty of the court to submit the case to the
 jury and no error was committed in the refusal of the court to direct
 a verdict. (Albany v. Chicago, 278 Ill. 2d 100)

It is next contended that there is no competent evidence in

the record connecting defendant with the ownership, operation, management and control of the automobile. The driver of the truck testified that he was hired by the Booth Fisheries Company, paid by it, and driving for it in the course of his duty in the delivery of fish, and that the name of the defendant appeared on the truck. This was prima facie evidence of the possession and control of the truck by the defendant. (Kirn v. Chicago Journal Co., 195 Ill. App., 197, 203, and cases cited. See also Hobeson v. Greyhound Lines, Inc., 257 Ill. App. 278, 285, and Hartray v. The A. T. Billett Co., 232 Ill. App. 193.)

It is also urged that plaintiff's intestate was guilty of contributory negligence, defendant contending that the testimony of Mrs. Annie Walker that she saw a man in front of her stop at the south side of Twelfth street at Blue Island avenue and look in both directions, and that she saw a truck coming from the east about half a block away, coming at the rate of twenty miles an hour, and as it approached Blue Island avenue did not sound a horn, is not to be considered as tending to prove that he was in the exercise of due care for his own safety. Whether evidence tends to prove contributory negligence is a question of law; whether the plaintiff as a matter of fact is guilty of contributory negligence is a question of fact for the jury. The court can determine adversely to the plaintiff only when no other conclusion can be reasonably drawn from the evidence that is favorable to the plaintiff. What is due care depends on the circumstances in each particular case. The only requirement of the law is that the conduct of the person involved shall be consistent with what an ordinary man of prudence would do under like circumstances. (Stack v. East St. Louis Ry. Co., 245 Ill. 308; Sienta v. Chicago City Ry. Co., 184 id. 246; Greenwald v. B. & O. R. R. Co., 332 id. 627.) Applying these rules to the instant case we are of the opinion the question was one of fact for the jury.

the record concerning statements with the ownership, operation,

management and control of the automobile. The driver of the truck

testified that he was hired by the South Western Company, said by

it, and driving for it in the course of his duty in the delivery of

it, and that the name of the defendant appeared on the truck.

This was prima facie evidence of the possession and control of the

truck by the defendant. (Wright v. Chicago, Terminal, 100 Ill. 477.)

197, 200, and cases cited. See also Wright v. Chicago, Terminal, 100 Ill. 477.

207 Ill. 477, 478, and Wright v. The E. L. Electric Co., 318

Ill. 477.)

It is also urged that defendant's negligence was guilty

of contributory negligence, defendant contending that the testimony

of Mrs. Annie Walker that she saw a man in front of her step at the

corner side of Twelfth street at nine o'clock and look in both

directions, and that she saw a truck coming from the east about half

a block away, coming at the rate of twenty miles an hour, and as it

approached nine o'clock she did not sound a horn, is not to be

considered as tending to prove that he was in the exercise of due

care for his own safety. Whether evidence tends to prove con-

tributory negligence is a question of fact; whether the plaintiff is

a matter of fact is a question of contributory negligence is a question

of fact for the jury. The court now determines adversely to the

plaintiff only when no other conclusion can be reasonably drawn from

the evidence that is favorable to the plaintiff. That is the rule

applied in the circumstances in each particular case. The only

requirement of the law is that the conduct of the person involved

shall be consistent with what an ordinarily man of common sense would do

under like circumstances. (Wright v. Chicago, Terminal, 100 Ill. 477.)

Ill. 477; Wright v. Chicago, Terminal, 100 Ill. 477; Greenwald

v. E. L. E. Co., 318 Ill. 477.) Applying these rules to the

instant case we are of the opinion the question was one of fact for

It is urged, and the contention of defendant's counsel is, that the prejudicial attitude assumed by the court and his remarks during the trial of the cause deprived the defendant of a fair trial. While the witness Hoxley was on the stand testifying the following occurred: Attorney for plaintiff. "Say, listen, will you quit talking for a minute and let me ask you a question, please? Now, tell me once more. Do you claim that the dim headlights on your Ford threw a brilliant illumination ahead of you so you could see from them? The witness: Well, not exactly. You would not trust no lights even if you had bright lights on, you would not see any too much that night. The Court: Well, just strike that out. Now, you answer the question." Attorney for defendant: "I object to that, your Honor, as not cross-examination, anyway. The Court: Let him answer." Attorney for defendant: "Exception. The Court: Strike out the 'brilliancy.' The witness: You could take a bright light and you would not see much that night. The Court: No, you were not asked that. We are asking you about your lights that night on your car. The witness: No, you couldn't figure on the lights there." Attorney for plaintiff: "Your dim light didn't help you to see in front of your car, did it? The witness: No, not the light itself, but there was plenty of light there besides that, those lights on the street car brightened it up. The Court: Mr. witness, do you want to go to jail? The witness: No. The Court: Then shut up. The witness: I am just ---" Attorney for plaintiff: "Now, young man, just answer the question and we will get along just wonderful. Just don't give me a lecture. Now, you say there was plenty of illumination on the corner there that night? The Court: Yes or no. The witness: From the street car there was. If the street car had not been there you could see then. You could see. Sure you could. I am positive of it. I could not see him any sooner because he was behind the street car. The brilliancy of the street

It is stated, and the contention of defendant's counsel is, that the prejudicial evidence was given by the witness and his remarks during the trial of the same deprived the defendant of a fair trial.

While the witness was on the stand testifying the following occurred: "Attorney for plaintiff: 'Now, listen, will you get talking for a minute and let me ask you a question. Plaintiff, tell me once more. A few days after the 21st of March, you were on your way to a certain place, and you were with you would see from there, the witness, all, was testify. You would not have no lights even if you had bright lights on, you would not see any too much that night. The Court: 'Well, just strike that out. Now, you answer the question.' Attorney for defendant: 'I object to that, your Honor, as not cross-examination, anyway. The Court: 'Let him answer.' Attorney for defendant: 'Objection. The Court: 'Strike out the testimony.' The witness: You could take a bright light and you would not see much that night. The Court: 'No, you were not asked that. We are asking you about your lights that night on your car. The witness: No, you couldn't figure on the lights there.' Attorney for plaintiff: 'Your witness didn't help you to see in front of your car, did he? The witness: No, not the light itself, but there was plenty of light there besides that, those lights on the street car brightened it up. The Court: 'Mr. witness, do you want to go to jail? The witness: No. The Court: 'Then strike up. The witness: I am just --' Attorney for plaintiff: 'Now, young man, just answer the question and we will get along just wonderfully. Just don't give me a lecture. Now, you say there was plenty of illumination on the street there that night? The Court: 'Yes or no. The witness: 'From the street car there was. If the street car had not been there you would not see them. You could see me, you could. I am positive of it. I could not see him any more because he was behind the street car. The brilliancy of the street

car light did not interfere with my vision at all. I came practically to a stop in front of the street car. Then I came across Blue Island avenue and stopped again. Practically stopped. I was in low speed. That was fast enough." Attorney for plaintiff: "Low speed? You did not start to go fast at all because of that, did you? The Witness: Well, it was practically a stop when I started there because there was two parties coming off the street car. The Court: Strike that out. Strike that out. Now, Mr. Witness, answer the question." Attorney for plaintiff: "When you got over to the west side of Blue Island avenue, you were still in first speed and practically stopped for some people that you saw coming in front of the street car, is that right? The Witness: I slackened up then. I already pretty near stopped again the second time for fear that them people on the car would come out." Attorney for plaintiff: "Well, they didn't come out? The Witness: If they did not hear the whistle they would have come out. The Court: Mr. Witness, will you answer these questions?" Attorney for defendant: "Your Honor, I think he is a little confused. The Court: No, he is not confused. Don't think for a moment either that you can confuse anybody here. Just answer the question yes or no, whenever you can." At another point in the cross-examination the following occurred: Attorney for plaintiff: "How far was he back of the street car when he came out on the trot." Attorney for defendant: "Just a minute. I object to the tactics of counsel. The Court: Let him answer. (To which ruling of the court, the defendant, by its counsel, then and there excepted.)" Attorney for defendant: "He can answer but he does not need to use that manner with this witness." Attorney for plaintiff: "It is not a manner, it is merely a question of getting him to answer. The Court: You cannot get an answer out of him." At another point in the cross-examination the following occurred: Attorney for plaintiff: "You were only in first speed, weren't you? The Witness: I was in first speed." Attorney for plaintiff: "I asked you, were

my light did not interfere with my vision at all. I came practically to a stop in front of the street car. Then I saw across Nine Island Avenue and stopped again. Practically stopped. I was in low speed. That was last enough. Attorney for plaintiff: "Low speed? You did not start to go back at all because of that, did you? The witness: Well, it was practically a stop when I started there because there was two parties coming off the street car. The Court: "What time was that?" "That was out. Now, Mr. Witness, answer the question." Attorney for plaintiff: "When you got over to the west side of Nine Island Avenue, you were still in first speed and practically stopped for some people that you saw coming in front of the street car, is that right?" The witness: I slackened up then. I already pretty near stopped again the second time for fear that some people on the car would come out." Attorney for plaintiff: "Well, they didn't come out? The witness: If they did not hear the whistle they would have come out. The Court: Mr. Witness, will you answer these questions? Attorney for defendant: "Your Honor, I think he is a little confused. The Court: No, he is not confused. Don't think for a moment either that you can confuse anybody here. Just answer the question you are asked; otherwise you can't. At another point in the cross-examination the following occurred: Attorney for plaintiff: "Now he was on the back of the street car when he came out on the first." Attorney for defendant: "That a minute. I object to the tactics of counsel. The Court: Let him answer. (The witness replied.)" Attorney for defendant: "He can answer but he can't not want to use that manner with this witness." Attorney for plaintiff: "It is not a manner, it is merely a question of getting him to answer. The Court: You cannot get an answer out of him." At another point in the cross-examination the following occurred: Attorney for plaintiff: "You were only in first speed, weren't you?" The witness: I was in first speed." Attorney for plaintiff: "I asked you, were

you in first speed." Attorney for defendant: "I object. He has answered the question. The Witness: I was in first speed at the front end of the car. The Court; Mr. Witness, if you don't stop talking I am going to send you to jail for contempt. You are not here to argue the question. You answer the question. If you can't answer it, say so." At another point in the cross-examination the following occurred: Attorney for plaintiff: "You were perfectly sober that night? The Witness: Sure, I am always sober. I don't drink, sir." Attorney for plaintiff: "Well, that is good." In his argument to the jury after commenting on the testimony of Moxley, plaintiff's counsel said: "Now, my brother asked her (Mrs. Annie Walker) a few questions and she was just a simple soul, and I don't think any of you were impressed with the fact that he upset her. She wasn't fencing with him. The court didn't have to threaten her to keep still. The court didn't have to threaten her with contempt &c." Counsel for defendant objected to this statement. The objection was overruled and counsel for defendant took an exception.

It is argued that from the remarks called to our attention the defendant did not have a fair trial and that they were prejudicial to the defendant so that the verdict was not a fair verdict. In the case of People v. Lurie, 276 Ill. 630, at p. 641:

"Everyone with any experience in the trial of cases in court appreciates that any intimation, however slight and unconsciously made, by the court in the presence of the jury is liable to have the force and effect of evidence and may be most damaging to the party against whom it is made."

In the case of Synon v. The People, 188 Ill. 609, 625, it was said:

"As said in Conkhite v. Dickerson, 81 Mich. 277: 'Jurors are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can be construed to the prejudice of either party.' And in Wheeler v. Wallace, 53 Mich. 355, it was said: 'It is possible for a judge, however correct his motives, to be unconsciously so disturbed by circumstances that should not affect him, as to do and say, in the excitement of a trial, something the effect of which he would not at the time realize, and thereby

You in first speech. "Attorney for defendant" I object. He has answered the question. The witness: I was in first speech at the front end of the bar. The Court: Mr. witness, if you don't stop talking I am going to send you to jail for contempt. You are not here to argue the question. You answer the question. If you don't answer it, say so. "Is another point in the cross-examination the following occurred: Attorney for plaintiff: "You were perfectly sober that night? The witness: Yes, I am always sober. I don't drink, sir." Attorney for plaintiff: "All that is good." In his argument to the jury after commenting on the testimony of Hickey, plaintiff's counsel said: "Now, my friend asked her (Mrs. Annie Nelson) a few questions and she was just a simple soul, and I don't think any of you were impressed with the fact that he asked her. The woman's fencing with him. The court didn't have to threaten her to keep still. The court didn't have to threaten her with contempt." Counsel for defendant objected to this statement. The objection was overruled and counsel for defendant took an exception.

It is argued that from the remarks called to our attention the defendant did not have a fair trial and that they were prejudicial to the defendant so that the verdict was not a fair verdict. In the case of People v. Luria, 275 Ill. 630, 27 P. 641:

"Everyman with any experience in the trial of cases in court appreciates that any indication, however slight and unobtrusive, by the court in the presence of the jury is liable to have the force and effect of evidence and may be most damaging to the party against whom it is made."

In the case of People v. Luria, 275 Ill. 630, 27 P. 641, it was said:

"As said in People v. Luria, 275 Ill. 630, 27 P. 641, 'Everyman with any experience in the trial of cases in court appreciates that any indication, however slight and unobtrusive, by the court in the presence of the jury is liable to have the force and effect of evidence and may be most damaging to the party against whom it is made.'"

are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can be construed as the prejudice of either party." And in People v. Luria, 275 Ill. 630, 27 P. 641, it was said: "It is possible for a judge, however correct his motives, to be unconsciously or disturbed by circumstances that should not affect him, as to do and say, in the excitement of a trial, something the effect of which he would not at the time realize, and thereby

accomplish a mischief not designed.' (See, also, 1 Thompson on Trials, 209.) And so, it seems to us, it was in this case. The jury might well have inferred from the language of the learned judge who sat in the trial of the case, that his opinion was that the plaintiff in error was making orations and arguments instead of giving testimony, and was also misbehaving himself as a witness; that he was recalcitrant, and showed a disposition to willfully disobey or disregard the directions or admonitions of the court. Such an impression conveyed to the jury by the presiding judge could not be otherwise than greatly prejudicial to the defendant and to his defense."

In the instant case, under the evidence, the jury might have returned a verdict for either party. Mrs. Walker, who claimed to have seen the accident, gave evidence tending to show negligence by the defendant; but her presence at the scene was not left free from doubt and Moxley, the driver of the automobile truck, narrated the circumstances differently. Under these circumstances it was of the utmost importance that the record be substantially free from error, and the court should have been extremely careful that nothing was said which might be construed to the prejudice of either party. When the court inquired of Moxley, "do you want to go to jail?" and suggested that the witness was endeavoring to confuse the matter, that no answer could be gotten out of him, and finally saying that if the witness didn't stop talking the court would "send him to jail for contempt," he was intimating to the jury that Moxley was misbehaving himself; that he was recalcitrant and was disregarding the directions of the court, and these remarks were, in our opinion, prejudicial to the defendant and the only remedy is to grant a new trial.

Other questions have been called to our attention, but in view of the conclusion we have reached it will not be necessary to pass upon them at this time.

The judgment of the Circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Seanlan, J., concur.

...and a witness was designated. (See also, I Thompson, at 101.) And so, it seems to me, it was in this case, the jury might have inferred from the language of the learned judge who sat in the trial of the case, that his opinion was that the plaintiff in error was making serious and arguments instead of giving testimony, and was also misbehaving himself as a witness, that he was recalcitrant, and showed a disposition to willfully disobey or disregard the directions or admonitions of the court. Such an impression conveyed to the jury by the presiding judge could not be otherwise than greatly prejudicial to the defendant and to his defense."

In the instant case, under the evidence, the jury might have returned a verdict for either party. Mrs. Calles, who claimed to have seen the accident, gave evidence tending to show negligence of the defendant; but her presence at the scene was not felt from from bonds and Mexico, the driver of the automobile truck, narrated the circumstances differently. Under these circumstances it was of the utmost importance that the record be substantially free from error, and the court should have been extremely careful that nothing was said which might be construed as the prejudice of either party. When the court inquired of Mexico, "do you want to go to jail?" and suggested that the witness was endeavoring to confuse the matter, that no answer could be gotten out of him, and finally saying that if the witness didn't stop talking the court would "send him to jail for contempt," he was intimating to the jury that Mexico was misbehaving himself; that he was recalcitrant and was disregarding the directions of the court, and these remarks were, in our opinion, prejudicial to the defendant and the only remedy is to grant a new trial.

Other questions have been called to our attention, but in view of the conclusion we have reached it will not be necessary to pass upon them at this time. The judgment of the district court is reversed and the case is remanded for a new trial.

...and a witness was designated. (See also, I Thompson, at 101.) And so, it seems to me, it was in this case, the jury might have inferred from the language of the learned judge who sat in the trial of the case, that his opinion was that the plaintiff in error was making serious and arguments instead of giving testimony, and was also misbehaving himself as a witness, that he was recalcitrant, and showed a disposition to willfully disobey or disregard the directions or admonitions of the court. Such an impression conveyed to the jury by the presiding judge could not be otherwise than greatly prejudicial to the defendant and to his defense."

34941

JACOB COHEN, for the use of
ALLIANCE INSURANCE CO., a
corporation,

Appellant,

v.

C. J. BURK, doing business
as the CENTRAL MOTOR WORKS
GARAGE,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2021.A.654⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On January 20, 1927, Jacob Cohen, for the use of Alliance Insurance Company, a corporation, brought an action in the Municipal court of Chicago against defendant, C. J. Burk, doing business as the Central Motor Works Garage, upon a contract of bailment, claiming that he delivered an automobile to defendant, who was a keeper of a public garage, and who failed to re-deliver it to plaintiff upon demand. The defendant was served on February 8, 1927, and an appearance and jury demand were entered in his behalf, and a motion made and allowed requesting that time to file an affidavit of merits be extended ten days. On February 18, 1927, an affidavit of merits was filed. The case was placed upon the regular Municipal court jury calendar. When the case was called for trial on January 22, 1929, in the regular course, the defendant failed to appear, evidence was introduced, and the jury returned a verdict for the plaintiff for \$1650. Judgment was entered on the verdict on the same day and on February 19, 1929, an execution was issued, which was returned by the bailiff of the Municipal court "defendant not found." On July 16, 1930, an alias execution was served on the defendant and returned by the bailiff "not satisfied." On August 19, 1930, the defendant

JAMES COHEN, for the use of
ALLIANCE INSURANCE CO., a
corporation,
defendant,

v.

J. J. HARRIS, doing business
as THE CENTRAL MOTOR GARAGE,
defendant.

ALLIANCE INSURANCE CO.
COUNTY OF CHICAGO.

20-1-A-654

THE COURT HEREIN DELIVERED THE OPINION OF THE COURT.

On January 20, 1937, James Cohen, for the use of Alliance Insurance Company, a corporation, brought an action in the Municipal Court of Chicago against defendant, J. J. Harris, doing business as THE CENTRAL MOTOR GARAGE, upon a contract of bailment, claiming that he delivered an automobile to defendant, who was a keeper of a public garage, and who failed to re-deliver it to plaintiff upon demand. The defendant was served on February 3, 1937, and an appearance and jury demand were entered in his behalf, and a motion made and allowed requesting that time be fixed for the trial of the case on February 18, 1937, on affidavit of merits was filed. The case was placed upon the regular Municipal court jury calendar. Then the case was called for trial on January 22, 1937, in the regular court, the defendant failed to appear, and a default was entered, and the jury returned a verdict for the plaintiff for \$1000. Judgment was entered on the verdict on the same day and on February 1, 1937, an execution was issued, which was returned by the bailiff of the Municipal Court "defendant not found." On July 10, 1937, an alias execution was served on the defendant and returned by the bailiff "not notified." On August 19, 1937, the defendant

appeared in court and moved the court to vacate the judgment entered on January 22, 1929, on the ground that its entry resulted from an error of fact. The plaintiff moved the court to deny the motion for the reason that the affidavits filed in support of the motion were insufficient to give the court jurisdiction. This motion was denied, to which ruling the plaintiff took exception. The defendant's motion to vacate the judgment was granted and the judgment was set aside. The plaintiff then moved the court to expunge the order vacating the judgment from the records. The court denied this motion and the plaintiff excepted and prayed an appeal to this court, in which he seeks to reverse the order of the Municipal court vacating and setting aside the judgment in his favor and against the defendant.

The motion apparently is based on section 21 of the Municipal court Act. Cahill's Stat. Ch. 37, par. 409, which provides that there shall be no stated terms of the Municipal court; that a judgment of that court shall not be vacated after thirty days except "upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the Circuit Court." The section means that where a judgment is entered in the Municipal court and thirty days have elapsed, the Municipal court is without power to vacate or set it aside except it may be vacated or set aside if a motion is made under section 89 of the Practice Act, Cahill's Stat. Ch. 116, par. 89, showing sufficient grounds under that section, or the judgment may be vacated and set aside upon

appeared in court and moved the court to vacate the judgment entered on January 22, 1933, on the ground that the entry resulted from an error of fact. The plaintiff moved the court to deny the motion for the reason that the affidavit filed in support of the motion was insufficient to give due notice. This motion was denied. The defendant's motion to which ruling the plaintiff took exception. The defendant's motion to vacate the judgment was granted and the judgment was set aside. The plaintiff then moved the court to arrange the order vacating the judgment from the records. The court denied this motion and the plaintiff excepted and prayed an appeal to this court, in which he seeks to reverse the order of the Municipal court vacating and setting aside the judgment in his favor and against the defendant.

The motion apparently is based on section 21 of the Municipal court act, Capili's Stat. Ch. 57, par. 409, which provides that there shall be no stated term of the Municipal court; that a judgment of that court shall not be vacated after thirty days except upon appeal or writ of error, or by a bill in equity, or by a petition to set aside the judgment on the grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity.

provided, however, that all errors in fact in the proceedings in such court, which might have been corrected at common law by the writ of error, shall not be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the "Trial Court". The section means that where a judgment is entered in the Municipal court and thirty days have elapsed, the Municipal court is without power to vacate or set aside except it may be vacated or set aside if a motion is made under section 21 of the Practice Act, Capili's Stat. Ch. 110, par. 32, showing sufficient grounds under that section, or the judgment may be vacated and set aside upon

petition being filed which alleges facts sufficient to cause the judgment to be vacated and set aside by a bill in equity if filed in the Circuit or Superior court.

The defendant claims that the affidavits on file in support of his motion to vacate the judgment set forth facts sufficient to warrant the court in vacating the judgment. The motion was heard upon the affidavits and the testimony of Michael B. Goldberg, no answer having been filed by plaintiff.

The affidavit of merits states substantially that on July 1, 1926, he^(Durk) became a member of Midwest Garage Owners Association, an association of reputable garage owners, having offices in the Garrick Building, Chicago; that said association maintained a law department and employed an attorney licensed to practice in Illinois, for the purpose of attending to law business of its members; that on January 27, 1927, he was served with summons in the instant case; that he thereupon instructed his manager, Robert F. Gray, to take the summons to the lawyer for said Midwest Garage Owners Association and engage said attorney to represent him in said suit and to do all things necessary in the defense of the cause; that Gray did engage the attorney and that affiant paid said attorney a retainer fee. That on February 7, 1927, Gray, in company with a clerk from the office of said lawyer, went to a court room in the Municipal court and heard the instant case called and was informed the cause had been placed on the jury calendar and that it would not be necessary for him to pay further attention to the matter until he heard from his attorney; that affiant did not hear of the case again until July 15, 1930, when he was served with an execution. The affidavit recites further that affiant instructed Gray to get in touch with his attorney in the offices of the Midwest Garage Owners Association, and he (Gray) found that the Midwest Garage Owners Association were no longer occupying offices in the Garrick Building, and that Gray was unable to locate the attorney or the Midwest Garage

petition being filed which alleged that defendant had caused the
defendant to be removed and was asked by a bill in equity to be
in the Circuit or Superior Court.
The defendant claims that the affidavit on file in support
of his motion to remove the instant case from the Circuit to
be heard by the court in removing the judgment. The motion was heard
upon the affidavit and the testimony of Michael A. Gaidner, an answer
having been filed by plaintiff.

The affidavit of Mervin states substantially that on July 1,
1937, he became a member of Midwest Garage Owners Association, an
association of reputable garage owners, having offices in the Garfield
Building, Chicago; that said association maintained a law department
and employed an attorney licensed to practice in Illinois, for the
purpose of attending to law business of its members; that on January
17, 1937, he was served with summons in the instant case; that he
thereupon instructed his manager, Robert E. Gray, to take the summons
to the lawyer for said Midwest Garage Owners Association and engage
said attorney to represent him in said suit and to do all things
necessary in the defense of the cause; that Gray did engage the attorney
and that plaintiff paid said attorney a retainer fee. That on February 1,
1937, Gray, in company with a clerk from the office of said lawyer,
went to a court room in the Municipal Court and heard the instant case
called and was informed the case had been placed on the July calendar
and that it would not be necessary for him to pay further attention to
the matter until he heard from his attorney; that plaintiff did not hear
of the case again until July 18, 1938, when he was served with an
association. The affidavit recites further that plaintiff instructed Gray
to get in touch with his attorney in the office of the Midwest Garage
Owners Association, and he (Gray) found that the Midwest Garage Owners
Association were no longer occupying offices in the Garfield Building,
so that Gray was unable to locate the attorney or the Midwest Garage

Owners Association. It further recites affiant denies he disregarded his duty to give proper care in the storage and keeping of plaintiff's automobile; that he was not guilty of any negligence in the maintenance and storage of the automobile, but on the contrary he exercised the highest degree of care in connection with the bailment.

The affidavit of Robert F. Gray recites that plaintiff gave him the summons; that he went to the office of the Midwest Garage Owners Association and asked to see the attorney for the association; that he was taken into a private office and met a man about 35 years of age, whose name he does not recall, and that he related the facts of the case to this attorney.

It appears from the record in the instant case that on February 8, 1927, the appearance of the defendant was filed by Michael A. Goldberg, and that on February 13, 1927, an affidavit of merits was filed on the back of which appears the name of Louis I. Fisher, attorney for defendant. The affidavit of Michael A. Goldberg recites that at no time did he accept an engagement from plaintiff or from anyone representing him and that he did not enter his appearance in the instant case and that he had no knowledge that such an appearance had ever been filed. Goldberg also testified that he was the attorney for the Midwest Garage Owners Association the latter part of 1926 and during the month of January, 1927; that the appearance filed was not in his handwriting.

The affidavit of Louis I. Fisher recites that he is an attorney at law; that the first knowledge he had of the instant case was in the month of July, 1930; that he did not know plaintiff and was never engaged to represent him in the instant case and that he never authorized the filing of the affidavit of merits.

No issue of fact was made on the defendant's motion by any plea filed by the plaintiff denying the truth of the alleged errors of

General Association. It further recites that the plaintiff gave his duty to give proper care in the storage and keeping of plaintiff's automobile; that he was not guilty of any negligence in the maintenance and storage of the automobile, but on the contrary he exercised the highest degree of care in connection with the defendant.

The affidavit of Robert V. Gray recites that plaintiff gave him the sum of \$100.00 to take to the office of the Midwest Garage General Association and asked to see the attorney for the association; that he was taken into a private office and met a man about 35 years of age, whose name he does not recall, and that he refused the latter of the sum to this attorney.

It appears from the record in the instant case that on February 6, 1937, the appearance of the defendant was filed by Michael J. Colabory, and that on February 12, 1937, an affidavit of service was filed on the back of which appears the name of Louis E. Visher, attorney for defendant. The affidavit of Michael J. Colabory recites that at no time did he accept an engagement from plaintiff or from anyone representing him and that he did not enter his appearance in the instant case and that he has no knowledge of any such appearance and ever been filed. Colabory also testified that he was the attorney for the Midwest Garage General Association the latter part of 1936 and during the month of January, 1937, and the appearance filed was not in his handwriting.

The affidavit of Louis E. Visher recites that he is an attorney at law and the first knowledge he has of the instant case was in the month of May, 1937, that he did not know plaintiff and was never engaged to represent him in the instant case and that he never authorized the filing of the affidavit of service. It is also filed by the plaintiff denying the truth of the alleged return of the issue of fact was made on the defendant's motion by any

fact, as set up in that motion. Where such a motion is interposed by a defendant, after the judgment term, the plaintiff may raise an issue of fact upon it by filing a plea denying the truth of the error in fact, alleged by the motion, or the legal sufficiency of the motion may be raised by demurrer to the motion. (Myth v. Fargo, 307 Ill. 300.) The only point made by the parties in this court is one of law, the plaintiff contending that the motion to vacate, filed by the defendant, is insufficient on its face, for it fails to set forth any error in fact, sufficient to support such a motion. In the instant case the parties and the trial court treated that position as a demurrer ore tenus.

The question presented for determination is whether, taking all the facts well pleaded in the motion and admitted by the demurrer to be true, the defendant is entitled to the relief authorized by section 89 of the Practice Act. That section (Cahill's Stat. 1929, p. 2027), provides:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

The practice, upon the motion which has been substituted by the statute for the writ of error coram nobis, has been pointed out by the Supreme Court in a number of cases. (Mitchell v. King, 187 Ill. 452; Pisa v. Reack, 206 id. 344; Cramer v. Commercial Men's Ass'n, 260 id. 516; The People v. Noonan, 276 id. 430; Chapman v. North American Ins. Co., 292 id. 179; Marabia v. Thompson Hospital, 309 id. 147; Loew v. Krauspe, 320 id. 244; Central Bond Co. v. Besser, 323 id. 90; The People v. Crooks, 326 id. 266, and Jacobson v. Ashkinaze, 337 id. 141.) While the statute has substituted a motion for the common law writ of error coram nobis, these cases hold that the essentials of the proceedings upon the

fact, as set up in that motion. There was a motion in response
by a defendant. After the judgment term, the plaintiff may raise an
issue of fact upon it by filing a plea denying the truth of the
facts in fact, alleged by the motion, or the legal sufficiency of
the motion may be raised by demurrer to the motion. (Smith v. Smith)
307 Ill. 500. The only point made by the parties in this court
in one of law, the plaintiff contending that the motion to vacate
filed by the defendant, is insufficient on its face, for it fails to
set forth any error in fact, sufficient to support such a motion.
In the instant case the parties and the trial court treated that
motion as a demurrer and hence.

The question presented for determination is whether,
taking all the facts well pleaded in the motion and admitted by the
defendant to be true, the defendant is entitled to the relief requested
by section 85 of the Practice Act. That section (Smith's case, 1929,
p. 308V), provides:

"The writ of error shall be granted in every case in which
any error in fact, committed in the proceedings of any court of
record, and which, by the common law, could have been corrected by
the court in which the error was committed, upon motion in writing,
made at any time within five years after the rendition of final
judgment in the case, upon reasonable notice."

The practice, upon the motion which has been submitted
by the statute for the writ of error shall be granted, has been pointed
out by the supreme court in a number of cases. (Michael v. Michael,
107 Ill. 482; Pine v. Pine, 202 Ill. 244; Cramer v. Commonwealth,
207 Ill. 430; The People v. Brown, 275 Ill. 430;
People v. Brown, 202 Ill. 170; People v. Thompson,
207 Ill. 167; People v. Brown, 202 Ill. 164; Central Bank,
207 Ill. 164; The People v. Brown, 202 Ill. 164, and
People v. Brown, 207 Ill. 164.) While the statute has not
provided a motion for the common law writ of error shall be granted,
these cases hold that the essentials of the proceedings upon the

motion are the same as they were at common law upon the writ. In the Jacobson case, supra, the court said, p. 146:

"The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law."

The errors of fact which may be corrected must be such as do not appear on the face of the record and are unknown to the court, and which, if known, would have precluded the rendition of the judgment. The writ relates only to matters on which the judgment is silent. All errors appearing on the face of the record, either of law or fact, are treated as errors of the court, and the court cannot set aside a judgment entered by it for errors committed by the court after the term has adjourned, but such errors must be reached by writ of error. (Chapman case, supra.) In the instant case defendant's counsel argues, as we understand it, that the defendant was prevented from presenting or interposing a defense to plaintiff's claim through fraud and without negligence on his part; the fraud being perpetrated upon defendant by someone connected with the Midwest Garage Owners Association, in holding himself out as an attorney, accepting a retainer, and advising defendant that it was not necessary for him to give further attention to the cause until he heard from his attorney, and that these facts, if known to the court, would have prevented the entry of a judgment. We cannot agree with the contention of counsel, for the reason that the fraud which may be availed of on a writ of error coram nobis, or under the statute, must be a fraud committed by the opposing party or his counsel. (Chapman v. North American Ins. Co., 292 Ill. 179-189; The People v. Drysch, 311 Ill. 342, 349; The People v. Crooks, 326 Ill. 266, 280.) There

is no claim that plaintiff or his counsel are guilty of any fraud which prevented defendant from presenting a defense to plaintiff's claim. It is the duty of a party litigant to be present in court when his case is reached for trial. (Staunton Coal Co. v. Menk, 197 Ill. 369.) The affidavits do not show that due diligence was exercised by defendant; they do not show sufficient excuse for not being present in court at the time when the case was reached for trial, the judgment being entered because of the failure of the defendant to appear and make a defense when in the regular course of procedure the case was reached for trial, and such failure was due to the negligence of defendant. The motion is not intended to relieve the party of the consequences of his own negligence. (Loew v. Krauspe, 320 Ill. 244.) And it is well settled that relief will be barred where the applicant has been guilty of negligence. (Engleston v. Royal Trust Co., 205 Ill. 170.) The defendant knew he had been sued and that the case had been placed on the jury calendar and would in due course be reached for trial. Unquestionably such failure to appear and defend the cause must be deemed negligence, but not an error in fact. The fact that Goldberg's appearance and the name of Fisher on the affidavit of merits were not genuine, do not constitute such errors of fact as would avail defendant under the writ of error coram nobis or under the motion herein considered. The fact that the court may have entered judgment without examining the files to ascertain who filed defendant's appearance and who, if anyone, filed his affidavit of merits, do not constitute errors of fact, for the reason that courts take judicial notice of their records, and the records are always constructively before the court. (Cramer v. Commercial Men's Ass'n, 260 Ill. 516.) The motion is not available to review questions of fact which arise upon the pleadings. (Jacobson v. Ashkinaze, 337 Ill. 141, 146.)

No facts constituting a fraud or excusable mistake are stated. Accordingly the judgment order vacating and setting aside the judgment in the case will be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

is no claim that defendant was negligent in failing to call the
which provided defendant with presenting a defense to plaintiff's
claim. It is the duty of a party defendant to be present in court
when his case is reached for trial. (Harris v. State, 127
Ill. 299.) The affidavit he has taken that his obligation was exer-
cised by defendant; they do not show sufficient excuse for not being
present in court at the time when the case was reached for trial. The
judgment being entered because of the failure of the defendant to
appear and make a defense when in the regular course of procedure the
case was reached for trial, and such failure was due to the negligence
of defendant. The motion is not intended to relieve the party of the
consequences of his own negligence. (Lowe v. State, 280 Ill. 246.)
and it is well settled that relief will be denied where the applicant
has been guilty of negligence. (Harris v. State, 127 Ill.
299.) The defendant knew he had been called and that the case had been
placed on the jury calendar and would in due course be reached for
trial. Unquestionably such failure to appear and taking the case
would be deemed negligence, but not an error in fact. The fact that
defendant's appearance and the name of witness on the affidavit of merits
were not genuine, do not constitute such errors of fact as would avail
defendant under the rule of error given above or under the motion here-
in considered. The fact that the court may have entered judgment with-
out examining the files to ascertain who filed defendant's appearance
and who, if anyone, filed his affidavit of merits, do not constitute
errors of fact. For the reasons these courts have indicated motion of their
review, and the records are hereby respectfully before the court.
(Harris v. State, 127 Ill. 299.) The motion is not
available to review questions of fact which arise upon the pleadings.
(Harris v. State, 127 Ill. 299.)
The facts constituting a fraud or unconscionable mistake are
stated. Accordingly the judgment under review and setting aside the
judgment in the case will be reversed.

REVEREND
Circuit, 2. 3. and Section, 3. 3. Section.

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34951

HARRY N. KRANSZ, as trustee,
(complainant),
Appellee,

v.

SIDNEY A. LEIBSOHN et al.,
Defendants.

—
SIDNEY A. LEIBSOHN,
Appellant.

7
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

262 I.A. 655

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is a bill filed August 20, 1929, by complainant, Harry N. Kransz, as trustee, to foreclose a trust deed executed by the defendant, Sidney A. Leibsohn, conveying real estate in Chicago to Harry N. Kransz, as trustee, to secure \$55,000 evidenced by 110 principal bonds of \$500 each, payable in installments. The bonds bear interest at six per cent per annum. The interest is evidenced by coupons attached to the bonds. The bill alleges that bonds 1 to 20, both inclusive, have been paid, cancelled and surrendered, but default was made in the payment of bonds No. 21 to 110, inclusive, which matured on August 8, 1929, the principal of such bonds amounting to \$45,000. There was a provision in the trust deed that in case default shall be made (a) in the payment of the principal of any bond, or (b) in the payment of interest on any bond, and such default shall continue for a period of thirty days, or (c) in the performance of any other covenant, and such default shall continue for a period of thirty days after demand for performance by the trustee, the trustee may proceed to foreclose the trust deed. The answer filed by the defendant denied that default had been made, and averred that the loan was usurious in that the commission provided to be

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HARRY E. KENAN, as Trustee,
(Complainant),
vs.
STEWART A. LEBRON, et al.,
Defendants.

ARIZONA PROBATE DIVISION

COUNTY, COCHISE COUNTY

2621A.655

STEWART A. LEBRON,
Appellant.

MR. JUSTICE WHELAN DELIVERED THE OPINION OF THE COURT.

This is a bill filed August 20, 1937, by complainant,

HARRY E. KENAN, as Trustee, to foreclose a trust deed executed

by the defendant, STEWART A. LEBRON, conveying real estate in

Arizona to HARRY E. KENAN, as Trustee, to secure \$25,000 evidenced

by 110 principal bonds of \$200 each, payable in installments. The

bonds bear interest at six per cent per annum. The interest is

advanced by coupons attached to the bonds. The bill alleges that

bonds 1 to 20, both inclusive, have been paid, cancelled and returned

and, but default was made in the payment of bonds No. 21 to 110, in-

clusive, which matured on August 2, 1936, the principal of such bonds

amounting to \$22,000. There was a provision in the trust deed that

in case default shall be made (a) in the payment of the principal of

any bond, or (b) in the payment of interest on any bond, and until de-

fault shall continue for a period of thirty days, or (c) in the per-

formance of any other covenant, and such default shall continue for

a period of thirty days after demand for performance by the trustee,

the trustee may proceed to foreclose the trust deed. The answer

filed by the defendant denied that default had been made, and averred

that the loan was made in full the commission provided to be

paid, together with the stated interest, amounted to more than seven per cent allowed by law; also that the bill was filed without notice to defendant after complainant had agreed to await the conclusion of negotiations which defendant had pending for a new loan. The cause was referred to a master to take the testimony and report his conclusions of law and of fact. The master filed his report in which he recommended that the court enter a decree of foreclosure in accordance with his findings. Objections to the report were ordered to stand as exceptions which, after hearing, were overruled, and on November 1, 1930, the chancellor entered a decree in conformance with the findings and recommendation of the master. The amount found due by the decree was \$48,913.20. From that decree the defendant has appealed.

From the evidence it appears that prior to August 5, 1924, the defendant was the owner of real estate in Chicago upon which he was erecting an apartment building and, desiring to make a loan with which to pay for its construction, applied on August 5, 1925, to the firm of A. M. Krensky & Bro., engaged in the business of obtaining loans for borrowers, and authorized them to negotiate a loan for him for \$55,000 for a period of five years at six per cent interest, agreeing to pay them seven per cent commission. Krensky, acting as defendant's agent, negotiated with the firm of Henry P. Kranz Company, engaged in Chicago in the business of real estate estate loans and insurance. He was successful in inducing the Henry P. Kranz Company to make the loan at six per cent interest for five years, and a commission of four and one-half per cent. Krensky had no regular or established connection with the Kranz Company, and no arrangement with the Kranz Company with respect to compensation for his services to effect the loan, and did not act as broker for the Kranz Company and the commissions received by Krensky hereinafter mentioned were

and the commission received by Kennedy hereafter mentioned were to effect the loan, and also act as broker for the Kansas company with the Kansas company with respect to compensation for his services or established connection with the Kansas company, and no arrangement or commission of loan and one-half per cent. Kennedy had no regular to make the loan at six per cent interest for five years, and a interest. He was successful in inducing the Henry T. Kansas company based in Chicago in the business of real estate estate loans and in- and's agents, negotiated with the firm of Henry T. Kansas Company, en- ing to pay them seven per cent commission. Kennedy, acting as defend- for \$25,000 for a period of five years at six per cent interest, agree- loans for borrower, and authorized them to negotiate a loan for him from H. A. Kennedy & Co., engaged in the business of obtaining which he pay for the commission, applied on August 5, 1902, to the was residing in apartment building and, decided to make a loan with the defendant was the owner of real estate in Chicago upon which he from the evidence is apparent that prior to August 5, 1902, appeared. From the above it appears that prior to August 5, 1902, of the decree was \$48,000.00. From that decree the defendant has the findings and recommendation of the master. The amount found due November 1, 1902. The chancellor entered a decree in conformity with stand as exceptions which, after hearing, were overruled, and an- ance with his findings. Objections to the report were ordered to be recommended that the court enter a decree of foreclosure in accord- clause of law and of fact. The master filed his report in which was referred to a master to take the testimony and report his con- negotiations which defendant had entered to await the conclusion of a statement after completion had agreed to await the conclusion of not sent allowed by law; also that the bill was filed without notice paid, together with the stated interest, amounted to more than seven

not in pursuance of any arrangement with the Kranz Company. The loan was made, the defendant executing the trust deed and bonds and there was credited to defendant on the books of the Kranz Company on August 22, 1924, the sum of \$55,000 which was paid for defendant's account in various amounts as the building progressed from time to time from August 22, 1924, to January 9, 1925, when the balance then on hand of \$1111.42 was paid to defendant. Out of the amount of the loan there was paid to the Kranz Company \$2475, or four and one-half per cent of \$55,000 as their commission for making the loan; \$82.50 for printing the bonds; \$823 was expended for insurance premiums; \$235 for a guaranty policy; \$27.50 for revenue stamps; \$1375, or two and one-half per cent of \$55,000 was paid to Krensky as his commission on October 16, 1924, and the balance was expended for labor and material in the construction of the building and to pay a prior indebtedness to a bank.

The main contention of the defendant is that the transaction was usurious, and is based upon the fact that \$2475 was paid to the Kranz Company and \$1375 to Krensky & Bro. to pay commissions in procuring the loan of the money. The Statutes of Illinois (Ch. 74, sec. 6, Cahill's Revised Statutes, 1923, p. 2070) prohibit the making of any contract to receive from an individual, interest in excess of seven per cent of the amount loaned, and as a penalty for the violation of such statute limits the lender to the recovery of the principal sum loaned, less any interest paid. The test as to a violation of the statute is whether or not more than seven per cent has been charged. In order to establish the charge of usury, it must appear there was a contract to receive a greater rate of interest than seven per cent, and the burden of proof is on the party claiming usury to show clearly that the transaction is usurious. The evidence must satisfactorily establish the elements necessary to make the defense good, and the evidence must be clear and convincing. (Boylston et al. v. Bain, 90

was in pursuance of my arrangement with the Kansas Company. The
loan was made, the defendant executed the trust deed and bonds
and there was credited to defendant on the books of the Kansas
Company on August 22, 1934, the sum of \$50,000 which was paid for
defendant's account in various amounts at the building purchased
from time to time from August 22, 1934, to January 2, 1935, when
the balance then on hand of \$1111.48 was paid to defendant. Out
of the amount of the loan there was paid to the Kansas Company \$2475.
or two and one-half per cent of \$50,000 as their commission for making
the loan; \$22.50 for printing the bonds; \$225 was expended for insur-
ance premiums; \$225 for a quarterly policy; \$27.50 for revenue stamps;
\$1375, or two and one-half per cent of \$50,000 was paid to Krensky as
his commission on October 12, 1934, and the balance was expended for
labor and material in the construction of the building and to pay a
prior indebtedness to a bank.
The main contention of the defendant is that the prosecution
was defective, and is based upon the fact that \$2475 was paid to the
Kansas Company and \$1375 to Krensky & Bro. to pay commissions in pro-
viding the loan of the money. The records of Illinois (Ch. 74, sec.
6, Krensky's Revised Statutes, 1925, p. 2079) prohibit the making of
any contract to receive from an individual, interest in excess of
seven per cent of the amount loaned, and as a penalty for the violation
of said statute limits the lender in the recovery of the principal sum
loaned, from any interest paid. The test as to a violation of the
statute is whether or not more than seven per cent has been charged.
In order to establish the charge of usury, it must appear there was
a contract to receive a greater rate of interest than seven per cent,
and the burden of proof is on the party claiming usury to show clearly
that the transaction is usurious. The evidence must satisfactorily
establish the elements necessary to make the offense good, and the
evidence must be clear and convincing. People v. V. V. V.

111. 293; Kihlholz v. Wolf, 103 id. 362; Telford v. Garrels, 132 id. 550.) If an agreement can reasonably be construed as non-usurious, it should be so construed (Mosier v. Horton, 83 Ill. 519; Mumford v. Tolman, 157 id. 258; Stanley v. Chicago Trust & Savings Bank, 165 id. 295; Home Building & Loan Ass'n. v. McKay, 217 id. 351), as an unlawful and corrupt intent is the very essence of a usurious transaction. (Boylston et al. v. Bain, *supra*.) Where the lender, at the request of the borrower, pays out of the money loaned, commissions and other expenses of third persons, as agents of the borrower in procuring the loan, the transaction will not be usurious. (Kihlholz v. Wolf, *supra*; Telford v. Garrels, *supra*.) Brokers negotiating loans of other people's money may charge the borrower commission without making such a loan usurious. (Hoyt v. Pawtucket Inst. for Savings, 110 Ill. 390; Brown v. Mortgage Company, 110 id. 235; Cox v. Mass. Mutual Life Ins. Co., 113 id. 382; Abbott v. Stone, 172 id. 634, and Council v. Bernard, 319 id. 392.) In Northern Trust Co. v. Sanford, 308 Ill. 381, the appellants borrowed \$9,000 from the lender and received only \$8,000, \$1,000 having been paid to another person as commission for securing the loan for them, there being no proof that the lender ever received any of the commission, it was held the defense of usury was not proved. In Brown v. Mortgage Company, *supra*, at page 235, the court said: "It cannot concern the lender what the borrower pays to his own agent."

It is also claimed by defendant that after deducting the \$2475 paid to the Kranz Company the net amount of the loan is \$52,525, and calculating the interest at the highest rate allowed by law for the length of time for which the loan was made the amount of principal and interest which could be charged and collected without incurring the penalty of usury would be \$69,237.21; that the amount provided to be paid by the borrower to the lender in addition to the \$2475 retained was \$70,030, or \$792.79 in excess of the principal and interest at

111. 222; Kimberly v. Taylor, 100 14. 222; Taylor v. Kimberly

112 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 100 111.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

113 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

114 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

115 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

116 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

117 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

118 14. 222. It is an agreement was reasonably to be construed as

non-est, it should be so construed. (Kimberly v. Taylor, 101 14.

112; Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14.

Kimberly v. Taylor, 101 14. 222; Kimberly v. Taylor, 101 14. 222.

119 14. 222. It is an agreement was reasonably to be construed as

seven per cent annum. He cannot agree with counsel in this contention. It has been held that interest may be deducted in advance and that it is not usury to withhold a commission for a loan, if the total amount of interest charged together with the commission, does not exceed seven per cent for the length of time for which the loan is made. (McGovern v. Union Mutual Life Ins. Co., 109 Ill. 151; Brown v. Mortgage Company, 110 id. 235; Hoyt v. Pawtucket Inst. for Savings, 110 id. 390; Telford v. Garrels, 132 id. 550; Willett v. Maxwell, 169 id. 540; Cobe v. Guyer, 237 id. 517; National Life Ins. v. Donovan, 238 id. 283, 298, and Council v. Bernard, 319 id. 392.) Calculating the interest for the length of time for which the loan was made at seven per cent per annum aggregates \$17,535. Figuring the interest at six per cent per annum for the same period makes a total of \$15,030, and adding thereto the \$2475 charged as commissions, totals \$17,505, which is less than seven per cent and not usurious.

It is next urged that the amount of the loan was disbursed in installments and that if the interest was calculated from the dates of the respective disbursements the transaction is usurious. It was held in Bishopp v. Blair, 90 Ill. App. 64, that that fact would not make the transaction usurious unless it appeared from the proof that it was intended as a cover for usury. No such claim is made here.

It is also claimed that the Kranz Company received insurance commissions from a fire insurance company for placing fire insurance upon the building involved in this proceeding and received a discount upon the bill of the Chicago Title & Trust Company for a guarantee policy. It appears that the defendants requested the Kranz Company who, in addition to being loan brokers, were fire insurance brokers, to cover the property against loss by fire; they did so, and ~~xxxxxxxxxxxxxxxx~~ obtained from the fire insurance

never pay any amount. It cannot agree with counsel in this con-
clusion. It has been held that interest may be deducted in
advance and that it is not necessary to withhold a commission for a
loan, if the total amount of interest charged together with the
commission, does not exceed seven per cent for the length of time
for which the loan is made. (See Wells Fargo & Co. v. United States,
100 U.S. 111; First Nat. Bank v. United States, 100 U.S. 113; First Nat. Bank v. United States, 100 U.S. 115;
First Nat. Bank v. United States, 100 U.S. 117; First Nat. Bank v. United States, 100 U.S. 119;
10, 200; First Nat. Bank v. United States, 100 U.S. 121; First Nat. Bank v. United States, 100 U.S. 123;
217; National Life Ins. Co. v. United States, 100 U.S. 125, 127, and 129;
First Nat. Bank v. United States, 100 U.S. 131; First Nat. Bank v. United States, 100 U.S. 133;
of time for which the loan was made of seven per cent per annum
amounted \$17,938. Paying the interest at six per cent per annum
for the same period makes a total of \$18,038, and adding thereto the
\$17,938 charged as commission, totals \$35,976, which is less than
seven per cent and not material.
It is next urged that the amount of the loan was \$10-
bonds in installments and that if the interest was calculated
from the date of the respective disbursements the transaction is
material. It was held in Wells Fargo & Co. v. United States, 100 U.S. 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 223, 225, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 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3575, 3577, 3579, 3581, 3583, 3585, 3587, 3589, 3591, 3593, 3595, 3597, 3599, 3601, 3603, 3605, 3607, 3609, 3611, 3613, 3615, 3617, 3619, 3621, 3623, 3625, 3627, 3629, 3631, 3633, 3635, 3637, 3639, 3641, 3643, 3645, 3647, 3649, 3651, 3653, 3655, 3657, 3659, 3661, 3663, 3665, 3667, 3669, 3671, 3673, 3675, 3677, 3679, 3681, 3683, 3685, 3687, 3689, 3691, 3693, 3695, 3697, 3699, 3701, 3703, 3705, 3707, 3709, 3711, 3713, 3715, 3717, 3719, 3721, 3723, 3725, 3727, 3729, 3731, 3733, 3735, 3737, 3739, 3741, 3743, 3745, 3747, 3749, 3751, 3753, 3755, 3757, 3759, 3761, 3763, 3765, 3767, 3769, 3771, 3773, 3775, 3777, 3779, 3781, 3783, 3785, 3787, 3789, 3791, 3793, 3795, 3797, 3799, 3801, 3803, 3805, 3807, 3809, 3811, 3813, 3815, 3817, 3819, 3821, 3823, 3825, 3827, 3829, 3831, 3833, 3835, 3837, 3839, 3841, 3843, 3845, 3847, 3849, 3851, 3853, 3855, 3857, 3859, 3861, 3863, 3865, 3867, 3869, 3871, 3873, 3875, 3877, 3879, 3881, 3883, 3885, 3887, 3889, 3891, 3893, 3895, 3897, 3899, 3901, 3903, 3905, 3907, 3909, 3911, 3913, 3915, 3917, 3919, 3921, 3923, 3925, 3927, 3929, 3931, 3933, 3935, 3937, 3939, 3941, 3943, 3945, 3947, 3949, 3951, 3953, 3955, 3957, 3959, 3961, 3963, 3965, 3967, 3969, 3971, 3973, 3975, 3977, 3979, 3981, 3983, 3985, 3987, 3989, 3991, 3993, 3995, 3997, 3999, 4001, 4003, 4005, 4007, 4009, 4011, 4013, 4015, 4017, 4019, 4021, 4023, 4025, 4027, 4029, 4031, 4033, 4035, 4037, 4039, 4041, 4043, 4045, 4047, 4049, 4051, 4053, 4055, 4057, 4059, 4061, 4063, 4065, 4067, 4069, 4071, 4073, 4075, 4077, 4079, 4081, 4083, 4085, 4087, 4089, 4091, 4093, 4095, 4097, 4099, 4101, 4103, 4105, 4107, 4109, 4111, 4113, 4115, 4117, 4119, 4121, 4123, 4125, 4127, 4129, 4131, 4133, 4135, 4137, 4139, 4141, 4143, 4145, 4147, 4149, 4151, 4153, 4155, 4157, 4159, 4161, 4163, 4165, 4167, 4169, 4171, 4173, 4175, 4177, 4179, 41

company a commission for their services; they also received from the Chicago Title & Trust Company a discount of ten per cent or \$20. We do not believe it can be said, in view of the record in the instant case, that the Kranax Company with a corrupt intent collected these items for the purpose of avoiding the usury law.

It is next claimed that there was no default under the terms of the trust deed. The bill was filed August 20, 1929. The trust deed provides in case default shall be made (a) in the payment of the principal of any bond, or (b) in the payment of interest on any bond, and such default shall continue for a period of thirty days, or (c) in the non-performance of any other covenant, and such default shall continue for a period of thirty days after demand for performance by the trustee, the trustee may proceed to foreclose the trust deed. The defendant argues that the thirty days' grace after default is provided for all three contingencies. We cannot agree with this contention. In our opinion the trust deed provided that the foreclosure bill might be filed whenever there was a default in the payment of the principal of any bond. It is undisputed that the defendant did default in the payment of the principal which matured on August 8, 1929.

The defendant further contends that it was error for the chancellor to refuse to permit him to give bond in lieu of appointing a receiver. On June 5, 1930, complainant filed a petition praying for the appointment of a receiver for the premises involved in the instant case. On June 7, 1930, defendant answered the petition, and on June 30, 1930, the court, upon the bill, petition, answer of the defendant and the hearing of witnesses, found the premises constituted meager and scant security and appointed a receiver. Thereupon the defendant offered to give bond in lieu of appointing a receiver as provided in ch. 22, sec. 56, Cahill's Ill. Revised Statutes, 1929, which was denied. No certificate of evidence was filed. Upon this

... a commission for their services they also received from
the Chicago Title & Trust Company a discount of ten per cent on
the amount of the loan. It is not believed that the record in
the instant case, that the Chicago Company with a contrary intent
collected these items for the purpose of avoiding the equity law.
It is here claimed that there was no default under the
terms of the trust deed. The bill was filed August 30, 1930. The
trust deed provided in case default shall be made (a) in the payment
of the principal of any bond, or (b) in the payment of interest on any
bond, and such default shall continue for a period of thirty days, or
(c) in the non-performance of any other covenant, and such default
shall continue for a period of thirty days after demand for performance
by the trustee. The trustee may proceed to foreclose the trust deed.
The defendant argues that the thirty days' grace after default is
provided for all trust mortgages. It cannot agree with this
contention. In my opinion the trust deed provided that the foreclosing
bill might be filed at any time and a default in the payment of
the principal of any bond. It is contended that the defendant did
default in the payment of the principal which matured on August 3, 1930.
The defendant further contends that it was error for the
court to refuse to permit him to file bond in lieu of appointing
a receiver. On June 5, 1930, complainant filed a petition praying
for the appointment of a receiver for the premises involved in the
instant case. On June 7, 1930, defendant answered the petition, and
on June 30, 1930, the court, upon the bill, petition, answer of the
defendant and the hearing of witnesses, found the premises conveyed
margin and same security and appointed a receiver. Thereupon the
defendant offered to give bond in lieu of appointing a receiver as
provided in the 22, sec. 58, Civil Code, Revised Statutes, 1929,
which was denied. No certificate of evidence was filed. Upon this

of
state the record the point is not well taken.

It is finally contended by the defendant that while he was negotiating for another loan and after the Kranz Company had shown a disposition of indulgence, complainant filed his bill without giving him reasonable notice of the termination of such indulgence, which constituted an act of bad faith. It appears from the evidence that the defendant was on July 9, 1929, advised in writing by complainant that his loan matured on August 8, 1929, and he was requested to pay same promptly at maturity, and again on August 16, 1929, he was advised the Kranz Company had checked the records and found no new trust deed thereon, and that unless a definite commitment on a new loan was presented not later than August 19, 1929, foreclosure proceedings would be commenced. The bill was filed on August 20, 1929. We have considered the arguments of counsel but are unable to find that the complainant waived his right to a foreclosure without giving the defendant any further opportunity to complete his negotiations for a loan.

We see no grounds for reversal and the decree of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

of the record the point is not well taken.

It is finally contended by the defendant that while he

was negotiating for another loan and after the Kansas Company had

shown a disposition of indulgence, complainant filed his bill

without giving him reasonable notice of the formal demand made

indulgence, which constituted an act of bad faith. It appears from

the evidence that the defendant was on July 9, 1929, advised in writing

by complainant that his loan matured on August 8, 1929, and he was

requested to pay same promptly at maturity, and again on August 16,

1929, he was advised the Kansas Company had checked the records and

found no new first trust mortgage, and that unless a definite commit-

ment on a new loan was presented not later than August 18, 1929, fore-

closure proceedings would be commenced. The bill was filed on August

27, 1929. We have considered the arguments of counsel but are

unable to find that the complainant waived his rights to a foreclosure

without giving the defendant any further opportunity to complete his

negotiations for a loan.

We see no grounds for reversal and the decree of the

Superior Court is affirmed.

APPROVED:

Attorney, J. J. and Son, J. J. Son.

34970

M. G. HABEMDIEL and
M. ORTNER, a copartnership
trading as APEX ELECTRIC
COMPANY, (plaintiffs),
Appellees,

v.

HENRY RAYMER and A. C. HALMOS,
trading as VIENNA MEDICAL
ASSOCIATION, and DR. LEO WEISS,
(defendants),

On appeal of A. C. HALMOS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 655²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This suit is based upon a claim for work, labor and services rendered and materials furnished, consisting of electric wiring, at defendants' special instance and request. There was a jury trial resulting in favor of plaintiffs. After denial of defendant's motion for an instructed verdict in his behalf made at the close of plaintiffs' evidence and again at the close of all the evidence, and denial of the usual motions for a new trial and in arrest of judgment, judgment was entered on the verdict in plaintiffs' favor and against the defendants Henry Raymer and A. C. Halmos for \$330. To reverse the judgment the defendant A. C. Halmos appealed.

The suit was originally commenced against Henry Raymer, who was served with summons and failing to appear was defaulted, and A. C. Halmos, trading as Vienna Medical Association, who filed an affidavit of merits denying that he was identified with the Vienna Medical Association other than as a consulting physician and surgeon and denying that the services were rendered at his request.

H. C. KAHN, JR. and
H. C. KAHN, JR. a partnership
trading as KAHN MEDICAL
ASSOCIATION, (plaintiffs),
vs.
JAMES H. HAYNES, (defendant).

HENRY HAYNES and A. C. KAHN,
trading as VIENNA MEDICAL
ASSOCIATION, and J. H. HAYNES,
(defendants),

ON appeal of A. C. KAHN,
Appellant.

THE COURT IN THIS CASE HAS THE HONOR TO SAY:

This suit is based upon a claim for work, labor and
services rendered and materials furnished, consisting of electric
wiring, of defendants' special insurance and reagent. There was
a jury trial resulting in favor of plaintiff. After denial of
defendant's motion for an instructed verdict in his behalf made
at the close of plaintiff's evidence and again at the close of all
the evidence, and denial of the usual motions for a new trial and
in arrest of judgment, judgment was entered on the verdict in
plaintiff's favor and against the defendant Henry Haynes and
to reverse the judgment the defendant
A. C. Kahn for \$250. To reverse the judgment the defendant
A. C. Kahn appealed.

The suit was originally commenced against Henry Haynes,
who was served with summons and failing to appear was defaulted,
and A. C. Kahn, trading as Vienna Medical Association, who filed
an affidavit of merits denying that he was identified with the
Vienna Medical Association other than as a consulting physician and
outgoing and denying that the services were rendered at his request.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.
22470 A. C. KAHN

An amended statement of claim was filed making Dr. Leo Weiss an additional defendant. Summons was issued and delivered to the bailiff of the Municipal court for service on Dr. Leo Weiss. He, however, was never served with summons, the cause proceeding to trial against Henry Raymer and A. C. Halmos.

The plaintiffs' evidence consisting of the testimony of Max Ortner discloses that in June, 1928, he had a conversation with all three defendants, the defendant Halmos introducing him to the other two defendants, at which conversation Halmos said to Ortner that he had some electrical work for him; the three defendants then in company with Ortner went to the premises on George street, at which the services were to be performed; after examining the premises Ortner advised the defendants the price for the work would be \$330, and all three men agreed to pay for the work as soon as it was completed; the labor and materials were furnished and the plaintiffs have not been paid. There is no denial on the part of Halmos that he did accompany Ortner and Weiss to the building on George street. Halmos testified that he did see Ortner the early part of June, 1928, and had a conversation with him, at which he told him that Weiss and Raymer were two old acquaintances of his and that they wanted to form a medical association and that they needed some electrical work and that he had recommended plaintiff to them, but that he never informed Ortner that he (Halmos) would pay for it and had not promised to pay for the work and material and that he was not a member of the Vienna Medical Association.

The defendants' counsel contend that there being merely the testimony of Ortner for the plaintiffs and the denial of the defendants the plaintiff cannot recover. In the case of Mills & Co. v. Luke, 232 Ill. App. 277, 280, the court said:

in a stated statement of claim was filed making Dr. Lee witness an additional defendant. Summary was issued and delivered to the plaintiff of the Municipal court for service on Dr. Lee. However, the case never arrived with summary, the cause proceeding to trial against Dr. Lee and Dr. Lee.

The plaintiff's evidence consisted of the testimony of Dr. Lee and others. Dr. Lee, in June, 1928, he had a conversation with all three defendants, the defendant Nelson introducing him to the other two defendants, at which conversation Nelson said to Dr. Lee that he had some electrical work for him; the three defendants then in company with Dr. Lee went to the premises on George street, at which the services were to be performed; after examining the premises Dr. Lee advised the defendants the price for the work would be \$250, and all three men agreed to pay for the work as soon as it was completed; the labor and materials were furnished and the plaintiff's have not been paid. There is no denial on the part of Nelson that he did accompany Dr. Lee and also to the building on George street. Nelson testified that he did not Dr. Lee the early part of June, 1928, and had a conversation with him, at which he told him that Nelson and Dr. Lee were two old acquaintances of his and that they wanted to form a medical association and that they needed some electrical work and that he had recommended plaintiff to them, but that he never informed Dr. Lee that he (Nelson) would pay for it and had not promised to pay for the work and material and that he was not a member of the Medical Association.

The defendants' counsel contend that there being no testimony of Dr. Lee for the plaintiff and the denial of the defendant Nelson, the plaintiff cannot recover. In the case of Wells v. Wells, 222 Ill. App. 2d, 230, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness, who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such cases that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review."

See also Rimer v. Miller, 255 Ill. App. 465, and cases cited. After examining the testimony in this case, we would not be warranted in holding that the verdict is against the manifest weight of the evidence.

It is next urged that the judgment is erroneous in that an action was brought against the three defendants jointly while the judgment is against two of the defendants only. There can be no question but that the law is well settled that where a plaintiff declares against several as joint obligors the evidence must show such joint liability as to all the defendants in order to entitle the plaintiff to a judgment. (Powell v. Finn, 198 Ill. 567.) The record in the instant case shows that by the amended statement of claim Dr. Leo Weiss was made a defendant; that summons was issued against him which was placed in the hands of the bailiff of the Municipal court and by him returned not found. Section 14 of the Practice Act, Cahill's Ill. R. S. (1929) ch. 110, par. 14, p. 2018, provides as follows:

"If a summons or capias is served on one or more, but not on all of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and the plaintiff may at any time afterwards, have a summons, in the nature of scire facias, against the defendant not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment; and upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally summoned or brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered, and the judgment of the court against such defendant shall be that the plaintiff recover against such defendant, together with the defendant in the former judgment, the amount of his debt or damages, as the case may be."

Under this section of the statute the trial court had a right to enter judgment against the two defendants notwithstanding the fact that their co-defendant, Leo Weiss, was not served with process. Moreover, the evidence clearly shows that all three defendants were liable for plaintiff's claim.

Finally it is urged as a ground for reversal that the trial court erred in the giving of the forms of verdict. From the record it appears that after the court had orally instructed the jury, he said: "There are two forms of verdict. We, the jury find the issues against the defendants and assess the plaintiff's damages in the sum ofDollars. If you find for the plaintiff the amount is \$330. The defendants' form of verdict is, We, the jury, find the issues against the plaintiff * * You will retire and select your form of verdict and bring in your verdict."

The argument of counsel as he states it is that in order to find the issues for the defendant Halmos the jury would be compelled to cross out Raymer's name from the verdict finding the issues in favor of the plaintiffs. We are unable to find any merit in this contention. The jury had been instructed that it was the duty of plaintiffs to establish their claim by the greater weight of evidence and if they failed to prove by a preponderance of the evidence that the work and material had been ordered by the defendant Halmos, their verdict must be against plaintiffs, and were further instructed that the fact that Raymer was in default and might be liable would not affect the defendant Halmos. From the instructions and the forms of verdict given the jury the jury was clearly advised of the issues and could, had they^{so} believed, readily found the issues against the plaintiffs. We are unable in this contention of the defendant to find any ground which would warrant us in reversing the judgment of the trial court.

Under this action of the court the trial court had a right to
order judgment against the two defendants notwithstanding the
fact that their co-defendants, the wife, was not served with process.
Moreover, the evidence clearly shows that all three defendants were
liable for plaintiff's claim.

Finally it is urged as a ground for reversal that the
trial court erred in the giving of the form of verdict. When
the record is opened then after the court had orally instructed
the jury, he said: "There are two forms of verdict. For the jury
find the issues against the defendant and answer the plaintiff's
damages in the sum of dollars. If you find for
the plaintiff the amount is \$3000. The defendant's form of ver-
dict is, We, the jury, find the issues against the plaintiff &
you will retire and select your form of verdict and bring in your
verdict."

The argument of counsel as he states it is that in order
to find the issues for the defendant Kaiman the jury would be compelled
to cross out Kaiman's name from the verdict finding the issues in
favor of the plaintiff. We are unable to find any merit in this con-
tention. The jury had been instructed that it was the duty of plain-
tiff to establish their claim by the greater weight of evidence and
if they failed to prove by a preponderance of the evidence that the
work and material had been ordered by the defendant Kaiman, their ver-
dict must be against plaintiff, and were further instructed that the
fact that Kaiman was in a loan and might be liable would not affect
the defendant Kaiman. From the instructions and the form of verdict
given the jury the jury was clearly advised of the issues and could
not have believed, readily found the issues against the plaintiff.
We are unable in this contention of the defendant to find any ground
which would warrant an reversal the judgment of the trial court.

Plaintiffs have filed cross-errors, but in the view we have taken of the instant case it is not necessary that we discuss the errors assigned by plaintiffs.

Finding no reversible error the judgment of the Municipal court will be affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

35021

SHERIDAN TRUST & SAVINGS BANK,
(Plaintiff),

Defendant in Error,

v.

MORRIS A. BENDER and SADIE BENDER,
(Defendants),

Plaintiffs in Error.

ERROR TO SUPERIOR
COURT, COOK COUNTY.

262 I.A. 655

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendants below, Morris A. Bender and Sadie Bender, seek the reversal of a judgment by confession for the sum of \$18,756.10, obtained by plaintiff upon the note of the defendant, which was, after leave granted defendants to defend upon a trial of the court without a jury, confirmed.

Defendants filed the general issue and an affidavit of merits in which they assert that the note sued upon was tainted with usury, claiming that a usurious rate of interest had been charged upon a loan in which the note involved in the instant case was included; that there was paid to plaintiff \$8,482.80 as interest, which was usurious, and that they were entitled to a credit for that amount on the judgment rendered.

The material facts are that December 1, 1922, the defendant Morris A. Bender, made an application in writing for a building loan addressed to plaintiff, in which he stated that he authorized the Sheridan Trust & Savings Bank to negotiate for him a loan of \$22,000 with interest at six and one-half per cent per annum, payable \$1,000 in two years, \$1,000 in three years, \$1,000 in four years, \$1,000 in five years, \$1,000 in six years, and \$17,000 in seven years, to be secured by a trust deed upon real estate in Chicago, and agreed to pay all expenses or advances made or incurred for guarantee policies,

1941

SES. A. I. 22

THESE ARE THE NAMES OF THE PERSONS WHOSE NAMES ARE LISTED IN THE

...this will of error the defendant below, ...
...and ...
...for the sum of \$10,000.00, obtained by plaintiff upon the
...of the defendant, which was, after having granted defendant
...to defend upon a trial of the issue without a jury, continued.
...defendant filed the general issue and an affidavit of
...in which they assert that the note upon was tainted
...claiming that a material part of interest had been
...upon a loan in which the note involves in the instant case
...that they are held to plaintiff \$10,000.00 as interest,
...and that they were entitled to a credit for that
...on the judgment rendered.

The material facts are that on December 1, 1932, the defendant
for his A. Bomber, made an application in writing for a building loan
addressed to plaintiff, in which he stated that he understood the
American Trust & Savings Bank to negotiate for him a loan of \$25,000
with interest at six and one-half per cent annum, payable \$1,000
in two years, \$1,000 in three years, \$1,000 in four years, \$1,000 in
five years, \$1,000 in six years, and \$17,000 in seven years, to be
secured by a first deed upon real estate in Chicago, and agreed to
pay all expenses of abstract made or incurred for guarantee policies.

recording, revenue stamp and fire insurance, and to pay plaintiff as commission three and one-half per cent of the amount loaned. Notes evidencing an indebtedness of \$22,000 as described in the application, and a trust deed securing the same were executed by the defendants and delivered to the plaintiff and there was on December 4, 1922, credited to defendants on the books of the plaintiff \$22,000 and the money was available to defendants. The first payment out of the loan was on December 4, 1922, when the plaintiff expended \$4.40 for a revenue stamp and the sum of \$77, being three and one-half per cent of \$22,000, was charged against the account for commissions; on January 6, 1923, \$10,043 was expended for a release deed and the payment of a prior indebtedness on the real estate in question. This was a building loan and the funds accruing from the loan were devoted to the erection of a building at 4027-29 Broadway, Chicago. On various dates from January 6, 1923, and up to and including February 8, 1923, payments were made for material and labor in the construction of the building, surveying the premises, guarantee policy and fire insurance premiums and on February 21, 1923, after defendants had been credited with an interest rebate of \$139.02, the balance then remaining amounting to \$851.27 was paid them. In the trust deed it was said that the trust deed and the notes are intended to be circulated as commercial paper, and to be used as investments, and are executed for the purpose of being negotiated. On April 3, 1923, the plaintiff sold the notes to an investor, who did not know of the commission charged by plaintiff and he received no part of the commission. On July 23, 1924, the plaintiff purchased the \$17,000 note and held it until May 26, 1925, when it resold it, and bought it back again, after its maturity on December 8, 1929. All of the notes, except the \$17,000 note were on their respective maturity dates and the interest thereon at six and one-half per cent per annum were paid to their respective maturity dates, and interest at

recording, revenue stamp and fire insurance, and to pay plaintiff
 a commission three and one-half per cent of the amount loaned.
 Notes evidencing an indebtedness of \$25,000 as described in the
 application, and a trust deed securing the same were executed by
 the defendant and delivered to the plaintiff and there was on
 December 4, 1922, credited to defendant on the books of the plain-
 tiff \$25,000 and the money was available to defendant. The first
 payment out of the loan was on December 4, 1922, when the plaintiff
 expended \$4.40 for a revenue stamp and the sum of \$770, being three
 and one-half per cent of \$22,000, was charged against the account
 for commission; on January 8, 1923, \$12,000 was expended for a
 release deed and the payment of a prior indebtedness on the real
 estate in question. This was a building loan and the funds coming
 from the loan were devoted to the erection of a building at 4027-29
 Broadway, Chicago. On various dates from January 8, 1923, and up
 to and including February 2, 1923, payments were made for material
 and labor in the construction of the building, satisfying the promise
 guaranteed policy and fire insurance premiums and on February 21, 1923,
 after defendant had been credited with an interest rebate of \$150.00,
 the balance then remaining amounting to \$481.75 was paid them. In
 the first deed it was said that the first deed and the notes are in-
 tended to be circulated as commercial paper, and to be used as invest-
 ments, and are executed for the purpose of being negotiated. On April
 2, 1923, the plaintiff sold the notes to an investor, who did not
 know of the commission charged by plaintiff and he received no part
 of the commission. On July 22, 1924, the plaintiff purchased the
 \$17,000 note and held it until May 26, 1925, when it recede to, and
 bought it back again, after its maturity on December 5, 1925. All of
 the notes, except the \$17,000 note were on their respective maturity
 dates and the interest thereon at six and one-half per cent per
 annum were paid to their respective maturity dates, and interest at

six and one-half per cent per annum upon the \$17,000 was paid to June 1, 1929, at the bank, as provided by the notes and trust deed, the bank acting as agent for the owner and was by the bank paid to the owner of the notes, except during the period of July 23, 1924, until May 26, 1925, during which period the bank was the owner of the notes.

Defendants' counsel in their brief and upon oral argument of the cause stated that the only question in the case is whether or not the transaction is tainted with usury. The contention of the defendant is that the sum of \$770 charged as commission, when added to six and one-half per cent per annum interest, provided for by the notes, makes a total amount over seven per cent and the transaction usurious.

The plaintiff replies first, that it negotiated the loan at the request of the defendants as a commercial loan to be sold to an investor, that it was agreed between it and the defendants that the commission charged was for services to be rendered in connection with the loan and the erection of the building and that the commission could not possibly be considered as a reward for the forbearance money, and second, that if the commission is regarded as interest, and added to the interest at six and one-half per cent per annum provided for in the notes, the rate would still be less than the legal rate of seven per cent and not usurious.

In the view we take of the instant case it will not be necessary to discuss the first contention of the plaintiff as we choose to base our opinion on the proposition that even if the commission is regarded as interest, the rate would still be less than the legal rate and not usurious.

Section 6, ch. 75, Cahill's Ill. Rev. Stats. (1921) p. 2091, which was in force, at the time this loan was made, provides:

the owner of the notes.

19. 1904, until May 30, 1905, during which period the bank was

held. The bank acting as agent for the owner and was by the bank

June 1, 1907, at the bank, as provided by the notes and from

six and one-half per cent per annum upon the 11,000 was paid to

transaction relations.

of the notes, makes a total amount over seven per cent and the

added to six and one-half per cent per annum interest, provided for

of the defendant is that the sum of \$770 charged as commission, when

whether or not the transaction is tainted with bribery. The commission

ment of the same stated that the only question in the case is

1904. Defendant's counsel in their brief and upon oral argu-

never got sent and not returned.

for in the notes, the rate would still be less than the legal rate of

added to the interest at six and one-half per cent per annum provided

money, and second, that if the transaction is regarded as interest, and

would not possibly be considered as a reward for the transaction

with the loan and the creation of the building and that the commission

the transaction charged was for services to be rendered in connection

an interest, that it was agreed between it and the defendant that

at the request of the defendant as a commercial loan to be sold to

the loan. The plaintiff replies first, that it negotiated the loan

than the legal rate and not mentioned.

commission is regarded as interest, the rate would still be less

choice to have our opinion on the question that even if the

necessarily to discuss the first question of the plaintiff as to

in the view of some of the instant case it will not be

never got sent and not returned.

Section 4, Ch. 78, Conn. Gen. Stat. (1907) p.

that, which was in force, at the time this loan was made, provided:

"If any person or corporation in this State shall contract to receive a greater rate of interest or discount than seven (7) per cent, upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation. And all contracts executed after this Act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable."

It has been held that an unlawful and corrupt intent is the very essence of an usurious transaction (Boylston v. Bain, 90 Ill. 283; 27 E. C. L. 208), and whether a contract is usurious depends upon the intention of the parties (Clemens v. Crane, 234 Ill. 215; Curtis v. LeMoynes, 248 Ill. App. 99, 103); and if an agreement can be reasonably construed as non-usurious, it should be so construed (Mosier v. Norton, 83 Ill. 519; Mumford v. Tolman, 157 id. 258; Stanley v. Chicago Trust & Savings Bank, 165 id. 295; Home Bldg. & Loan Ass'n v. McKay, 217 id. 551), and in order to establish the charge of usury it must appear there was a contract to receive a greater rate of interest than seven per cent; the evidence must be clear and convincing and satisfactorily establish the elements necessary to make the defense good. (Boylston v. Bain, *supra*; Hilholz v. Wolf, 103 Ill. 362; Telford v. Garrels, 132 id. 550.) It is not usury to withhold a commission for a loan if the total amount of interest charged together with the commission does not exceed seven per cent for the length of time for which the loan is made. (McGovern v. Union Mutual Life Ins. Co., 109 Ill. 151, 155; Brown v. American Mortgage Co., 110 id. 235; Hoyt v. Pawtucket Inst. for Savings, 110 id. 390; Fillett v. Maxwell, 169 id. 540; Cobe v. Guyer, 237 id. 516; National Life Ins. Co. v. Donovan, 238 id. 283, and Council v. Bernard, 319 id. 392.)

We have arrived at the conclusion that under the circumstances in the instant case it cannot be said that the defendant has proven by clear and convincing evidence that plaintiff with an unlawful and corrupt intent entered into a contract to receive a greater rate

of interest than seven per cent. The notes were executed on December 1, 1922, and the money was credited and became available to defendants on December 4, 1922. The plaintiff voluntarily and without any agreement or contract so to do, on February 21, 1923, credited defendant's account with a rebate of interest amounting to \$139.02. Calculating interest for the length of time for which the loan was made at seven per cent aggregates \$9,730. Figuring the interest at six and one-half per cent per annum for the same period makes a total of \$9,035 and adding thereto the \$770 charged as commissions, less the sum of \$139.02 rebated for interest on February 21, 1923, makes a total \$9,664.98 which is less than seven per cent and not usurious. That this is the proper way of figuring the interest was decided in National Life Ins. Co. v. Donovan, 238 Ill. 283.

We think the judgment was right and it is affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

35040

TACKGUN AUTOMATIC MACHINE CORP.,
(Plaintiff),

Appellee,

v.

HIBBARD, SPENCER, BARTLETT & CO.,
(Defendant),

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

262 I.A. 655⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff, Tackgun Automatic Machine Corporation, against defendant, Hibbard, Spencer, Bartlett & Company, to recover the contract price of tackguns and steel staples. Tried before jury and a verdict and judgment in favor of the plaintiff for \$3950 from which the defendant appealed.

The statement of claim sets forth that October 10, 1928, defendant gave plaintiff its written order for tackguns and steel staples; that plaintiff agreed to fill said order and October 11, 1928, delivered to defendant said merchandise so sold, by shipping all of said merchandise to the defendant f. o. b. New York as provided in the contract and billed the merchandise to defendant at the agreed price of \$3950, and that defendant has failed and refused to pay for said merchandise as agreed.

The affidavit of merits alleges that defendant did not execute the written order for the merchandise; that L. A. Smith, who signed the order, was without any authority from the defendant to execute and deliver the order; that defendant, on discovering that L. A. Smith had executed said unauthorized order, requested the plaintiff not to deliver the goods and advised plaintiff that the order had been executed by an unauthorized employee of defendant; that defendant never accepted delivery of the merchandise; that the merchandise is now held by the defendant for the benefit of and

at the risk of plaintiff; that before the execution of the order, plaintiff falsely and fraudulently represented to the said L. A. Smith that plaintiff had received large orders for the same class of merchandise from certain competitors of defendant and that L. A. Smith relied on said representations in executing the said order, but said representations were false and were known to be false by the plaintiff.

The evidence shows that Charles I. Tager, president of the plaintiff corporation, on October 10, 1928, went to the defendant's place of business and interviewed an information clerk or usher who knew to what buyer prospective sellers should be referred. He was referred to and went to the desk of L. A. Smith in the buying department of tacks, nails and special tools. A tackgun is a device for stapling labels on boxes; Tager demonstrated its operation to Smith and discussed at length the use of the goods, the market, other customers who had purchased these goods and the quantity of goods for the defendant to purchase as an initial order. Smith, one of 27 or 30 buyers and assistant buyers, had been in the employ of defendant for almost 19 years and had done nothing but buying for 8 years, signing 40 to 60 orders a week, drafted an order in pencil and took it to one of defendant's stenographers and had it typewritten on the defendant's printed order form as follows:

"SHIP AT ONCE

25 only Tack Guns with Plain Base

No Charge

5 only " " " Special Base
for shade rollers

No Charge

10 Case Tack Gun Steel Staples

(packed 50 Boxes per case 20000
per box.) at \$7.90 per box

Staples

F. O. B. New York 2% 10 Days

We are to have exclusive sale of this
item in the State of Illinois.

If we find that we are unable to handle this product after 6 months from date you are to relieve us of unsold merchandise at the invoice price.

You will supply electros for our catalog and 2000 circulars bearing our imprint.

Yours truly,

HIBBARD SPENCER BARTLETT & CO.

L. A. Smith.

Price guaranteed against
decline as to stock on hand
or unfilled orders
M K

Both the individual packages and outside containers should bear our numbers. Printed or rubber style, either will answer our requirements."

He then signed it and gave it to Tager. The order was telegraphed to New York and the merchandise shipped October 11, 1928, and the bill of lading and invoice were mailed to defendant.

Pritchard Stewart, senior vice president of defendant, was in charge of buying; the first knowledge he had of the order was the following morning when a carbon copy of it came to his desk; he wrote plaintiff: "Please hold shipment of Tack guns and staples on our order 10/10 until advised further," which letter was received by plaintiff October 15, 1928; it replied they could not comply with the request as the merchandise had been shipped October 11, in accordance with written order. October 19, defendant wrote plaintiff that they found their "buyer" Smith had entered into negotiations with plaintiff for some of its merchandise under date of October 10, 1928, in which plaintiff guaranteed certain very important things, and requested a financial statement so as to satisfy itself that plaintiff would be in a position to carry out the terms and agreements made with Smith and closed, "As soon as we have the above information we will act upon the same promptly, and it will permit us to take care of your invoice of October 11th, in the amount

It is being said we are unable to handle
this product after 6 months from date you are to
receive as it would be considered as the invoice
price.

You will supply electricity for our catalog
and 2000 of our new catalog.

Yours truly,

L. A. Smith.

Price guaranteed against
decline as to stock on hand
or unfilled orders

Both the individual packages and outside containers
showed our numbers. Printed or rubber type, either
will answer our requirements.

We then signed it and gave it to Jager. The order was forwarded
to New York and the merchandise shipped October 11, 1938, and the
bill of lading and invoice were mailed to defendant.

Richard Stewart, senior vice president of defendant,

was in charge of buying; the first knowledge he had of the order
was the following morning when a carbon copy of it came to his desk;
he wrote plaintiff: "Please hold shipment of 7000 guns and scopes
on our order 10-12 until advised further," which letter was received
by plaintiff October 11, 1938; it being the day when the goods
with the request as the merchandise had been shipped October 11,

in accordance with written order. October 18, defendant wrote
plaintiff and they found their "buyer" Smith had ordered into
negotiations with plaintiff for some of the merchandise under date
of October 10, 1938, in which plaintiff guaranteed certain very
important things, and requested a financial statement as to plaintiff
itself that plaintiff would be in a position to carry out the terms
and agreements made with Smith and closed. "As soon as we have the
above information we will act upon the same promptly, and it will
permit us to take care of your invoice of October 11th, in the amount

of \$3950, which we will hold up payment of in the meantime."

Plaintiff replied October 22, 1928, referring for information as to its responsibility and integrity to Chase National Bank of New York and Consolidated Products Company of Chicago. October 24, 1928, defendant wrote plaintiff that the order was executed by an "assistant buyer" without proper authority, and that the information solicited as to plaintiff's financial condition was desired for the purpose of deciding whether it would be possible to approve of the unauthorized action taken by Smith, and that until these matters were disposed of in a satisfactory manner, they could only receive the merchandise subject to plaintiff's order and pointed out that in the unauthorized order of October 10th, plaintiff undertook to relieve defendant of any unsold merchandise at the end of six months, which presented a credit problem. October 28th, plaintiff wrote defendant:

"Immediately after the order was shipped, we received advice from your assistant buyer to hold off the shipment. When we stated that the shipment had already been forwarded, we received another letter from your Mr. P. Stewart that you require a financial statement. When we tried to satisfy you on this point as well as we felt we should and consistently could, then we received your latest letter that you had finally concluded that your assistant buyer was without authority to execute the order."

To which defendant replied October 31, that the young man who signed the order was without authority to bind the defendant in the transaction; that plaintiff had undertaken certain obligations in it and before defendant could approve the order it must assure itself that plaintiff is prepared to carry them out. To this letter plaintiff on November 9, replied, enclosing a financial statement, upon receipt of which defendant requested an interview with one of plaintiff's officers. Tager, president of plaintiff, came to Chicago and had an interview with defendant.

Defendant introduced a letter from Chase National Bank of New York that plaintiff's balances had generally been in moderate

of 1933, which we will call up presently in the morning.
It is still replied October 22, 1933, referring for information as
to its responsibility and integrity to Chase National Bank of New
York and Consolidated Technical Company of Chicago, October 22,
1933, defendant wrote plaintiff that the order was executed by an
"assistant buyer" without proper authority, and that the information
afforded as to plaintiff's financial condition was derived for the
purpose of deciding whether it would be possible to approve of the
unauthorized action taken by him, and that until these matters
were disposed of in a satisfactory manner, they could only receive
the merchandise subject to plaintiff's order and pointed out that
in the unauthorized order of October 1933, plaintiff understood to
relieve defendant of any possible responsibility at the end of six months,
which presented a credit problem. October 23rd, plaintiff wrote

defendant:

"Immediately after the order was shipped, we received
advice from your assistant buyer to hold off the order.
We are glad that the shipment has already been forwarded,
as we received another letter from your Mr. F. Bennett that you
wanted a financial statement. When we tried to call you
on this point as well as we felt we should and consequently
sent, then we received your letter later that you had finally
concluded that your assistant buyer was without authority to
cancel the order."

To which defendant replied October 24, that the young man who signed
the order was without authority to give the defendant in the
transaction; that plaintiff had not received certain information in 1933
and before defendant could approve the order it was never likely
that plaintiff is prepared to give them any. In this letter plain-
tiff on November 2, replied, enclosing a financial statement, upon
receipt of which defendant requested an interview with one of plain-
tiff's officers. Later, president of plaintiff came to Chicago and
had an interview with defendant.
Defendant interviewed a representative of Chase National Bank of
New York and plaintiff's statement was generally seen in substance

four figure amounts, but recently had been in low proportions, averaging in moderate three figures; that the account had been conducted on a non-borrowing basis and they were not able to advise as to their financial affairs, and also introduced a letter from Consolidated Products Company, dated October 27, 1928, saying they knew nothing of plaintiff's credit or financial standing.

On the trial Fritchard Stewart testified that Smith had no authority to sign and deliver contracts for the purchase of merchandise without an O. K. from him and that he had not approved the order.

The only conflict in the evidence was that Tager testified that Smith requested the order to be telegraphed to New York, which was denied by Smith. Smith testified that after he prepared the order he took it to Stewart's office and not finding him in he returned to his desk, signed the order and said to Tager that the order was subject to approval by Mr. Stewart; that he is not in his office and he would arrange for the approval of it in the regular course later on. Tager denied that any such conversation was had between them.

The defendant contends that Smith, who executed the contract, was a special agent and that it devolves upon the person dealing with such an agent to acquaint himself with the extent of the agent's authority. Plaintiff claims under the facts in the instant case that Smith was not a special agent, but was a general agent. A general agent is one who is authorized to do all acts connected with a particular business or in a particular place, while a special agent is one who is empowered to act only in a specific transaction. (Stock Yards Co. v. Mallory, etc. Co., 187 Ill. 554, 562.) In Butler v. Maples, 76 U. S. 766, in discussing the distinction between a general and a special agent, the court said, p. 773;

from these amounts, but recently had been in low proportion, averaging in several cases figures; that the account had been conducted on a non-borrowing basis and they were not able to advise as to their financial affairs, and also introduced a letter from Associated Products Company, dated October 27, 1938, saying they were looking at plaintiff's credit or financial standing.

On the trial witness testified that Smith had no authority to sign and release contracts for the purchase of machinery, and that he had not approved the same.

The only conflict in the evidence was that Tager testified that Smith requested the order to be telegraphed to New York, which was denied by Smith. Smith testified that after he prepared the order he took it to Stewart's office and was standing in the vestibule to his desk, signed the order and told to Tager that the order was subject to approval of Mr. Stewart; that he is not in the office and he would arrange for the approval of it in the regular course of business. Tager testified that any such conversation was not possible.

The defendant contends that Smith, who received the order, was a special agent and that it devolves upon the person dealing with such an agent to ascertain himself with the extent of the agent's authority. Plaintiff claims under the facts in this case that Smith was not a special agent, but was a general agent. A general agent is one who is authorized to do all acts connected with a particular business or in a particular place, while a special agent is one who is authorized to act only in a specific transaction. (Smith v. Tager, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

"The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents - one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only."

In Mechem on Agency (2nd) Section 246, the author says that:

" * * * it may be stated as a general rule that whenever a person has held out to another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity; - whether it be in a single transaction or in a series of transactions - his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority."

The act of a general agent to transact all the business of his principal, of a particular kind, will bind the principal so long as the agent keeps within the scope of his authority, though he may act contrary to his private instructions. (Noble v. Nugent, 89 Ill. 523; The Home Life Ins. Co. v. Pierce, 75 id. 426.) Having in mind the admonition of the court in Loan v. Duncan, 17 Ill. 272, 274, in which it was said that the extent of the agent's authority, whether limited or unlimited, should not be confounded with the nature of the agency, whether general or special, it is clear from the evidence that plaintiff's president went to the place of business of the defendant, interviewed an information clerk or usher who knew to what buyer prospective sellers should be referred, and was referred to Smith,

"The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal is a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, and authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents - one to buy cotton, another to buy wool, and another to buy horses. He may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only."

In Neuman on Agency (2nd) Section 246, the author says that:

"* * * it may be stated as a general rule that whenever a person has held out to another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity; - whether it be in a single transaction or in a series of transactions - his authority to such other to be act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act so assumed to be, provided that such act was within the real or apparent scope of the presumed authority."

The act of a general agent to transact all the business of his principal, of a particular kind, will bind the principal so long as the agent keeps within the scope of his authority, though he may act contrary to his private instructions. (Mobile v. Bankers, 22 Ill. 582)

The East Hill Ice Co. v. Fierston, 78 Ill. 482, having in mind the assumption of the court in Leon v. Lincoln, 17 Ill. 373, 374, in which it was said that the extent of the agent's authority, whether limited or unlimited, should not be confounded with the nature of the agency, whether general or special, it is clear from the evidence that plain-
tiff's president went to the place of business of the defendant,
interviewed an information clerk or usher who knew to what buyer
prospective orders should be referred, and was referred to Smith,

who was one of twenty-seven or thirty buyers and assistant buyers, and sold him an order of goods, Smith drafting the contract on one of defendant's printed order forms and signing it in the name of the defendant, nothing appearing on the order form to indicate that the approval of any other person in the employ of the defendant was necessary. Applying the foregoing principles to the case before us we are compelled to the conclusion that Smith was defendant's general agent, authorized to act for the defendant in the purchasing of merchandise, plaintiff relying upon the appearance of authority with which defendant had clothed Smith, and having no notice of any limitation upon the apparent authority of Smith to execute the contract, the contract became binding upon the defendant and it cannot now be heard to deny, to the prejudice of plaintiff, the authority of Smith in that regard.

Furthermore, it is the duty of the principal to repudiate the act of his agent who has transcended his authority as soon as he is fully informed of what has been done in his name by his agent, otherwise it will be considered that the principal has ratified by implication the act of his agent. (Searing v. Butler, 69 Ill. 575, 578.) We are of the opinion there is evidence in the record of a ratification of the contract.

We have considered the arguments of defendant's counsel that it was error to deny defendant's motion for a directed verdict. It has repeatedly been held if there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the statement of claim have been proven, a verdict should not be directed. At the conclusion of the plaintiff's case there was sufficient evidence in the record warranting the trial court in submitting the case to the jury and the motion was properly denied.

The next point raised by defendant is that the court erred

who was one of twenty-seven or thirty buyers and assistant buyers, and sold him an order at goods, which he took the contract on the at defendant's printed order form and signing it in the name of the defendant, nothing appearing on the order form to indicate that the approval of any other person in the employ of the defendant was necessary. Applying the foregoing principles to the case before us we are compelled to the conclusion that such was defendant's general agent, authorized to act for the defendant in the purchasing of merchandise, plaintiff's relying upon the appearance of authority with which defendant had clothed Smith, and having no notice of any limitation upon the apparent authority of Smith to execute the contract, the contract became binding upon the defendant and it cannot now be heard to deny, to the prejudice of plaintiff, the authority of Smith in that regard.

Furthermore, it is the duty of the defendant to designate the act of his agent and has recommended his authority as such to be in fully authorized to act as such agent in its name as its agent, otherwise it will be considered that the principal has ratified by implication the act of his agent. (Scott v. Bailey, 80 Ill. 575, 172.) We are of the opinion there is evidence in the record of a ratification of the contract.

We have considered the arguments of defendant's counsel that it was error to deny defendant's motion for a directed verdict. It has repeatedly been held there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material elements of the statement of claim have been proven, a verdict should not be directed. In the conclusion of the plaintiff's case there was sufficient evidence in the record warranting the trial court in submitting the case to the jury and the motion was properly denied.

The next point raised by defendant is that the court erred

in not sustaining plaintiff's objection to the offer of proof concerning an alleged custom. It appears from the record that while Pritchard Stewart was on the stand he was asked if he knew whether there is a general custom in the City of Chicago in department stores and concerns such as defendant's regarding the authority of buyers to bind their principal without the approval of a supervisor, to which an objection was sustained, defendant's counsel then said: "I offer to prove that there was at that time a general custom in the City of Chicago among department stores and other concerns of the nature of business of the defendant employing buyers and assistant buyers in various departments that such so-called buyers and assistant buyers had no authority to make purchases without the approval and confirmation of a supervisor or general manager of purchases." The court did not err in sustaining these objections. The proper office of a custom or usage in business is to ascertain and explain the intent of the parties, but it cannot be against an established principle of law (Bissell v. Ryan, 23 Ill. 517), and it is not admissible to vary the terms of a contract. (Klaub v. Vohoun, 169 Ill. App. 434.) Moreover, neither the question nor offer of proof specified what type of contracts were referred to, or that there was any similarity between the business of the defendant and of department stores and the question and offer of proof were indefinite and uncertain; nor was there an offer of proof that the custom or usage was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. (Papin v. Goodrich, 103 Ill. 86, 93.)

It is also contended that it was error to reject evidence of written and verbal instructions given by the defendant in the form of general rules for all buyers and in the form of specific verbal instructions to Smith. We are of the opinion that the court did not err in sustaining the objection, as Smith was held out by the

It was submitted that the offer of proof was not sustained. It appears from the record that while the witness was on the stand he was asked if he knew whether there is a general custom in the City of Chicago in department stores and concerns such as defendant's regarding the authority of buyers to bind their principal without the approval of a supervisor, to which an objection was sustained. Defendant's counsel then said: "I offer to prove that there was at that time a general custom in the City of Chicago among department stores and other concerns of the nature of business of the defendant employing buyers and assistant buyers in various departments that such so-called buyers and assistant buyers had no authority to make purchases without the approval and consent of a supervisor or general manager of purchases." The court did not sit in sustaining these objections. The proper office of a custom or usage in business is to ascertain and explain the intent of the parties, but it cannot be adopted as established principle of law (Smith v. Ryer, 22 Ill. 517), and it is not admissible to vary the terms of a contract. (Smith v. Ryer, 22 Ill. 517). However, neither the question nor offer of proof specified what type of contracts were referred to, or that there was any similarity between the business of the defendant and of department stores and the question and offer of proof were indefinite and ambiguous; nor was there an offer of proof that the custom or usage was uniform, long established, generally recognized in, and so well known as to induce the belief that the parties contracted with reference to it. (Smith v. Ryer, 22 Ill. 517, 52.) It is also submitted that it was error to reject the offer of written and verbal instructions given by the defendant in the form of general rules for all buyers and in the form of specific verbal instructions to Smith. As one of the questions was asked the court did not sit in sustaining the objection, an Smith was held entry the

defendant and acted in the capacity of general agent and plaintiff having no knowledge of any limitations of Smith's authority, defendant was bound even though according to these instructions Smith may have transcended his authority. (St. L. & M. P. Co. v. Parker, 59 Ill. 23; The Home Life Ins. Co. v. Pierce, 75 id. 426, 434; Swisher v. Palmer, 106 Ill. App. 432, 436), and the principal will not be permitted to deny that the agent was authorized to do the act he assumed to do. (Faber-Musser Co. v. Lee Clay Co., 291 Ill. 240.)

It is next claimed that the court erred in refusing to instruct the jury that the burden was not upon defendant. We do not believe the court erred in this regard as the court did instruct the jury that the burden was upon plaintiff and that it could not recover unless it proved its case by a preponderance of the evidence.

It is also urged that the court erred in instructing the jury. The court instructed the jury orally. After the reading of the instructions, the bill of exceptions shows that defendant's counsel before the retirement of the jury objected to the two instructions that will be discussed later in this opinion. However, he made no specific objections to the instructions. Objections to the jury of oral instructions must be specific. (Grollman v. Lake Geneva Piano Stool Co., 147 Ill. App. 332; The Baldwin Co. v. Paley, 161 id. 300; Howe v. Fulton, 225 id. 589, and Pecararo v. Halberg, 246 Ill. 95.) We have, however, considered the court's charge.

The court in its charge said "though a principal is not bound by the unauthorized act of his agent, that he is bound by every act on his part which gives his agent an apparent authority upon which other persons rely to do the act, the validity of which may be in question." It is insisted that this instruction is uncertain and misleading and our attention is called to the pronoun "his" in the clause "he is bound by every act on his part" and it is claimed the

jury would understand that while the principal is not bound by his agent's unauthorized act, that he is bound by his agent's act which gave the appearance of authority on which others relied to do the act. It is clear to us that the instruction refers to acts on the part of the principal which gave his agent the apparent authority. It is also argued that there is no evidence of any act or conduct on the part of the defendant which gave Smith an apparent authority to sign contracts. There was evidence upon which to base this instruction and it was not error to give it.

It is also urged that it was error for the court to tell the jury that it was not necessary for plaintiff to show any express authority in Smith to purchase goods to render the defendant liable, if the goods in question were purchased by Smith in the general course and conduct of the business of the defendant and the defendant knew Smith was acting as its purchasing agent and the goods were purchased by Smith for use in the defendant's business. The argument advanced is that the instruction is tantamount to an instruction to find the issues for plaintiff; that the instruction did not require that the knowledge on the part of defendant should have been prior to the time of the act in question and that there was no evidence that the defendant previously knew Smith was acting as a purchasing agent. We think the instruction stated the law correctly and that there was evidence tending to show that Smith was acting as defendant's purchasing agent.

For the reasons stated the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, J., and Scanlan, J., concur.

any would understand that while the principal is not bound by his agent's unauthorized act, that he is bound by his agent's act which gave the appearance of authority on which others relied to do the act. It is clear to us that the instruction refers to acts on the part of the principal which gave his agent the appearance of authority. It is also argued that there is no evidence of any act or conduct on the part of the defendant which gave Smith an appearance of authority to sign contracts. There was evidence upon which we based this instruction and it was not error to give it.

It is also urged that it was error for the court to tell the jury that it was not necessary for plaintiff to show any express authority in Smith to purchase goods to render the defendant liable. If the goods in question were purchased by Smith in the general course and conduct of the business of the defendant and the defendant knew Smith was acting as its purchasing agent and the goods were purchased by Smith for use in the defendant's business. The argument is that the instruction is tantamount to an instruction to find the issue for plaintiff; that the instruction did not require that the knowledge on the part of defendant should have been that at the time of the act in question and that there was no evidence that the defendant previously knew Smith was acting as a purchasing agent. We think the instruction stated the law correctly and that there was evidence tending to show that Smith was acting as defendant's purchasing agent.

For the reasons stated the judgment of the Municipal

court is affirmed.

WITNESSED my hand and seal of office at St. Louis, Mo., this 10th day of June, 1908.

JOHN W. HAYES, J. C. CLERK.

IT IS ORDERED that the judgment of the Municipal Court be affirmed.

WITNESSED my hand and seal of office at St. Louis, Mo., this 10th day of June, 1908.

JOHN W. HAYES, J. C. CLERK.

35104

ISAAC K. GOODMAN,
(Plaintiff),
Appellee,

v.

MARGARET ERNST,
(Defendant),
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2622 A. 635⁵

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

An action was brought by plaintiff against defendant to recover \$900, alleged to be due upon an account stated. The case was tried by the court without a jury, finding for plaintiff, damages assessed at \$900, upon which judgment was entered and defendant brings the record here for review by appeal.

The plaintiff is an attorney at law and his statement of claim sets forth that his claim is for professional services rendered to defendant as follows:

"March 6, 1930: Conference and examination of documents of Arthur Ernst, Deceased, husband of defendant and with reference to her legal rights.

"March 7, 1930, Attendance at Kaspar American State Bank re: Estate and will of Arthur Ernst, Deceased.

"March 8, 1930, Notice to Travelers Insurance Company re: death of insured on accounts policies Nos. S. D. 120554 and 1387586. Also notices to Rockwood Company of said claim. Notice to Atlas Brewing Company re: compensation claim under Employment Statute of Illinois. * * * that the reasonable, usual and customary fees for the services rendered is \$900.00. Plaintiff alleges an account stated * * * between plaintiff and defendant May 31st, 1930 for the sum of \$900.00."

The affidavit of merits states inter alia that the conference of March 6, 1930, and the attendance at the Kaspar American State Bank on March 7, 1930, occupied less than three hours of the plaintiff's time; that the insurance claims were paid to defendant direct without intervention of plaintiff or other attorneys, except

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• (continued)

THE UNIVERSITY OF CHICAGO

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THE UNITED STATES DEPARTMENT OF THE INTERIOR

damages assessed at \$200, upon which judgment was entered and was paid by the party without a jury, finding for plaintiff. The case was reversed \$200, allowed to be due upon an account stated. The case was brought by plaintiff against defendant to

document in his way to present as of this date only

... ..

100-443887-100

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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Letter of March 6, 1930, and the statement of the Kansas American
State Bank on March 7, 1930, accepted less than three years of the
plaintiff's time; that the insurance claim was paid to defendant
after a full investigation of plaintiff by other attorneys, except

that plaintiff wrote a letter to each of said companies; that no services were rendered by plaintiff in the matter of the compensation claim which was handled without participation by plaintiff; that \$900 is not a reasonable, usual and customary fee for the services rendered by plaintiff and that defendant has paid plaintiff \$250 which is greatly in excess of the reasonable, usual and customary fee for the services rendered by plaintiff, and denies that there was an account stated between the plaintiff and defendant and denies that defendant is indebted to plaintiff in any sum.

The controlling material facts are that plaintiff is an attorney at law and on March 6, 1930, was informed by defendant that her husband had been killed and requested him to call at her home and inquire into the question of collecting the insurance upon the life of her husband; he called and examined papers in her possession. The following day the parties met at a bank, obtained two life insurance policies which he examined and advised her they contained a double indemnity clause in case of death by accident. He notified the insurance companies of the claims on the policies and advised her she had a claim for compensation against the Atlas Brewing Company, her husband having suffered a fatal injury in their employ, and notified the brewing company of her claim. After plaintiff had written the brewing company, defendant was advised by the brewing company that it was not necessary for plaintiff to do anything in the matter as they would take care of it, and the brewing company did file the necessary application with the Industrial Board and had an award made and promptly paid. It also appears that after plaintiff had written the insurance company concerning the insurance policies he had a conference with a representative of the insurance company, who advised him the insurance company would have to investigate the death of Arthur Ernst. March 13th or 14th the adjuster for the insurance company, who was a nephew of defendant's

that plaintiff wrote a letter to each of said companies; that no services were rendered by plaintiff in the matter of the compensation claim which was handled without participation by plaintiff; that \$500 is not a reasonable, usual and customary fee for the services rendered by plaintiff and that defendant has paid plaintiff \$500 which is grossly in excess of the reasonable, usual and customary fee for the services rendered by plaintiff, and denies that there was an account stated between the plaintiff and defendant and denies that defendant is indebted to plaintiff in any sum.

The controlling material facts are that plaintiff is an attorney at law and on March 4, 1930, was informed by defendant that her husband had been killed and requested him to call at her home and inquire into the question of collecting the insurance upon the life of her husband; he called and examined papers in her possession. The following day the parties met at a bank, obtained two life insurance policies which he examined and advised her they contained a double indemnity clause in case of death by accident. He notified the insurance companies of the claim on the policies and advised her she had a claim for compensation against the Atlas Insurance Company, her husband having suffered a fatal injury in their factory, and notified the Reading Company of her claim. Thereafter plaintiff had visited the Reading Company, defendant was advised by the Reading Company that it was not necessary for plaintiff to be employed in the matter as they would take care of it, and the Reading Company also file the necessary application with the Industrial Accident Board and had no more to be done and promptly paid. It also appears that after plaintiff had written the insurance company concerning the insurance policies he had a consultation with a representative of the insurance company, who advised him the insurance company would have to investigate the facts of the death of John Brown. March 18th or 19th the attorney for the insurance company, who was a nephew of defendant's

husband, brought defendant a check for \$10,000 and told her the company would have to investigate the balance of the claim in the regular way and not to worry. This adjuster prepared the necessary papers for the settlement of the insurance claim. April 8, 1930, plaintiff requested a retainer and she paid him \$250. April 15, she received a check from the insurance company for the balance of her claim; defendant was advised of that fact and on April 20 sent her a bill for \$2530. There was evidence on behalf of the plaintiff to the effect that on May 31st the defendant called to see plaintiff and said she came to make a settlement and would pay plaintiff \$900 which the plaintiff said he would accept, but this was denied by the defendant.

It is insisted that plaintiff cannot recover on the evidence for the reason that no contract for compensation having been entered into prior to plaintiff being retained by defendant as her attorney, any charge for such services must be shown to be fair and reasonable.

After considering the evidence we think it clear on reason and authority that there is merit in this contention. On the trial plaintiff rested his case entirely upon the proof of an account stated without attempting to show the value of his services, and the trial court assumed that that was the only issue in the case. The law is well settled, where no fiduciary relation exists between the parties, any admission of a balance or acknowledgment made by one party to another that a sum is due to the latter, no fraud, mistake or misrepresentation being shown, is sufficient prima facie evidence to prove an account stated. (Shane v. DeLeon, 258 Ill. App. 435.) In the instant case it is claimed that May 31, 1930, defendant agreed to pay plaintiff \$900 for the services rendered her; from March 6, 1930 to May 31, 1930, the relation of attorney and client existed between the plaintiff and the defendant. Under such circumstances an attorney will not be allowed to receive from his client, or bind

...brought defendant a check for \$10,000 and told her the company would have to investigate the balance of the claim in the regular way and not to worry. This defendant prepared the necessary papers for the settlement of the insurance claim. April 8, 1930, plaintiff requested a retainer and she paid him \$250. April 12, she received a check from the insurance company for the balance of her claim; defendant was advised of that fact and on April 20 sent her a bill for \$250. There was evidence on behalf of the plaintiff to the effect that on May 1st the defendant called to see plaintiff and said she came to make a settlement and would pay plaintiff \$200 which the plaintiff said he would accept, but this was denied by the defendant.

It is insisted that plaintiff cannot recover on the oral contract for the reason that no contract for compensation having been entered into prior to plaintiff being retained by defendant as her attorney, any charge for such services must be shown to be fair and reasonable.

After considering the evidence we think it clear on reason and authority that there is merit in this contention. On the trial plaintiff rested his case entirely upon the proof of an account stated without attempting to show the value of his services, and the trial court assumed that that was the only issue in the case. The law is well settled, where no fiduciary relation exists between the parties, any admission of a balance or acknowledgment made by one party is another that a sum is due to the latter, no fraud, mistake or misrepresentation being shown, is sufficient prima facie evidence to prove an account stated. (Shank v. Pollock, 200 Ill. App. 433.) In the instant case it is claimed that May 21, 1930, defendant agreed to pay plaintiff \$200 for the services rendered her; from March 2, 1930 to May 21, 1930, the relation of attorney and client existed between the plaintiff and the defendant. Under such circumstances an attorney will not be allowed to receive from his client, or dish

his client to pay him greater compensation for his services than he would have a right to demand if no contract had been made during the relation, and such a contract will not be enforced unless it is shown to be fair and reasonable. (Cassem v. Muestis, 201 Ill. 208, 232.) The rule is a just one and imposes no unreasonable burden upon the attorney; the reason for the rule is that the relations between an attorney and client are so confidential and the client relies so fully upon his attorney for the protection of his legal rights, and is by the nature of the relation so subject to the advice of the attorney, that in all such contracts the attorney cannot rely on the fact of the agreement itself, but is compelled by law to show in addition thereto that the contract is fair and reasonable and that the client was fully informed of all the facts which enable him to judge its fairness and reasonableness. (Cooper v. Conklin, 139 N. Y. 3. 352.) In Elmore v. Johnson, 143 Ill. 513, 525, the court said:

"The reason for the doctrine is to be found in the nature of the relation, which exists between attorney and client. That relation is one of confidence, and gives the attorney great influence over the actions and interests of the client. In view of this confidential relation, transactions between attorney and client are often declared to be voidable, which would be held to be unobjectionable between other parties. The law is thus strict, 'not so much on account of hardship in the particular case, as for the sake of preventing what might otherwise become a public mischief.' * * * Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm's length. * * * But the law watches with unusual jealousy over all transactions between the parties, which occur while the relation exists."

For the reasons stated in this opinion the judgment of the Municipal court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

his effort to pay him greater compensation for his services than he would have a right to demand if no contract had been made during the relation, and such a contract will not be enforced unless it is shown to be fair and reasonable. (Casper v. Wheeler, 201 Ill. 202, 203.)

"The reason for the holding is to be found in the nature of the relation, which exists between attorney and client. That relation is one of confidence, and gives the attorney great influence over the actions and behavior of the client. In view of this confidential relation, immunities between attorney and client are often granted to be voluntary, which would be no longer the case if the law is strict, not so much as in the past. In the past, the law was strict, as for the sake of protection of the public, because a client might be misled. * * * Before the attorney was not in the business of the client, he was content with reference to his services, because no confidential relation then existed and the parties dealt with each other as equals. * * * But the law withdrew with unusual liberality over all immunities between the parties, when during the relation existed."

For the reasons stated in this opinion the judgment of the court will be reversed and the cause remanded for a new trial.

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35144

MAURICE KLEIN,
(Plaintiff),
Appellee,

v.

GUARANTY FIRE INSURANCE
COMPANY, a corporation,
(Defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2621A. 656'

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Maurice Klein sued the Guaranty Fire Insurance Company, a corporation, in a fourth class action. Tried by the court without a jury. Finding for plaintiff for \$177.13 and judgment for that amount against the defendant, from which defendant appealed. The plaintiff has not appeared or filed a brief in this court.

The statement of claim sets forth in substance that the action is brought upon a draft, which is dated at Providence, R. I., September 23, 1930, directed to the defendant at Providence, R. I., as drawee, and reads:

"Upon acceptance, Pay to the order of

Joe Siegal

the sum of One Hundred Seventy Five & 00/100 - Dollars \$175.00 in full satisfaction and discharge of all claims for loss and damage by fire to property insured under Policy No. 254929 issued at Chicago, Illinois Agency of said Company and occurring on the 12th day of July, 1930. In consideration of said payment, said policy is hereby reduced in said amount.

R. P. Ketcham, Sec.

(Industrial Trust Co. Providence RI
(Rhode Island Hospital Trust Co.)

On the reverse side appear the names of Joe Siegal and Maurice Klein.

Plaintiff further alleged that he was the owner and holder of the draft, in due course, for valuable consideration, without notice of any infirmities; that he acquired title thereto on September 26,

1934

CHICAGO, ILL.

WILLIAM KLEIN
(Plaintiff)

vs.
THE CHICAGO TRUST CO.

CHICAGO TRUST CO.

CITY OF CHICAGO

262 I.A. 656

CHICAGO TRUST CO.
(Defendant)

THE CHICAGO TRUST CO. PLAINTIFF THE CHICAGO TRUST CO.

WILLIAM KLEIN and the Chicago Trust Insurance Company,

a corporation, in a certain class action, filed in the court

without a jury. The plaintiff has alleged that the defendant

for their account against the defendant, the plaintiff has

alleged. The plaintiff has not alleged that it is a party to

this court.

The plaintiff of claim was filed in the court on

the action is brought upon a writ, which is called a writ of

in the court on the 12th day of the month of January, 1934.

in the court, and the writ

Upon the plaintiff, the writ is

the writ

the sum of One hundred dollars Five & 00/100 -

Dollars \$118.00 in full satisfaction and discharge of

all claims for loss and damage by fire or property in-

ured under policy No. 12345 issued to Chicago, Illinois

Agency of said company and occurring on the 12th day of

July, 1933. In consideration of said payment, said

policy is hereby returned to said company.

W. L. KLEIN, 262

CHICAGO TRUST CO. (Plaintiff)

CHICAGO TRUST CO. (Plaintiff)

in the reverse side appear the names of the legal and William Klein.

Plaintiff further alleged that he was the owner and holder of the

trust, in the court, for valuable consideration, without notice of

any interest in the property and he alleged that he received the same on September 25,

1930, and was the actual bona fide owner thereof; that said draft was presented for payment and payment thereof was refused.

On the trial plaintiff testified he received the instrument from Joe Siegal some time in September, 1930, for a valuable consideration; that he left it at his bank and three weeks later it was returned to him unpaid. The instrument was then offered in evidence. Attached to it was an instrument purporting to be made by a notary public, commissioned in the city of Providence, R. I., that on October 1st he (the alleged notary public) presented the instrument at the office of Guaranty Fire Insurance Company for payment and payment was refused. The defendant objected to the introduction of the instrument and the statement of the notary public on the ground, among others, that there was no proof of acceptance of the draft, which objection the court overruled. Plaintiff rested and the defendant moved the court to find the issues for the defendant, which motion the court overruled.

Defendant contends that the instrument sued on is not negotiable, but is a mere chose in action under which defendant could not acquire any greater rights than the payee, Joe Siegal, had. We are of the opinion it is correct in its contention. It is a requisite of commercial paper that it must be payable absolutely and at all events. If the payment is made dependent upon any contingent event, the instrument ceases to be commercial paper. In order to be negotiable the paper must be unconditional. (Clause 2, sec. 1, par. 21, ch. 98, Cahill's Revised Stats. 1931, p. 1931; Baird v. Underwood, 13 Ill. 604; Novorka v. Kemmer, 108 Ill. App. 443; National Council, etc. v. Hibernian Banking Ass'n, 137 Ill. App. 175; Kingsbury v. Wall, 68 Ill. 311.) In Van Sandt v. Hopkins, 151 Ill. 248, the action was upon an instrument whereby the makers promised to pay \$5,000, but a memorandum below the signature stated that a certain certificate of stock was to be surrendered on payment

of the note, it was held the note was not an unconditional promise to pay, and therefore was not a negotiable instrument. In Husband v. Epling, 81 Ill. 172, the instrument sued upon provided for the payment of a certain sum of money to be paid when the estate of a person named was settled up, and it was held that the instrument was not a negotiable instrument. In Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172, the instrument was directed to the defendant and provided "upon acceptance, etc." The court held the instrument not having been accepted it never became a complete and operative contract and that it was not a negotiable instrument. A similar instrument was involved in General Fire Assurance Co. v. State Bank, 164 N. Y. S. 871, providing "upon acceptance, etc.," the court, on page 873, said: "Whether the paper in question is regarded as a check or as a draft, it has no validity, force, or effect whatever until it was accepted * * * ."

The instrument in the instant case is payable only upon acceptance. Acceptance by the defendant must necessarily be alleged and proved in order to entitle the plaintiff to recover on the instrument, the money, then, is not to be paid absolutely, but only on acceptance, so the writing lacks that element necessary to negotiability, payment at all events of a sum certain, at a time certain. Until the defendant did accept it, it was incomplete, and was not a contract by which the defendant agreed to pay the amount named in the instrument and action thereon could not be maintained.

The trial court should have found the issues for the defendant as a matter of law. The judgment is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

of the note, it was held the note was not an unconditionally payable
to pay, and therefore was not a negotiable instrument. In Harvard v.
Exline, 81 Ill. 178, the instrument sued upon provided for the pay-
ment of a certain sum of money to be paid when the estate of a person
named was settled up, and it was held that the instrument was not a
negotiable instrument. In Harvard v. Exline, 81 Ill. 178,
801 Mass. 178, the instrument was directed to the executor and
provided "upon acceptance, etc." The court held the instrument was
having been accepted it never became a complete and operative contract
and that it was not a negotiable instrument. A similar instrument was
issued in Harvard v. Exline, 81 Ill. 178, 801 Mass. 178, and
providing "upon acceptance, etc." The court, on page 875, said:
"Hence, the paper in question is regarded as a check or as a draft,
it has no validity, force, or effect whatever until it was accepted."

The instrument in the instant case is payable only upon
acceptance. Acceptance by the defendant was necessarily be alleged
and proved in order to entitle the plaintiff to recover on the instru-
ment, the money, then, is not to be paid absolutely, but only on
acceptance, so the writing lacks that element necessary to negotiability,
payment of all events of a sum certain, at a time certain. Until the
defendant did accept it, it was incomplete, and was not a contract by
which the defendant agreed to pay the named sum in the instrument
and action thereon could not be maintained.

The trial court should have found the law for the defend-
ant as a matter of law. The judgment is reversed.

Reversed.
J. J. and Benjamin, J., concur.

35206

L. T. ELLIS COMPANY,
a corporation, (plaintiff),
Appellee,

v.

JOHN HEYL, (defendant),
Appellant.

1867
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2621.A.656²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

In this case plaintiff, L. T. Ellis Company, obtained a judgment by confession against the defendant, John Heyl, for \$331.45. Subsequently he moved that the judgment be vacated and filed a verified petition in support of his motion, which was denied and defendant appealed.

The judgment was upon a promissory note for \$300 with the usual power of attorney to confess judgment, executed by defendant, dated July 24, 1930, to be paid in twelve monthly installments of \$25 each. The note was payable to his order and by him indorsed, the installments bearing no interest until maturity. The installments were to be paid at the office of the plaintiff. The only evidence heard upon the motion consisted of the verified petition of the defendant and the admissions of his counsel in arguing the motion.

It appears from the petition and the admissions of defendant's counsel that July 24, 1930, defendant purchased a Ford automobile from Rangelcroft-Plotow, Inc., automobile dealers, on which, after a charge of \$12 for insurance premiums was made, he paid \$128 in cash, leaving a balance of \$259, and as part of the purchase price he executed the note in question and a conditional sale contract and the automobile was delivered to defendant;

AMERICAN TRUST COMPANY

COURT OF CHICAGO

282 I.A. 656

IN RE: THE ESTATE OF
JAMES HENRY (deceased),
Applicant.

V.
JOHN HENRY (defendant),
Appellant.

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff, J. T. Ellis Company, obtained a judgment by confession against the defendant, John Henry, for \$282.45. Subsequently he moved that the judgment be vacated and filed a verified petition in support of his motion, which was denied and defendant appealed.

The judgment was upon a promissory note for \$200 with two annual payments of principal in equal installments, secured by defendant, dated July 24, 1920, so as paid in twelve monthly installments of \$25 each. The note was payable to his order and by him indorsed, the installments bearing no interest until maturity. The installments were to be paid at the office of the plaintiff. The only evidence went upon the motion consisted of the verified petition of the defendant and the testimony of his counsel in support of the motion.

It appears from the petition and the testimony of defendant's counsel that on July 24, 1920, defendant purchased a Ford automobile from plaintiff-James Henry, a reputable dealer, on which, after a charge of \$15 for license, insurance and taxes he paid \$115 in cash, leaving a balance of \$200, and on part of the purchase price he executed the note in question and a conditional sales contract and the automobile was delivered to defendant.

the transaction was negotiated in the office of Rangescroft-Flotow, Inc. In order to pay the balance due on the purchase price of the automobile a loan was negotiated through Rangescroft-Flotow, Inc., in behalf of defendant with the plaintiff, and plaintiff loaned to defendant \$259. Defendant had no dealings with plaintiff with reference to the purchase of the automobile and all the terms of sale were agreed upon and the deal consummated with Rangescroft-Flotow, Inc.; that for a valuable consideration plaintiff received the note and conditional sale contract from Rangescroft-Flotow, Inc., and that the plaintiff is without a license from the Department of Trade & Commerce, as provided by ch. 74, par. 27, Cahill's Revised Statutes.

It is defendant's contention that plaintiff loaned defendant \$259 and obtained the note for \$300, the difference of \$41 being usurious interest and within the purview of the "Small Loan Act." This Act being ch. 74, par. 27, Cahill's Ill. Revised Statutes, 1931, p. 1731, provides that:

"It shall be unlawful to make any loan of money, credit, goods, or things in action in the amount or to the value of three hundred dollars (\$300) or less, whether secured of unsecured and charge, contract for, or receive a greater rate of interest than seven (7) per centum per annum therefor, without first obtaining a license from the Department of Trade and Commerce as herein provided."

To this contention plaintiff replied that as the defendant admitted in the trial court that the transaction was not a loan of money but was the purchase by the defendant of an automobile from a dealer under a time payment plan, the Small Loan Act was not applicable and cites Manufacturers Finance Trust v. Stone, 251 Ill. App. 414, in which it was held that it is ^{not} usury to buy a note in the course of business at a discount higher than the rate of interest allowed by law. We think that case is not in point, as it did not involve par. 27, ch. 74, Cahill's Ill. Revised Statutes, for the reason that the amount involved in that case was \$683, while the Act in question

the transaction was negotiated in the office of Hangerford-Wisner, Inc. In order to pay the balance due on the purchase price of the automobile a loan was negotiated through Hangerford-Wisner, Inc., in which of defendant with the plaintiff, and plaintiff loaned to defendant \$500. Defendant had no dealing with plaintiff with reference to the purchase of the automobile and all the terms of sale were agreed upon and the deal consummated with Hangerford-Wisner, Inc.; that for a valuable consideration plaintiff received the note and conditional sale contract from Hangerford-Wisner, Inc., and that the plaintiff is without a license from the Department of Trade & Commerce, as provided by ch. 74, par. 27, Cahill's Revised Statutes. It is defendant's contention that plaintiff loaned defendant \$500 and obtained the note for \$500, the difference of \$44 being defendant's interest and within the purview of the "small loan act". This act being ch. 74, par. 27, Cahill's Ill. Revised Statutes, 1927.

It shall be alleged to make for loan of money, credit, or value in action in the amount or to the value of three hundred dollars (\$300) or less, whether secured or unsecured and otherwise, contract for, or receive a greater rate of interest than seven (7) per annum per annum interest, without first obtaining a license from the Department of Trade and Commerce as herein provided.

It is this contention plaintiff repeats that as the defendant admitted in the trial court that the transaction was not a loan of money but was the purchase by the defendant of an automobile from a dealer under a time payment plan, the small loan act was not applicable and does not apply to the case.

It is not held that it is merely to pay a note in the course of business at a discount higher than the rate of interest allowed by law. We think that case is not in point, as it did not involve pay-
 ment involved in that case was \$200, while the act in question

is limited to loans, credits, goods or things in action in the amount or to the value of \$300 or less.

In considering motions of this character the trial court has considerable discretion, but in applying its discretion the controlling question is, whether the defendant has shown an equitable reason why his motion should be allowed. (Mumford v. Tolman, 157 Ill. 258; Moyses v. Schendorf, 238 id. 232; Barrow v. Phillips, 250 Ill. App. 587.) A petition of this sort is strictly construed against the pleader; it must state facts which constitute a meritorious defense and it must be examined with this rule in mind. (Mandel Bros. v. Cohen, 248 Ill. App. 186.) If the petition presented facts establishing an equitable reason why the motion should be allowed the court must permit the defendant to plead to the merits. In our opinion the petition, if true, did set up a defense. The petition is positive and unequivocal that Rangescroft-Flotow, Inc., negotiated the loan for defendant with plaintiff and that plaintiff actually loaned or advanced the money; that only \$259 was loaned while the note was for \$300 and that the difference of \$41 was usurious interest.

In view of this state of the record we are of the opinion that the court erred in refusing to open up the judgment. The judgment of the Municipal court is reversed and the cause remanded with directions to sustain the motion of the defendant to open up the judgment and for leave to plead.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Scanlan, J., concur.

is limited to loans, credits, goods or things in action in the amount or to the value of \$500 or less.

In consulting motions of this character the trial court

has considerable discretion, but in applying its discretion the

controlling question is, whether the defendant has shown an equitable

reason why his motion should be allowed. Winkler v. Talamo, 137

Ill. App. 2d 111, 287. Winkler v. Talamo, 137 Ill. App. 2d 111, 287.

A position of this sort is entirely consistent

against the plaintiff if there were facts which constituted a meritorious

defense and it must be examined with this rule in mind. Winkler v. Talamo, 137

Ill. App. 2d 111, 287. If the plaintiff presented facts estab-

lishing an equitable reason why the motion should be allowed the court

must permit the defendant to place its case. In our opinion

the plaintiff, if true, did set up a defense. The position is positive

and undisputed that Winkler v. Talamo, 137, constituted the loan for

settlement with plaintiff and that plaintiff actually loaned or

advanced the money; that only \$500 was loaned while the note was for

\$1000 and that the difference of \$500 was plaintiff's interest.

In view of this state of the record we are of the opinion

that the court erred in refusing to open up the judgment. The

judgment of the appellate court is reversed and the cause remanded

with directions to sustain the motion of the defendant to open up

the judgment and let leave be placed.

REVEREND AND HONORABLE JUSTICE OF THE COURT.

Delivered, P. J. and Honorable, J. J. corner.

col. 74

not involved

35267

1877
LOTTIE MYER,
(Plaintiff),

Appellee,

v.

G. L. ABBOTT,
(Defendant),

Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

262 I.A. 656³

MR. JUSTICE KENNER DELIVERED THE OPINION OF THE COURT.

On December 30, 1930, a judgment by confession was rendered in favor of plaintiff and against the defendant for \$2,949.45 upon four promissory notes aggregating \$2,473.42, payable to plaintiff, with the usual power of attorney to confess judgment, all dated August 20, 1929, and payable one year after date with interest at seven per cent per annum after date until paid. On January 2, 1931, defendant's motion, supported by her affidavit, that the judgment be vacated and set aside was denied; thereafter, on February 7, 1931, the affidavit was withdrawn. On March 14, 1931, the motion was renewed and again denied and from the order denying the motion defendant appealed.

In support of her motion made on March 14, 1931, defendant filed a verified petition, in which she alleged that at the time of the delivery of the notes defendant was not indebted to plaintiff in any sum of money or in any manner whatsoever and there was no consideration for the notes; that before and at the time of the execution of the notes the plaintiff stated to defendant that in view of the fact that defendant had no immediate relations plaintiff would like to be sure of getting something from the estate of defendant and suggested the giving of promissory notes,

SECRET

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COOK COUNTY

SECRET
11/1/51

IN RE: JAMES EARL RAY, ALIAS; THE UNITED STATES OF AMERICA, PLAINTIFF.

On December 20, 1950, a judgment by confession was rendered in favor of plaintiff and against the defendant for \$12,947.42 upon four promissory notes aggregating \$12,947.42, payable to plaintiff, with the usual power of attorney to enforce judgment, all dated August 20, 1948, and payable one year after date with interest at seven per cent per annum after date until paid. On January 2, 1951, defendant's motion, supported by her affidavit, that the judgment be vacated and set aside was denied; thereafter, on February 7, 1951, the affidavit was withdrawn. On March 14, 1951, the motion was renewed and again denied and from the order denying the motion defendant appealed.

In support of her motion made on March 14, 1951, defendant filed a verified petition, in which she alleged that at the time of the delivery of the notes defendant was not indebted to plaintiff in any sum of money or in any manner whatsoever and there was no consideration for the notes; that before and at the time of the execution of the notes the plaintiff endeavored to defendant that in view of the fact that defendant had no immediate relation plaintiff would like to be sure of getting something from the estate of defendant and suggested the giving of promissory notes.

which defendant did, upon the express agreement and understanding that they were not to be treated by plaintiff as an obligation on the part of defendant unless defendant predeceased plaintiff.

It appears from the record, that at the time of the execution of the notes there were certain blank spaces in which had since been inserted the words, "I", "me", and "my" and "reasonable". The defendant claims that the filling in of the blank spaces in the notes with the words, "I", "me", "my" and "reasonable" after execution constituted a material alteration of the notes and annulled the power of attorney to confess a judgment. Such is not the law. (See section 14, par. 34, ch. 98, Cahill's Revised Stats. 1931; Packer v. Roberts, 140 Ill. 9; Schnitzer v. Kramer, 268 id. 603; White v. Alward, 35 Ill. App. 195, and Harris Trust & Savings Bank v. Neighbors, 222 Ill. App. 201.)

It is also contended that the petition sets up a good defense. In considering motions of this character the trial court has considerable discretion, but in applying its discretion the controlling question is, has the defendant shown an equitable reason why her motion should be allowed. (Mumford v. Tolman, 157 Ill. 258; Moyses v. Schendorf, 238 id. 232.) The petition filed in support of such a motion must be construed strictly against the pleader (Cressman v. Wohlleben, 90 Ill. 537; The Chicago Fire Proofing Co. v. Park National Bank, 145 id. 481, 487; Duddleson v. Eckhart, 134 Ill. App. 656; Mandel Bros. v. Cohen, 248 Ill. App. 184), and must be examined with this rule in mind, and basic facts must be alleged, conclusions of fact being ineffectual. (Davis v. BIRTH, 249 Ill. App. 544.) Facts should be stated that make out a meritorious defense, and not merely facts from which it is possible to infer such a defense (The Chicago Fire Proofing Co. v. Park National Bank, *supra*), and a bare statement that the note was without consideration is insufficient

unless accompanied by the facts which would show that there was in fact no consideration for the notes. (Parent Mfg. Co. v. Oil Products, etc. Co., 246 Ill. App. 222, 224.)

A note intended as a mere gift, executed without any valuable consideration can not form the ground of recovery in an action at law. A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future, and is not executed until the note is paid (Williams v. Forbes, 114 Ill. 167, 171; Richardson v. Richardson, 148 id. 563, 572); It is a mere promise to make a gift in the future (Shaw v. Camp, 160 id. 425, 429) and is without consideration. (Stump v. Dudley, 207 Ill. App. 587, 588.) While it is true that the statement that defendant at the time of the delivery of the notes was not indebted to plaintiff in any sum of money or in any manner whatsoever and there was no consideration for the notes, is a legal conclusion (Gilmore v. German Savings Bank, 39 Ill. App. 442, 444), it is obvious that that statement when read with the statement that before and at the time of the execution of the notes the plaintiff stated to defendant that in view of the fact that defendant had no immediate relations plaintiff would like to be sure of getting something from the estate of defendant and suggested the giving of the promissory notes, which the defendant did, upon the express agreement and understanding that they were not to be treated by plaintiff as an obligation on the part of defendant unless defendant predeceased plaintiff, is a statement accompanied by facts which show that there was, in fact, no consideration for the notes, and if true, presented facts establishing an equitable reason why the motion should be allowed and the court permit the defendant to plead to the merits.

For the reasons indicated the judgment of the Superior

which accompanied by the facts which would show that there was

in fact no consideration for the notes. (Parsons v. Williams, 100 Ill. App. 2d 111, 224.)

(Parsons v. Williams, 100 Ill. App. 2d 111, 224.)

A note intended as a mere gift, executed without any

valuable consideration can not form the ground of recovery in an

action of law. A gift is always revocable until it is executed,

and a promissory note, intended purely as a gift, is not a promise

to make a gift in the future, and is not enforceable until the note is

made (Williams v. Williams, 100 Ill. App. 2d 111, 224.)

100 Ill. App. 2d 111, 224. It is a mere promise to make a gift in the

future (Parsons v. Williams, 100 Ill. App. 2d 111, 224.) and is without consideration.

(Parsons v. Williams, 100 Ill. App. 2d 111, 224.) While it is true that

the statement that defendant at the time of the delivery of the notes

was not intended to plaintiff in any way of money or in any manner

whatsoever and there was no consideration for the notes, is a legal

conclusion (Parsons v. Williams, 100 Ill. App. 2d 111, 224.)

it is evident that defendant when he made the statement that

before and at the time of the execution of the notes the plaintiff

intended to defendant that in view of the fact that defendant had

no immediate relations plaintiff would like to be sure of getting

something from the estate of defendant and suggested the giving of

the promissory notes, which the defendant did, upon the express

agreement and understanding that they were not to be treated by

plaintiff as an obligation on the part of defendant unless defendant

expressed plaintiff, in a statement accompanied by facts which

showed that there was, in fact, no consideration for the notes, and if

such statement accompanied an equitable reason why the notes

should be allowed and the court permits the defendant to place the

burden of proof on the plaintiff. (Parsons v. Williams, 100 Ill. App. 2d 111, 224.)

court is reversed and the cause is remanded with directions to sustain the motion of the defendant to open up the judgment and for leave to plead, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Grifley, P. J., and Scanlan, J., concur.

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35290

JOHN W. WECCARD,
(Plaintiff),
Appellee,

v.

J. B. DICUS and BERTHA DICUS,
(Defendants),
Appellants.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

2621A.656

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of an order denying their motion to vacate a judgment entered against them.

A judgment by confession was rendered in favor of plaintiff and against the defendants for \$922.50, based upon defendants' promissory note for \$700, with the usual power of attorney to confess judgment, dated July 10, 1925, payable six months after its date to their order and by them indorsed, with interest at six per cent per annum after date until paid.

Upon examining the record it appears that the judgment was rendered February 17, 1930; that an execution was issued and served upon the defendant, J. B. Dicus, October 22, 1930, and that March 21, 1931, defendants made their motion to vacate the judgment. The competent material averments of the affidavit of J. B. Dicus in support of the motion are, that they executed the note and delivered it to H. H. Dicus, a brother of the defendant, J. B. Dicus, who had it in his possession at the time of his death; that H. H. Dicus died November 3, 1925; that A. G. Dicus, another brother, was appointed and qualified as executor of the last will of H. H. Dicus; that the note was not inventoried in his estate; that A. G. Dicus as executor assigned the note to Mabel Hoskins, daughter of H. H. Dicus, who

JOHN V. FLEMING
(Plaintiff),
vs.
J. E. FLEMING and GEORGE FLEMING,
(Defendants).
Appeals.

APPEALS FROM COUNTY COURT,
COCK COUNTY.

2621 A. 656

THE JUSTICE HEREBY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of an order denying their motion to vacate a judgment entered against them. A judgment by confession was rendered in favor of plaintiff and against the defendants for \$750.00, based upon defendants' promissory note for \$700, with the usual power of attorney to renew judgment, dated July 10, 1928, payable six months after its date to their order and by them endorsed, with interest at six per cent per annum after date until paid.

Upon examining the record it appears that the judgment was rendered February 17, 1929; that an execution was issued and served upon the defendants, J. E. Fleming, October 22, 1929, and that March 21, 1931, defendants made their motion to vacate the judgment. The competent material averments of the affidavit of J. E. Fleming in support of the motion are, that they executed the note and delivered it to J. E. Fleming, a brother of the defendant, J. E. Fleming, who had it in his possession at the time of his death; that J. E. Fleming died November 8, 1928; that A. G. Fleming, another brother, was appointed and qualified as executor of the last will of J. E. Fleming; that the note was not inventoried in his estate; that A. G. Fleming as executor assigned the note to Emanuel Mackinn, daughter of J. E. Fleming, who

indorsed it in blank and delivered it to plaintiff who never paid any consideration for it; that the administrator of the estate of Elizabeth Flavel claims his intestate is the owner of the note and entitled to receive and collect the same.

It is not claimed that the note was not given for a good and valuable consideration, or that the debt for which judgment was rendered was not a just debt and honestly due, or that there was any defense to the note upon its merits, the only contention of defendants is that plaintiff was not the legal owner and holder of the note and that defendants have the right to have judgment rendered against them in favor of the legal holder of the note, so as to become a bar to a future recovery on the same instrument.

It has repeatedly been held, that a court of law exercises an equitable jurisdiction over a judgment by confession; that if there is an absence of authority to confess, the debtor will not be forced into a court of chancery to obtain relief, but may move to set aside the judgment before the court of law which rendered it; and that such court of law may open the judgment and permit the debtor to present his defense, if he has any. Yet, such relief will not be granted, if it appears that the debtor owes the amount of the judgment, and has no defense, either legal or equitable, to the debt for which the judgment is rendered (Farwell v. Huston, 151 Ill. 239), and that motions of this character are addressed to the sound legal discretion of the trial court (Pearce v. Miller, 201 Ill. 183); the controlling question is, have the defendants shown an equitable reason why their motion should be allowed. (Mumford v. Tolman, 157 Ill. 258; Moyes v. Schendorf, 238 id. 232.) The affidavit filed in support of such a motion must be construed strictly against the affiant (Grossman v. Wohlleben, 90 Ill. 537; Chicago Fire Proofing Co. v.

assumed it in blank and delivered it to plaintiff who never paid
any consideration for it. That the administrator of the estate of
Miss. John Travel claims his interest in the owner of the note and
entitled to receive and collect the same.

It is not claimed that the note was not given for a good
and valuable consideration, or that the debt for which judgment
was rendered was not a just debt and honestly due, or that there
was any defense to the note upon its merits, the only contention of
defendants is that plaintiff was not the legal owner and holder of
the note and that defendants have the right to have judgment rendered
against them in favor of the legal holder of the note, so as to become
a bar to a future recovery on the same instrument.

It has repeatedly been held, that a court of law exercises
an equitable jurisdiction over a judgment by conclusion; that it
there is an absence of authority to conclude, the debt will not be
forced into a court of equity to obtain relief, but may move to set
aside the judgment before the court of law which rendered it; and
that such court of law may open the judgment and permit the debtor
to present his defense, if he has any. Yet, such relief will not be
granted, if it appears that the debtor owes the amount of the judg-
ment, and has no defense, either legal or equitable, to the debt for
which the judgment is rendered (Wheeler v. Wheeler, 121 Ill. 230), and
that sections of this character are addressed to the same legal dis-
cretion of the trial court (Wheeler v. Wheeler, 121 Ill. 130); the con-
trolling question is, have the defendants shown an equitable reason
why their motion should be allowed. (Wheeler v. Wheeler, 127 Ill. 230;
Wheeler v. Wheeler, 127 Ill. 230.) The plaintiff filed in support
of such a motion which he commenced against the plaintiff
(Wheeler v. Wheeler, 127 Ill. 230).

Park National Bank, 145 Id. 481, and Mandel Bros. v. Cohen, 248 Ill. App. 183), and must be examined with this rule in mind and basic facts must be alleged, conclusions of fact being ineffectual. (Davis v. Wirth, 249 Ill. App. 544.)

The note is payable to the defendants and by them indorsed. Title to such a note passes by delivery. (Sec. 9, par. 29, and sec. 30, par. 50, ch. 98, Cahill's Revised Stats. 1931, pages 1951 and 1953.) The plaintiff had possession of the note and brought it into court and filed it, surrendering possession of it to the court, and caused it to be merged in the judgment in the instant case. Under such circumstances he will be presumed to be the equitable owner of the note, in the absence of any showing to the contrary. (Gilmore v. German Savings Bank, 89 Ill. App. 442; Harris Trust & Savings Bank v. Neighbors, 222 Ill. App. 201.)

It is obvious that the affidavit states the conclusions of the pleader, the statements that the administrator of the estate of Elizabeth Flavel claims he is the owner of the note and entitled to receive and collect it and that plaintiff paid no consideration for it are but legal conclusions. The sources or grounds of the pleader's information are not stated. No facts are set forth upon which such statement could be founded. Facts should be stated which make out a meritorious defense. (Chicago Fire Proofing Co. v. Park National Bank, supra.) The affidavit should have set forth such facts as would have established the fact that the plaintiff was not the owner. (Harris Trust & Savings Bank v. Neighbors, 222 Ill. App. 201, 204.)

No legal ground for vacating the judgment appears from the record. The judgment of the County court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

First National Bank, 146 N. 4th St., and Merchants Bank, 146 N. 4th St.

111. App. 188, and must be examined with this rule in mind and
which facts must be alleged, conclusions of fact being inferential.

First v. First, 146 N. 4th St., 188.

The note is payable to the defendant and by their instrument.

Title is such a note payable by delivery. (Sec. 8, par. 27, and sec.

88, par. 20, ch. 28, Civil Code, 1888. Sec. 1881 and

1882.) The plaintiff had possession of the note and assigned it into

court and filed it, withdrawing possession of it as the court, and

which it is to be noted in the judgment in the instant case. Under

such circumstances he will be presumed to be the equitable owner of

the note, in the absence of any showing to the contrary. (Harris v.

First National Bank, 146 N. 4th St., 188.

First v. First, 146 N. 4th St., 188.

It is obvious that the plaintiff placed the conclusion of

the plaintiff, the statement that the defendant of the note of

plaintiff travel claim he is the owner of the note and entitled to

receive and collect it and that plaintiff paid no consideration for it

are not legal conclusions. The answer or grounds of the plaintiff's

information are not stated. No facts are set forth upon which such

statement could be founded. Facts should be stated which make out a

willful statement. (Chicago Fire Insurance Co. v. First National Bank,

1888.) The plaintiff should have set forth such facts as would have

established the fact that the plaintiff was not the owner. (Harris

First v. First, 146 N. 4th St., 188.)

No legal ground for setting the judgment aside from the

record. The judgment of the County court is affirmed.

APPROVED.

First v. First, 146 N. 4th St., 188.

34703

P. F. CUNNINGHAM,
Appellant,

v.

O. C. JUDGE,
Appellee.

1897
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

2521A, 656⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

P. F. Cunningham, plaintiff, filed, in the Superior court of Cook county, what is called a "Submission to Arbitration." He also filed what purports to be an award of arbitrators, upon a contract of submission between plaintiff and defendant, upon which he asked judgment. The cause was tried by the court and the issues were found for the defendant. Plaintiff has appealed from a judgment entered upon the finding.

The plaintiff and the defendant entered into a written contract, dated November 9, 1922, by the terms of which the plaintiff agreed to furnish labor and material in the construction of a building for the defendant, for which the defendant agreed to pay the plaintiff \$6,700. The plaintiff claims that he furnished the labor and material in accordance with the terms of the contract and that by the order of the defendant and his architect he also furnished extras amounting to \$2,350.24; and that the defendant paid him \$6,568.58, leaving a net balance of \$2,482.26 due him from the defendant. On April 11, 1924, the plaintiff and the defendant entered into a written contract, which recites (inter alia) that a dispute had arisen between them in connection with their original contract, and the parties agree "to submit all controversies and differences between them to arbitration, said arbitration to be

V. F. THOMPSON, Plaintiff,

v.

O. C. LEWIS, Defendant.

MR. JUSTICE SEAGLE DELIVERED THE OPINION OF THE COURT.

2521 A. 556

COOK COUNTY.

APPEAL FROM JUDICIAL COUNCIL.

[Handwritten signature and notes]

... V. F. Thompson, Plaintiff, filed, in the Superior Court of Cook County, what is called a "Petition for Arbitration." He also filed what purports to be an award of arbitrators, upon a contract of arbitration between plaintiff and defendant, upon which he asked judgment. The award was filed by the court and the issues were found for the defendant. Plaintiff has appealed from a judgment entered upon the finding.

The plaintiff and the defendant entered into a written contract, dated December 8, 1922, by the terms of which the plaintiff agreed to furnish labor and material in the construction of a building for the defendant, for which the defendant agreed to pay the plaintiff \$2,700. The plaintiff claims that he furnished the labor and material in accordance with the terms of the contract and that by the order of the defendant and his architect he also furnished extra amounts to \$2,700.00 and that the defendant paid him \$2,000.00, leaving a net balance of \$700.00 due him from the defendant. On April 11, 1924, the plaintiff and the defendant entered into a written contract, which recites (in its original) that and which between them in connection with their original contract, and the parties agree "to submit all controversies and differences between them to arbitration, said arbitration to be

made under the terms of their contract, and under the provisions of the Statutes of the State of Illinois governing arbitrations and awards, upon the following terms and stipulations, to wit: Said O. C. Junge had selected Joe Bruno as arbitrator, the said F. F. Cunningham had selected Edward Chouinard. That said arbitrators should meet at once and agree in writing upon a third arbitrator." These two arbitrators agreed upon M. F. Riley as the third arbitrator. On May 16, 1924, two of the arbitrators, Riley and Chouinard, signed an award, which recites, inter alia, that "we have heard the matter in controversy and considered such testimony and exhibits as the parties have submitted to us, and find that under the terms and conditions of said contract there is due from the said O. C. Junge to the said F. F. Cunningham, \$2,432.26, and that said amount should be paid to him by the said O. C. Junge forthwith under the terms of the aforesaid contract without any deductions therefrom." This award was not paid and in August, 1924, the plaintiff commenced, in the Circuit court of Cook county, a common law suit against the defendant, although the contract for arbitration provided for arbitration under the provisions of the Illinois statute governing arbitrations and awards, and also provided that unless the award was promptly complied with proceedings to enforce the same should be "filed in the Superior Court of Cook County, any chancellor of which court is hereby nominated to enforce the terms of said award according to the statute in such case made and provided." From the plaintiff's affidavit of claim it appears that this Circuit court suit was based upon the award of 1924. The defendant pleaded the general issue and filed notice of special matters of defense, which stated, inter alia, that under the terms of submission an award could not be made the subject of a suit at law and that proceedings to enforce the same could only be filed in the Superior court; that the arbitrators never qualified as required by the statute and that no evidence was heard by them. It appears that this cause in the

made under the terms of their contract, and under the provisions of the Statutes of the State of Illinois governing arbitrations and awards, upon the following terms and conditions, to wit: Said O. C. Lange had selected Joe Lyons as arbitrator, the said E. F. Cunningham had selected Edward Chomard. That said arbitrators should meet at once and agree in writing upon a third arbitrator. These two arbitrators agreed upon M. E. Kelly as the third arbitrator. On May 14, 1924, two of the arbitrators, Kelly and Chomard, signed an award, which recited, inter alia, that "we have heard the matter in controversy and considered each testimony and exhibits on the parties have submitted to us, and find that under the terms and conditions of said contract there is due from the said O. C. Lange to the said E. F. Cunningham, \$2,427.25, and that said amount should be paid to him by the said O. C. Lange forthwith under the terms of the aforesaid contract without any deductions therefrom." This award was not paid and in August, 1924, the plaintiff commenced, in the Circuit Court of Cook County, a common law suit against the defendant, although the contract for arbitration provided for arbitration under the provisions of the Illinois Statute governing arbitrations and awards, and also provided that unless the award was promptly complied with proceedings to enforce the same should be "filed in the Superior Court of Cook County, any Chancellor of which court in pending pending to enforce the terms of said award according to the statute in such case made and provided." From the plaintiff's affidavit of claim it appears that this Circuit Court suit was based upon the award of 1924. The defendant pleaded the general issue and filed notice of special matters of defense, which stated, inter alia, that under the terms of submission an award could not be made the subject of a suit at law and that proceedings to enforce the same could only be filed in the Superior Court; that the arbitrators never qualified as required by the statute and that no evidence was heard by them. It appears that this cause in the

Circuit court was on trial before Judge Hood and a jury for approximately two days in the year 1928. No evidence was introduced by either party. The trial was then discontinued and on November 5, 1928, special counts were filed by the plaintiff, each one of which set out the building contract, the submission to arbitration and the award of 1924. The defendant filed demurrers to these special counts, which were sustained. On March 6, 1929, the plaintiff filed the instant proceedings in the Superior court, and on April 24, 1929, he took a voluntary nonsuit in the Circuit court case. Three documents were filed by the plaintiff in the instant proceedings. One recites an award made by the three arbitrators on February 6, 1929, under the contract of submission of April 11, 1924. Another is an instrument signed by the three arbitrators and addressed to the plaintiff and the defendant. This instrument recites, inter alia, that

"WHEREAS, by a certain contract between O. C. Junge and P. F. Cunningham, dated the 11th day of April, 1924, it is recited that a dispute had arisen between the parties in connection with and arising out of their relation and compensation to be paid P. F. Cunningham, contractor, in connection therewith; and

"WHEREAS, the parties to said contract recited that they had agreed both in their contract and independently thereof, to submit all controversies and differences between them to arbitration, said arbitration to be made under the terms of their contract, and under the provisions of the Statutes of the State of Illinois governing arbitrations and awards, upon the following terms and stipulations, to wit: Said O. C. Junge had selected Joe Pruno as arbitrator, and said P. F. Cunningham had selected Edward Schounard. That said arbitrators should meet at once and agree in writing upon a third arbitrator; and

"WHEREAS, Joseph L. Pruneau and Edward D. Chouinard, the persons named in said contract as Joe Pruno and Edward Schounard, met and agreed in writing upon a third arbitrator, and thereupon selected M. P. Riley as such third arbitrator, and thereupon said Joseph L. Pruneau, Edward D. Chouinard and M. P. Riley, constituted a Board of Arbitrators to hear said dispute and controversy; and

"WHEREAS, said Board of Arbitrators proceeded with all due expedition to hear said dispute and controversy and make an award therein; and

"WHEREAS, it has been called to the attention of said Board of Arbitrators that they proceeded informally and irregularly in the matter of said arbitration, never took an oath as required by statute, so that all acts by said Board of Arbitrators subsequent to their selection and appointment, have been absolutely null and void; and

circuits court was on trial before Judge Wood and a jury for approximately two days in the year 1938. No evidence was introduced by either party. The trial was then discontinued and on November 5, 1938, special counts were filed by the plaintiff, each one of which set out the building contract, the submission to arbitration and the award of 1934. The defendant filed however in these special counts, which were returned, on March 6, 1939, the plaintiff filed the instant proceedings in the Superior Court, and on April 24, 1939, he took a voluntary nonsuit in the Circuit Court case. Three documents were filed by the plaintiff in the instant proceedings, one recited an award made by the three arbitrators on February 6, 1938, under the contract of submission of April 11, 1934. Another is an instrument signed by the three arbitrators and addressed to the plaintiff and the defendant. This instrument recites, inter alia, that

"That, by a certain contract between J. C. Lunge and J. F. O'Connell, dated the 11th day of April, 1934, it is recited that a dispute had arisen between the parties in connection with and arising out of their relation and communication to be paid J. F. O'Connell, contractor, in connection therewith; and

"WHEREAS, the parties to said contract recited that they had entered into their contract and independently thereof, to submit all controversies and differences between them to arbitration, said arbitration to be made under the terms of their contract, and under the provisions of the Statute of the State of Illinois governing arbitrations and awards, upon the following terms and conditions, to wit: Said J. C. Lunge had selected Joe Bruno as arbitrator, and said J. F. O'Connell had selected Edward Behrmann. That said arbitrators agreed most of once and agree in writing upon a third arbitrator; and

"WHEREAS, Joseph I. Freeman and Edward E. O'Connell, the persons named in said contract as Joe Bruno and Edward Behrmann, met and agreed in writing upon a third arbitrator, and thereupon said Joseph I. O'Connell, Edward E. O'Connell and J. F. Lunge, constituted a Board of Arbitrators to hear said dispute and controversy; and

"WHEREAS, said Board of Arbitrators proceeded with all due expedition to hear said dispute and controversy and made an award therein; and

"WHEREAS, it has been called to the attention of said Board of Arbitrators that they proceeded informally and irregularly in the matter of said arbitration, never took an oath as required by statute, so that all acts of said Board of Arbitrators subsequent to their selection and appointment, have been absolutely null and void; and

"WHEREAS, it is the desire of said Board of Arbitrators to proceed regularly and in accordance with the statute in such cases made and provided,

"NOW, THEREFORE, it is resolved by said Board of Arbitrators that it will hear said dispute and controversy, and render an award or awards as is required by them by their selection and appointment.

"IT IS FURTHER RESOLVED by said Board of Arbitrators that the evidence heretofore taken by them, and all proceedings subsequent to the taking of said evidence in the way of supposed awards, be absolutely disregarded, and that said Board of Arbitrators begin anew to hear and adjudicate said dispute and controversy.

"THEREFORE, Notice is hereby given to said C. C. Junge and P. F. Cunningham, that the undersigned, Joseph L. Prunieu, Edward D. Chouinard and M. P. Riley, selected as a Board of Arbitrators as aforesaid, appeared before G. Spencer Crilly, a Notary Public in and for Cook County, in the State of Illinois, on the 16th day of January, A. D. 1929, and were then and there duly sworn faithfully and fairly to hear, examine and determine said cause and controversy, according to the principles of equity and justice, and make a just and true award or awards, according to the best of their understanding, and according to the stipulations and agreements of said submission.

"You and each of you are further notified that said Arbitrators will meet in Room 210, No. 35 South Dearborn Street, Chicago, Illinois, at 10:30 P. M. on the 30th day of January, 1929, and will hear said cause and controversy, take such evidence as may be presented by the parties to said controversy, according to the provisions of the Statute of the State of Illinois, will hear the parties thereto in the presentation of such evidence, arguments and matters as may be presented by them or either of them, to said Board of Arbitrators, and after due consideration of the same will render an award or awards pursuant to the powers and authority granted them. In case said hearing shall not be completed at the time above set forth, said Board of Arbitrators will continue said hearing from time to time until their duties above set forth are entirely complete."

These two instruments, together with one other which purports to show that on January 16, 1929, the three arbitrators subscribed to an affidavit before a notary public which recites that they were duly sworn to faithfully and fairly hear and determine the controversy submitted to them and to make a just award, constituted the only pleadings filed by the plaintiff. The defendant filed a written motion to quash the alleged award of February 6, 1929. Twelve exceptions were filed by him in support of his motion. The first and second aver that the proceeding in the Circuit court is upon the same cause of action or claim that is sought to be put in judgment in the instant proceeding; that the Circuit court suit is still pending and

"WHEREAS, it is the desire of said Board of Arbitrators to proceed regularly and in accordance with the statute in such cases made and provided,

"NOW, THEREFORE, it is resolved by said Board of Arbitrators that it will hear said dispute and controversy, and report on same or award as is required by them by their decision and appointment.

"IT IS FURTHER RESOLVED by said Board of Arbitrators that the evidence heretofore taken by them, and all proceedings subsequent to the taking of said evidence in the way of suggested awards, be absolutely disregarded, and that said Board of Arbitrators begin anew to hear and adjudge said dispute and controversy.

"WHEREAS, Notice is hereby given to said G. L. Lange and J. J. Cunningham, that the undersigned, Joseph I. Freeman, Edward J. Leland and M. P. Kiley, selected as a Board of Arbitrators as aforesaid, appeared before J. Spencer Gillett, a Notary Public in and for Cook County, in the State of Illinois, on the 10th day of January, A. D. 1922, and were then and there duly sworn faithfully and truly to hear, examine and determine said cases and controversy, according to the principles of equity and justice, and make a just and true award or awards, according to the best of their understanding, and according to the allegations and arguments of said claimants.

"You and each of you are further notified that said Arbitrators will meet in Room 210, No. 22 South Dearborn Street, Chicago, Illinois, at 10:30 P. M. on the 20th day of January, 1922, and will hear said cases and controversy, take such evidence as may be presented by the parties to said controversy, according to the provisions of the Statute of the State of Illinois, will hear the evidence in the presentation of such evidence, arguments and awards as may be presented by them or either of them, to said Board of Arbitrators, and after due consideration of the same will render an award or awards pursuant to the statute and authority granted them. In case said hearing shall not be completed at the time above set forth, said Board of Arbitrators will continue said hearing from time to time until their action above set forth are entirely completed."

These two instruments, together with two other which pertain to them

dated on January 12, 1922, the last of which is subscribed to me

attest before a Notary Public which certifies that they were duly

given to faithfully and truly hear and determine the controversy

submitted to them and to make a just award, constituted the only

instrument filed by the Plaintiff. The defendant filed a written

motion to quash the alleged award of February 4, 1922. Twelve days

there were filed by him in support of his motion. The first and

second were that the proceeding in the Circuit Court is upon the same

ground of claim as claim that is sought to be put in judgment in the

present proceeding; that the Circuit Court said is still pending and

that it is based on the former alleged award of May 16, 1924. The third avers "that said alleged arbitrators, having made said alleged award on said May 16th, 1924, under said submission they are functus officio, and without any power to proceed further under said submission." The fourth avers "that any finding now made by said alleged arbitration, even if otherwise legal, is void because the same was procured by fraud." The fifth avers that two of the alleged arbitrators have, on many occasions when said cause, in the Circuit court, was on trial call, been in consultation with plaintiff. The sixth avers that even if the alleged award were otherwise legal, the alleged finding of the arbitrators was a partisan finding. The seventh avers that one of the defenses presented to the suit in the Circuit court was that the alleged award of the arbitrators, of 1924, was obtained by fraud. The eighth avers that the alleged arbitrators did not hear any evidence of the defendant nor any of his witnesses, and that the alleged hearing was purely an ex parte affair. The ninth avers that the alleged hearing upon which the instant alleged award is based was made without consultation with or consent of the defendant. The eleventh avers "that a delay of action (even if in other respects the conduct of the alleged arbitrators was legal) from April 11, 1924, to January 30, 1929, is unreasonable, and without any jurisdiction, and void any alleged powers claimed to have been conferred by the submission." The twelfth avers that the court is without jurisdiction to hear and determine the instant cause for the reason that an action for the same identical claim was still pending in the Circuit court.

It appears that the defendant never agreed or consented to the second alleged arbitration hearing and that he never attended any of the meetings held by the alleged arbitrators during the hearing in 1929. Counsel for the plaintiff testified that the papers signed by the alleged arbitrators in January, 1929, and which were filed by the plaintiff as his pleadings in the instant case, were drafted by

that it is based on the former allegations of May 12, 1934. The third event "that said alleged arbitrator, having made said alleged award on said May 12th, 1934, under said submission they are further alleged, and without any power to proceed further under said submission." The fourth event "that any finding now made by said alleged arbitrator, even if otherwise legal, is void because the same was procured by fraud." The fifth event that one of the alleged arbitrators have, on many occasions when said award, in the literal sense, was on trial and, when in connection with said award, the claim event that even if the alleged award were otherwise legal, the alleged finding of the arbitrator was a fraudulent finding. The sixth event that one of the arbitrators presented to the court in the circuit court was that the alleged award of the arbitrator, at 1934, was obtained by fraud. The eighth event that the alleged arbitrators did not have any evidence of the defendant nor any of his witnesses, and that the alleged finding was purely an arbitrary finding. The ninth event that the alleged finding upon which the instant alleged award is based was made without consultation with any party of the defendant. The eleventh event "that a copy of action (even if in some respect the content of the alleged arbitrator was legal) from April 11, 1934, to January 20, 1935, is unobtainable, and without any justification. The twelfth event that the court is without jurisdiction to hear and determine the instant cause for the reason that an action for the same identical claim was still pending in the circuit court. It appears that the defendant never agreed or consented to the second alleged arbitration hearing and that he never attended any of the meetings held by the alleged arbitrators during the hearing in 1935. Counsel for the plaintiff testified that the papers signed by the alleged arbitrators in January, 1935, and which were filed by the plaintiff as his pleadings in the instant case, were signed by

the counsel for the plaintiff. The claim of the plaintiff in the instant case is based upon the alleged award of 1929. From the three instruments filed by him as his pleadings it clearly appears that the arbitrators and the plaintiff, through his counsel, sought to justify the alleged award of 1929 upon the ground that the award of 1924 was "absolutely null and void." One of the defenses interposed by the defendant to the suit in the Circuit court was that the award of 1924 was void because it was obtained by fraud. The defendant in the instant proceedings insists that the award of 1924 was void because it was obtained by fraud. The suit in the Circuit court, which was based upon the award of 1924, was voluntarily dismissed by the plaintiff. When the arbitrators made the award of 1924 their powers under the contract for arbitration expired and they could not be revived without the consent of the parties. (See Smith v. Smith, 28 Ill. 56, 59; Fitzgerald v. Fitzgerald, 3 Ky. Rep. (1 Hardin) 227.) In the instant case the defendant did not consent to the alleged arbitration proceedings held in 1929 and he took no part in the same. It clearly appears from the record that the plaintiff finally concluded to abandon the proceedings in the Circuit court and to treat the award of 1924 as "absolutely null and void," and, without the consent or approval of the defendant, he caused the arbitrators to hold the alleged arbitration proceedings of 1929. The trial court rightfully held that the award of 1929 was not binding upon the defendant.

The plaintiff contends that "the arbitrators were in reality appraisers, and so were not bound by all the formalities set forth in the statute on arbitrations and awards." This contention is plainly an afterthought. As the defendant states, "the claim that the arbitrators were not arbitrators but were in reality appraisers, appears here for the first time. It nowhere appears in the pleadings or in the record in this case, nor can

it arise by implication from them or anything that transpired in the case. The word appraiser cannot be found in the record from cover to cover." The contract of submission recites "that a dispute had arisen between the parties in connection with and arising out of their relation and compensation to be paid P. F. Cunningham, contractor, in connection therewith; and whereas, the parties to said contract recited that they had agreed both in their contract and independently thereof, to submit all controversies and differences between them to arbitration, said arbitration to be made under the terms of their contract, and under the provisions of the Statutes of the State of Illinois governing arbitrations and awards; * * * the Board of Arbitration shall proceed in every respect with promptness and dispatch, and its award or awards shall be in all respects final, binding and conclusive upon the parties hereto. Said Board shall have all of the powers and authority conferred upon arbitrators by the statutes of this state. * * * The award or awards of the Board shall be in writing, and shall, unless promptly complied with, be filed in the Superior Court of Cook County, any chancellor of which court is hereby nominated to enforce the terms of said award according to the statute in such case made and provided." The instant contention of the plaintiff is without the slightest merit.

The plaintiff also contends that "the first award was not irregular." We find it difficult to determine, from plaintiff's brief, his purpose in making this contention. It is clearly an afterthought. In the trial court the plaintiff claimed relief under the arbitration award of 1929 upon the theory that the award of 1924 was "absolutely null and void." There is no assignment of error to warrant the instant contention. In the assignment of errors the plaintiff complains that the court erred in not finding that the 1929 award "set forth in appellant's petition was valid and binding

is also by implication from them or anything that transpired in the case. The word "plaintiff" cannot be found in the record from either to either. The contract of submission recites "that a dispute had arisen between the parties in connection with and relating to the title and compensation to be paid to T. W. Cunningham, contractor, in connection therewith; and whereas, the parties to said contract recited that they had agreed both in their contract and independently thereof, to submit all controversies and differences between them to arbitration, said arbitration to be made under the terms of their contract, and under the provisions of the laws of the State of Illinois governing arbitrations and awards; and the Board of Arbitration shall proceed in every respect with promptness and dispatch, and its award or awards shall be in all respects final, binding and conclusive upon the parties hereto. And said Board shall have all of the powers and authority conferred upon arbitrators by the statutes of this State." The award or awards of the Board shall be in writing, and shall, unless expressly complied with, be filed in the Superior Court of Cook County, any challenge to which court is hereby nominated to enforce the terms of said award according to the statute in such case made and provided. The instant execution of the plaintiff is without the slightest merit. The plaintiff also contends that "the first award was not final." He finds it difficult to determine, from plaintiff's brief, his purpose in making this contention. It is clearly an attempt. In the trial court the plaintiff claimed relief under the arbitration award of 1923 upon the theory that the award of that year "absolutely null and void." There is no assignment of error in support of the instant contention. In the assignment of errors the plaintiff complains that the court erred in not finding that the award of 1923 was "not final" in plaintiff's petition was valid and binding.

upon appellant and appellee," and in not entering judgment for the amount of that award. The instant contention is without the slightest merit.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley, F. J., and Kerner, J., concur.

34790

CHARLES A. HOHMEIER LUMBER CO.,
a Corporation,
Defendant in Error,

vs.

ARTHUR E. KNIGHT, OLIVER ANDERSON,
CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustees, et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

262 I.A. 657

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant in error, Charles A. Hohmeier Lumber Co., a corporation, filed its bill of complaint to foreclose a mechanic's lien on certain property in the city of Chicago for a balance claimed to be due it for furnishing the material for the construction of buildings located thereon. The cause was referred to a master, who took proof and reported, recommending the foreclosure of the lien in favor of defendant in error for the sum of \$6,550, with interest. Objections to the report were overruled and were ordered to stand as exceptions. On a hearing the chancellor confirmed the report of the master, and entered a decree in favor of defendant in error and ordered the sale of the property on default of payment of the claim. This writ of error is sued out to review that decree.

The sole contention of the plaintiffs in error is that "there was no cause of action alleged in any bill of complaint filed within the four months' period prescribed by the statute."

Oliver Anderson was a general contractor employed by Arthur E. Knight, one of the plaintiffs in error, to do the carpenter work, etc., upon the buildings in question. Anderson made a subcontract with the defendant in error to furnish necessary millwork for the two buildings for the sum of \$19,000. That it furnished the millwork and made the last delivery of material on

CHARLES A. HANSEN, Plaintiff,
vs.
The Chicago Title and Trust Company, Defendant.

ARTHUR E. KNIGHT, OLIVER ANDERSON,
Plaintiffs, et al.,
vs.
The Chicago Title and Trust Company, Defendant.

MR. JUSTICE SWANSON DELIVERED THE OPINION OF THE COURT.

The defendant in error, Charles A. Hansen, a
corporation, filed its bill of complaint to recover a
mechanic's lien on certain property in the city of Chicago for a
balance claimed to be due it for furnishing the material for the
construction of buildings located thereon. The answer was returned
to a master, who took proof and reported, recommending the fore-
closure of the lien in favor of defendant in error for the sum of
\$6,380, with interest. Objections to the report were overruled
and were ordered to stand as exceptions. On a hearing the
chancellor confirmed the report of the master, and entered a
decree in favor of defendant in error and ordered the sale of
the property on default of payment of the claim. This writ of
error is now out to review that decree.

The sole contention of the plaintiff in error is that
"there was no cause of action alleged in any bill of complaint
filed within the four months' period prescribed by the statute."
Oliver Anderson was a general contractor employed by
Arthur E. Knight, one of the plaintiffs in error, to do the
carpenter work, etc., upon the buildings in question. Anderson
was a subcontract with the defendant in error to furnish necessary
material for the two buildings for the sum of \$10,000. That he
furnished the material and made the last delivery of material on

November 27, 1928, is not disputed, nor do the plaintiffs in error dispute the fact that there was a balance due the defendant in error of \$6,550 under the terms of the contract between Anderson and the defendant in error. On March 26, 1929, the defendant in error filed its original bill of complaint. General demurrers were filed to the same by the plaintiffs in error Arthur B. Knight and Chicago Title and Trust Company, Trustees. On May 20, 1929, the chancellor sustained the general demurrers and the defendant in error asked leave to file its amended bill within ten days. Thereupon the chancellor entered an order sustaining the general demurrer and that the defendant in error "be given ten days from the date hereof to file its Amended Bill of Complaint." On May 28, 1929, the defendant in error filed "its Amendment to the Bill of Complaint heretofore filed herein, pursuant to the order of Court entered on the 20th day of May, A. D. 1929." This amendment was filed without leave of court and the plaintiffs in error therefore disregarded it, which they had a right to do under the practice. (See Johnson v. Wright, 221 Ill. App. 6, 9, and cases cited therein.) However, on June 8, 1929, the parties stipulated that the defendant in error be given leave to file its amended bill of complaint instantler, and that plaintiffs in error be given leave to plead, answer or demur within ten days "without prejudice to the rights of the parties." On the same date the chancellor, pursuant to the stipulation, entered an order allowing the defendant in error to file its amended bill of complaint, instantler, and the plaintiffs in error to plead, answer or demur to the same within ten days. The amended bill was filed on that date.

Both parties agree that final payment was due the defendant in error November 27, 1928. Section 33 of the Mechanics'

November 27, 1932, is not disputed, nor is the plaintiff's in error
alleges the fact that there was a balance due the defendant in error
of \$5,250 under the terms of the contract between defendant and the
defendant in error. On March 26, 1932, the defendant in error
filed its original bill of complaint. General demurrers were
filed to the same by the plaintiff in error Arthur H. Knight
and Chicago Title and Trust Company, Trustee. On May 20, 1932,
the chancellor sustained the general demurrers and the defendant
in error asked leave to file its amended bill within ten days.
Thereupon the chancellor entered an order sustaining the general
demurrer and that the defendant in error "be given ten days from
the date hereof to file its amended bill of complaint." On May
22, 1932, the defendant in error filed "its amendment to the bill
of complaint heretofore filed herein, pursuant to the order of
Court entered on the 20th day of May, A. D. 1932." This amend-
ment was filed without leave of court and the plaintiff in error
therefore disregarded it, which they had a right to do under the
practice. (See Johnson v. Wright, 281 Ill. App. 3, 9, and cases
cited therein.) However, on June 2, 1932, the parties stipulated
that the defendant in error be given leave to file its amended
bill of complaint instantaneously, and that plaintiff in error be given
leave to plead, answer or demur within ten days "without prejudice
to the rights of the parties." On the same date the chancellor,
pursuant to the stipulation, entered an order allowing the defendant
in error to file its amended bill of complaint, instantaneously, and the
plaintiff in error to plead, answer or demur to the same within
ten days. The amended bill was filed on that date.
Both parties agree that their payment was due the de-
fendant in error November 27, 1932. Section 23 of the Warrant,

Liens act provides: "Limitation as to suit of sub-contractors to enforce lien.) Petition shall be filed or suit commenced to enforce the lien created by sections twenty-one (21) and twenty-two (22) of this act within four months after the time that the final payment is due the sub-contractor, laborer or party furnishing material." It is unnecessary to cite authorities to the effect that a general demurrer is in bar of the relief sought, and it proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks. It is founded upon some point of law going to the absolute denial of the relief sought. The plaintiffs in error contend that when their general demurrers to the original bill were sustained, the defendant in error did not elect to stand by its bill and that it asked leave to file an amended bill, that it thereafter filed an amended bill and that it thereby abandoned its original bill of complaint and is therefore in no position to question the ruling of the chancellor upon the general demurrers or to contend in this court that the original bill stated a good cause of action. That there is merit in this contention, see Hubbard v. Nat. Stamping & Electric Works, 213 Ill. App. 235, 236; Bennett v. Union Central Life Ins. Co., 203 Ill. 439, 444; Smith v. Smith, 169 Ill. 623, 624. However, an inspection of the original bill shows that the action of the chancellor in sustaining the general demurrers was warranted, as a reading of the bill fails to show the service of a notice in accordance with the statute. Under the rule laid down in North Side Sash & Door Co. v. Hecht, 295 Ill. 515, the instant suit was not begun until the amended bill was filed on June 8, and as both parties agree that the last delivery of material was made on November 27, 1928, and that final payment was due the defendant in error on that date, it follows that the defendant in error

in error on that date, it follows that the defendant is in error
November 27, 1928, and that final payment was due the defendant
parties agree that the last delivery of material was made on
not begun until the material bill was filed on June 6, and as soon
like East v. East, 208 Ill. 610, the instant suit was
accordance with the statute. Under the rule laid down in East
as a reading of the bill fails to show the service of a notice in
of the chancellor in sustaining the general demurrer was warranted.
However, an inspection of the original bill shows that the action
filed Jan. 22, 1928 Ill. 420, 444; East v. East, 189 Ill. 622, 624.
Electric Works, 225 Ill. App. 228, 230; Kennett v. Union Central
That there is merit in this contention, see Hubbard v. Nat. Banning
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and that it asked leave to file an amended bill, that it thereupon
joined, the defendant in error did not elect to stand by its bill
that when their general demurrer to the original bill were sus-
tained of the relief sought. The plaintiff's in error contend
back. It is founded upon some point of law going to the essence
bill to be true, the complaint is not entitled to the relief so
proceeds upon the ground that, admitting the facts stated in the
that a general demurrer is in bar of the relief sought, and it
material." It is unnecessary to cite authorities to the effect
payment is due the sub-contractor, laborer or party furnishing
(22) of this act within four months after the time that the final
force the lien created by sections twenty-one (21) and twenty-two
entire lien.) Petition shall be filed or suit commenced to en-
force or provision: "Limitation as to suit of sub-contractors to

failed to bring suit within the four months' period required by the statute and was not entitled to have a lien on the property in question. (See also 59th St. Lumber Co. v. Emery, 237 Ill. App. 416.) North Side Sash & Door Co. v. Hecht, supra, also holds that section 12 of the Mechanics' Liens act, authorizing certain amendments, "is merely declaratory of the right to amend, already permissible under the chancery practice in this State, and the rule that prevails in chancery practice would determine the time such amendments take effect. The section does not purport to authorize an amendment that shall be effective from the beginning of the original suit." A recent amendment to section 39 of our Practice act became in force July 1, 1929 (Laws 1929, p. 578; Cahill's St. 1929, ch. 110, p. 2021). This amendment reads as follows: "Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended, and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted, or the defense interposed in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact, or some other matter or matters, which are necessary conditions precedent to the right of recovery or defense asserted when such conditions precedent have been in fact performed." If this amendment were intended to apply to a mechanic's lien case it would not aid the defendant in error

failed to bring suit within the four months' period required by the statute and was not entitled to have a lien on the property in question. (See also Wells v. Wells, 127 Ill. App. 416.) Wells v. Wells, 127 Ill. App. 416, also holds that section 12 of the Reciprocity Lien Act, authorizing certain amendments, "is merely declaratory of the right to amend already permissible under the existing practice in this State, and the rule that prevails in ordinary practice would determine the time such amendments take effect. The section does not purport to authorize an amendment that shall be effective from the beginning of the original suit." A recent amendment to section 30 of our Practice Act became in force July 1, 1929 (Laws 1929, p. 575; Cahill's St. 1929, ch. 110, p. 302B). This amendment reads as follows: "Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended, and the cause of action or defense set up in the amended pleading shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and it shall appear from the original and amended pleading that the cause of action asserted, or the defense interposed in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact, or some other matter or matter, which are necessary conditions precedent to the right of recovery or defense asserted when such conditions precedent have been in fact performed." If this amendment were intended to apply to a mechanic's lien it would not aid the defendant in error

for the reason that the act was not in force until July 1, 1929, and we have held (Hanley v. Waters, 255 Ill. App. 239) that the amendment cannot be given a retrospective effect. The Supreme court refused a certiorari in that case. In Zister v. Pollack, 262 Ill. App. 170, the first division of this court construed this amendment. It appeared in that case that the deceased died on February 24, 1929, as a result of injuries sustained on February 16, 1929. An action for wrongful death was commenced on February 21, 1930, and the original declaration was filed April 10, 1930. The action was one in which suit must be brought within one year from the death of deceased, and before the expiration of the year, viz., on July 1, 1929, the amendment to section 39 went into effect. On June 25, 1930, plaintiff, by leave of court, filed her amended declaration. To this amended declaration the defendants pleaded, inter alia, "that the cause of action set up in the amended declaration did not accrue within one year after the death of Anthony M. Zister," and the first division of this court held that the amendment to the declaration was authorized by the amendment of section 39 and that therefore plaintiff's right to maintain her action was not barred. The decision in that case, in any event, cannot aid the defendant in error. The defendant in error argues that it "did file something" on May 28, 1929, and that whether its pleading of that date be considered as an amended bill of complaint or an amendment to the bill of complaint, it should be considered in passing upon the instant question. It is a sufficient answer to this argument to say that if that "pleading" were considered it would avail the defendant in error nothing, for the reason that it was filed more than four months after November 27, 1928.

In the instant case the defendant in error delivered the material under its contract with Anderson and this material

For the reason that the act was not in force until July 1, 1930, and we have said (Mister v. Webster, 228 Ill. App. 2d) that the amendment cannot be given a retrospective effect. The amendment court refused a certiorari in that case. In Mister v. Webster, 228 Ill. App. 170, the first division of this court sustained this amendment. It appeared in that case that the deceased died on February 24, 1929, as a result of injuries sustained on February 10, 1929. An action for wrongful death was commenced on February 21, 1930, and the original declaration was filed April 10, 1930. The action was one in which suit must be brought within one year from the death of deceased, and before the expiration of the year, viz., on July 1, 1930, the amendment to section 39 went into effect. On June 22, 1930, plaintiff, by leave of court, filed her amended declaration. In this amended declaration the defendant pleaded "inter alia," that the cause of action set up in the amended declaration did not accrue within one year after the death of Anthony M. Webster, and the first division of this court held that the amendment to the declaration was authorized by the amendment of section 39 and that therefore plaintiff's right to maintain her action was not barred. The decision in that case, in my opinion, cannot aid the defendant in error. The defendant in error argues that it "did file something" on May 22, 1930, and that whether the filing of that date be considered as an amended bill of complaint or an amendment to the bill of complaint, it should be considered in passing upon the instant question. It is a sufficient answer to this argument to say that if that "pleading" were considered it would avail the defendant in error nothing, for the reason that it was filed more than four months after November 27, 1929. In the instant case the defendant in error delivered the material under its contract with Anderson and this material

went into the buildings in question, and it is not disputed that there is due it under its contract with Anderson the sum of \$6,550, with interest. It further appears from the proof that the land in question was registered under the Torrens act and that in apt time the defendant in error filed in the office of the registrar of Cook county a subcontractor's notice of mechanic's lien, in accordance with the statute, and on the same date it filed in the office of the clerk of the Circuit court of Cook county its statement of claim for mechanic's lien upon the said premises, and on May 21, 1929, it filed in the office of the registrar of titles a lis pendens notice of the filing of its bill to foreclose. Under the facts of the case, if a good bill to foreclose had been filed in apt time, the defendant in error would have been entitled to its lien. While we cannot help but regret that the defendant in error has lost its right to a lien, we must, nevertheless, follow the law applicable to the facts of the case.

The decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to the chancellor to dismiss the complainant's bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Kerner, J., concur.

went into the building in question, and it is not disputed that there is now it under the contract with Anderson the sum of \$5,000, all interest. It is not disputed that the land in question was registered under the name of Anderson and that in apt time the defendant in error filed in the office of the register of Cook county a subsequent notice of mortgage's lien, in accordance with the statute, and on the same date it filed in the office of the clerk of the Circuit court of Cook county its statement of claim for mortgage's lien upon the said premises, and on May 21, 1920, it filed in the office of the register of claims a second notice of the filing of the bill to foreclose. Under the facts of the case, if a good bill to foreclose had been filed in apt time, the defendant in error would have been entitled to its lien. While we cannot help but regret that the defendant in error has lost its right to a lien, we must, nevertheless, follow the law applicable to the facts of the case.

The decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to the chancellor to dismiss the complainant's bill for want of equity.

REVEREND AND HONORABLE WITH DIGNITY.

GRILLEY, P. J., and KARNER, J., concur.

34828

SANITARY SCALE COMPANY,
a corporation,
Appellant,

v.

ADOLPH RYSER and JOHN DOE
and MARY ROE,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2621A.057²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 22, 1930, Sanitary Scale Company, a corporation, plaintiff, sued Adolph Ryser and John Doe and Mary Roe, defendants, in a replevin action. There was a trial before the court and the right of property was found in the defendant Adolph Ryser. The usual judgment was entered upon the finding and the plaintiff has appealed.

The facts in the case are not disputed. On July 11, 1929, the plaintiff and one Carl Swanson entered into a written contract which contained (inter alia) the following provisions:

"Please ship by freight, express or deliver to Carl Swanson, 5146 W. Clark Str. Chicago, Ill. F. O. B. Belvidere, Ill., two Sanitary Scales as described above, which I hereby order delivered to me (or us) under the following terms and conditions: Five Hundred Seventy Dollars (\$570.) to be paid in cash, less discounts, if any, as indicated here below, to you at your office in Belvidere, Ill.

| | |
|---|-------|
| 1. Total Amount | \$570 |
| 2. Less allowance for computing scale | \$200 |
| 3. Balance to be paid | \$370 |
| 4. Cash with contract | \$ 60 |
| 5. Leaving a net balance of | \$310 |

to be paid in(12) monthly
installments ofDollars (\$25.84) each. First
installment due July 15th, 1929.

1. It is agreed that the title to said leased goods, and to any goods delivered to me as replacement therefor, shall remain in you as lessor. Prompt payment of all installments being a condition of this lease I hereby, agree that in all cases when any installment remains due and unpaid for 30 days after the date of its maturity, to pay you the sum of one dollar per month on each overdue

SAFETY BELL COMPANY,
a corporation,
Appellant,

v.

ALFRED EYRE and JESSIE
and ELLY EYRE,
Appellees.

COURT OF CHICAGO,
APPEAL FROM CIRCUIT COURT

THE JUSTICE OF THE PEACE IN THE CIRCUIT COURT OF THE COUNTY OF CHICAGO.

On July 22, 1920, Security Bell Company, a corporation, plaintiff, sued Alfred Eyre and John Lee and Mary Lee, defendants, in a religious action. There was a trial before the court and the right of property was found in the defendant Alfred Eyre. The general judgment was entered upon the finding and the plaintiff has appealed.

The facts in the case are not disputed. On July 11, 1920, the plaintiff and one Carl Hansen entered into a written contract which contained the following provisions:

"Witness this by _____, witness of _____ deliver to _____, 512 E. Clark St., Chicago, Ill. P. O. B. Delivery, Ill., two Security Bells as described above, which I hereby deliver to me (or my) under the following terms and conditions: Five hundred dollars (\$500.) to be paid in cash, less dis- counts, if any, as indicated here below, to you at your office in Chicago, Ill.

1. Total Amount
2. Less allowance for commission
3. Balance to be paid
4. Cash with contract
5. Leaving a net balance of

to be paid in (12) monthly installments of Dollars (\$20.00) each. First installment due July 1921, 1922.

1. It is agreed that the title to said leased goods, and to any goods delivered to me as replacement therefor, shall remain in you as lessor. Prompt payment of all installments being a condition of this lease I hereby agree that in all cases when any installment remains due and unpaid for 30 days after the date of its maturity, to pay you the sum of one dollar per month on each overdue

installment until paid, in satisfaction of your liquidated damages suffered by reason of my default. In case of default by me as lessee in the payment of any installment of said rental or of any notes taken therefor, or should I wrongfully refuse to accept said leased goods, then upon the happening of any of said contingencies, the whole of the unpaid portion or installments of said rental shall, at your option and without notice to me, immediately become due and payable, and you may, if you so elect, re-take said leased goods as and for your own property with or without legal process and without any previous demand therefor and retain as your liquidated damages by reason of my default all rental payments previously made by me. All reasonable attorney fees paid or incurred by you in enforcing any terms of this contract to be paid by me.

2. It is agreed that if and when I shall have complied with all the conditions which I have assumed herein and shall have paid when due and payable all the rentals herein stated, I shall then have the right to purchase said leased goods, upon the further payment of one dollar to you, whereupon you will execute and deliver to me or to my legal representatives or assigns a valid Bill of Sale vesting title to said leased goods in me; and I agree that no evidence of my title, if any, shall be valid, except the evidence of such bill of sale.

3. It is agreed that, upon condition that I duly perform all of my promises herein made, you will guarantee said goods to be of first class material and workmanship, and that for the entire period of this lease, and in the event of a sale to me of said leased goods, for a period of two years from the date of shipment or delivery to me, you will make good defective mechanical parts free of charge, provided such parts be returned to you at Selvidere, accompanied by claim for replacement or repairs under this guaranty, stating the grounds therefor; carriage charge both ways to be paid by me. This guaranty is understood not to cover damage by ordinary wear and tear or by neglect or improper use of handling.

4. It is agreed that the loss, injury or destruction of said leased goods shall not operate in any manner to release me from the rental payments provided herein. It is agreed, as the essence of this contract, that this contract shall be construed as a lease and not as a conditional sale. This contract of lease is not subject to cancellation by me; and no goods are sent on trial. I also agree to pay promptly when due, all taxes or other public charges that may be legally assessed upon the said property. I have read and understood the above contract of which I have received a duplicate. The acceptance of this contract by the lessor shall be evidenced by the shipment or delivery of the leased goods."

Swanson defaulted in the payment of the monthly installments due thereunder, and he owed the plaintiff, at the time of the trial, \$184.80. On April 28, 1930, the defendant Byser obtained a judgment by confession against Swanson in the Municipal Court of Chicago, and subsequently, on June 23, 1930, through a bailiff's sale, Byser purchased all of the goods and chattels of Swanson, which included

[illegible]

2. It is agreed that if and when I shall have completed with all the conditions which I have assumed herein and shall have paid therefor and satisfied all the terms herein stated, I shall then have the right to purchase said leased goods, upon the further payment of one dollar to you, whereupon you will execute and deliver to me as to my legal representatives or assigns a valid bill of sale vesting title to said leased goods in me; and I agree that no sale comes of my title, if any, until so validly made the evidence of such bill of sale.

3. It is agreed that, upon condition that I only deliver all of my present and future work, you will guarantee such goods to be of first class material and workmanship, and that for the entire period of this lease, and in the event of a sale of said leased goods, for a period of two years from the date of shipment or delivery to me, you will make good defective mechanical parts free of charge, provided such parts be returned to you at delivery, season - provided by claim for replacement or repairs under this warranty, stating the grounds therefor; savings charge both ways to be paid by me. This contract is understood not to cover damage by ordinary wear and tear or by accident or improper use of handling.

[illegible][illegible]

property sold under the contract and which was afterwards replevied from Ryser in the instant suit. The plaintiff proved that prior to the commencement of this action it made a demand upon the defendant Ryser to turn over and deliver possession of the goods and chattels mentioned in the contract and which Ryser had received through the bailiff's sale, which demand was refused by Ryser. The defendant introduced a certified copy of a judgment in the case of Sanitary Scale Company, a corporation, v. Swanson, entered June 6, 1930, from which it appears that the plaintiff obtained judgment therein against Swanson for the balance due and owing to it under the terms of the contract in question. The plaintiff then proved that no part of this judgment had been paid to it, nor had the property described in the contract been received by it from Swanson. At the conclusion of the evidence plaintiff moved the trial court to find the issues for the plaintiff and the right to possession of the property replevied in the plaintiff, which motion the court overruled. The court thereupon found the right of property in the defendant Ryser and entered the judgment from which the plaintiff has appealed.

Both parties argue that the contract between the plaintiff and Swanson is a conditional sales contract. The defendant states that "the sole question involved in this case is whether or not the plaintiff, by instituting suit against Carl Swanson and subsequently obtaining a judgment, did or did not constitute an election of remedies which barred the plaintiff from recovering the property involved in this case by the action of replevin." The plaintiff contends that this question must be determined in the light of the fact that no part of the plaintiff's judgment against Swanson was satisfied. It is conceded that the ruling of the trial court was based upon the assumption that the recovery of the judgment by the plaintiff against Swanson, even though the judgment was wholly unsatisfied, operated to vest title in the chattels in Swanson.

property sold under the contract and which was afterwards registered
 from year to the instant date. The plaintiff proved that prior to
 the execution of this action it made a demand upon the defendant
 that it was over and either possession of the goods and chattels
 included in the contract and which year was received from the
 plaintiff's wife, which demand was refused by year. The defendant
 introduced a certified copy of a judgment in the case of LAURENCE
vs. LAURENCE, a certified copy of a judgment in the case of LAURENCE
 which is a copy of the judgment in the case of LAURENCE against
 year for the balance due and owing to it under the terms of the
 contract in question. The plaintiff then proved that as part of this
 judgment had been paid to it, nor had the property described in the
 contract been received by it from year. As the conclusion of the
 evidence plaintiff moved the trial court to find the balance for the
 plaintiff and the right to possession of the property registered in the
 plaintiff, which motion the court overruled. The court then
 found the right of property in the defendant year and entered the
 judgment from which the plaintiff has appealed.

Both parties argue that the contract between the plaintiff
 and year is a conditional sales contract. The defendant states
 that "the sole question involved in this case is whether or not the
 plaintiff, by instituting suit against year, was and subsequently
 obtained a judgment, did or did not constitute an election of remedies
 which barred the plaintiff from recovering the property involved in
 this case by the action of replevin." The plaintiff contends that
 this question must be determined in the light of the fact that no part
 of the plaintiff's judgment against year was satisfied. It is
 contended that the ruling of the trial court was based upon the
 assumption that the recovery of the judgment by the plaintiff
 against year, even though the judgment was wholly unsatisfied,
 operated to vest title in the chattels in year.

The position of the plaintiff is that under the contract between it and Swanson it "had the right to take judgment against Carl Swanson, and thereafter, judgment being unsatisfied, to retake the goods in default of payment, the two remedies being cumulative and not inconsistent." The position of the defendant Myer is that when the plaintiff took judgment against Swanson it "made an election of inconsistent and alternative remedies and could not subsequently successfully maintain a replevin action against the defendant who is a purchaser at a bailiff's sale of the goods of the said Carl Swanson; that upon obtaining a judgment in the suit against Carl Swanson, the plaintiff made an election and title passed to Swanson." The question we are called upon to determine was passed upon by the United States Circuit Court of Appeals, 7th Circuit, Illinois, in the case of In re Steiners Improved Dye Works, Inc. - McKey v. Troy Laundry Machinery Co., 44 Fed. (2d) 557, and the decision therein sustains the contention of the plaintiff.

In the instant case, the undisputed evidence shows that the defendant Myer was a judgment creditor of Swanson and not an innocent purchaser for value, and that Swanson remained in possession of the chattels covered by the contract until they were seized by the bailiff on an execution issued under the judgment obtained by Myer against Swanson.

In this state, prior to the adoption of the Uniform Sales Act, a contract, by which personal property was sold and delivered to the buyer, but title reserved in the seller until the purchase price was paid, was binding between the parties, but it did not bind execution creditors nor bona fide purchasers from the purchaser. "The Uniform Sales Act, Cahill's St. ch. 121a, par. 4 et seq., changed the rule in this state as to conditional sales contracts. By section 20 of this act, Cahill's St. ch. 121a, par. 23, such contracts are authorized." (Hickson v. Ford, 254 Ill. App. 505, 507.) Under the Uniform Sales

The position of the plaintiff is that under the contract between it and Hanson it "had the right to take judgment against" Hanson, and that its judgment being unassisted, it retains the goods in default of payment, the two remedies being cumulative and not inconsistent. The position of the defendant is that when the plaintiff took judgment against Hanson it "made an election of enforcement and alternative remedies and could not subsequently recover a judgment in respect of the goods of the said Hanson; a judgment of a plaintiff's sale of the goods of the said Hanson; the defendant obtaining a judgment in the suit against Hanson, the plaintiff made an election and this passed to Hanson. The question we are called upon to determine was passed upon by the United States Circuit Court of Appeals, 7th Circuit, Chicago, in the case of Ill. v. Plaintiff against the defendant, 124 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

act, which recognizes the validity of a conditional sale with reservation of title in the seller, where there is no basis for an estoppel, no title can be passed by the buyer of goods under such a contract though he has possession of the goods and the purchaser from him has no notice of the reservation. (The Sherer-Gillett Co. v. Long, 318 Ill. 432. See also Graver Bartlett Nash Co. v. Krans, 239 Ill. App. 522; Silverthorne v. Chapman, 259 Ill. App. 289; In re Steiners Improved Eye Works, Inc. - McKay v. Troy Laundry Machinery Co., supra.) In the instant case the plaintiff did nothing which might be construed to constitute an estoppel and therefore the provision in section 23 in reference to estoppel is not applicable to this case. The defendant Ryser was not injured by any act or failure to act on the part of the plaintiff.

Under the undisputed facts of this case the right of possession of the property seized under the writ of replevin is in the plaintiff. The judgment of the Municipal Court of Chicago will therefore be reversed with a finding of fact and judgment for the plaintiff is entered in this court, the latter having retained the property replevied.

REVERSAL WITH A FINDING OF FACT
AND JUDGMENT HERE.

Gridley, P. J., and Kerner, J., concur.

FINDING OF FACT.

We find, as an ultimate fact in this case, that the right of possession of the property seized under the writ of replevin is in the plaintiff.

not, which demonstrates the validity of a conditional sale with
reservation of title in the seller, where there is no basis for an
escape, no title can be passed by the buyer or goods under such
a contract though he has possession of the goods and the purchaser
knows him has no notice of the reservation. (The Harvey-Silvest Co.
v. Jones, 218 Ill. 482. See also Harvey-Silvest Co. v. Jones,
217 Ill. App. 622; Silvest v. Harvey, 202 Ill. App. 102; in re
Silvest's Estate, 217 Ill. App. 102. See also Harvey-Silvest Co. v. Jones,
217 Ill. App. 102.) In the instant case the plaintiff did nothing which might
be construed as constituting an escape and therefore the provision in
section 22 in reference to escape is not applicable to this case. The
defendant's name was not injured by any act or failure to act on the
part of the plaintiff.

Under the established facts of this case the right of
possession of the property retained under the sale of realty is in
the plaintiff. The judgment of the Municipal Court of Chicago will
therefore be reversed with a finding of fact and judgment for the
plaintiff as entered in this court, the latter having retained the
property retained.

REVEREND WITH A VIEW OF THE
AND FURTHER MORE.

Witness, J. J. and Kerner, J. J. County.

WITNESSES BY NAME.

We find, as an ultimate fact in this case, that the right
of possession of the property retained under the sale of realty is
in the plaintiff.

34860

1927

JOSEPH HAARS, a Minor, by JOSEPH
H. KING, his next friend,
Defendant in Error,

v.

WHITE CITY AMUSEMENT COMPANY, a
Corporation,
Plaintiff in Error.

ERROR TO SUPREME COURT,
COCK COUNTY.

252 LA. 657³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph Haars, a minor, by Joseph H. King, his next friend, sued White City Amusement Company, a corporation, in an action in tort, to recover damages for personal injuries sustained by him on the night of September 8, 1929, while riding as a passenger on an amusement device known as "The Pep," in a public park operated by the defendant in the city of Chicago. There was a trial before the court, with a jury, and a verdict was returned in favor of the plaintiff in the sum of \$10,000. Judgment was entered on the verdict and the defendant has sued out this writ of error.

The case was submitted to the jury upon the first count of the declaration, which alleges, inter alia, that the defendant was operating an amusement park and therein operated a certain ride called "The Pep," on which passengers were carried for hire, and that the defendant was then and there a common carrier of passengers for hire and reward, and that it was then and there the duty of the defendant to exercise the highest degree of care consistent "with the practical operation of their ride and mode of conveyance adopted for the safety of its passengers." The count then describes the construction and mode of operating the ride. It alleges, further, that on September 8, 1929, the plaintiff entered the ride, paid his fare and entered one of the cars of the ride and "that as soon as he

JOSEPH HARRIS, a minor, by J. H. HARRIS, his next friend, defendant in error.

v.

WILLIAMS CITY MANUFACTURING COMPANY, a corporation, plaintiff in error.

MR. JUSTICE COLEMAN DELIVERED THE OPINION OF THE COURT.

Joseph Harris, a minor, by Joseph H. Harris, his next friend, sued Williams City Manufacturing Company, a corporation, in an action in tort, to recover damages for personal injuries sustained by him on the night of September 6, 1929, while riding as a passenger on an amusement device known as "The Top," in a public park operated by the defendant in the city of Chicago. There was a trial before the court, with a jury, and a verdict was returned in favor of the plaintiff in the sum of \$17,000. Judgment was entered on the verdict and the defendant was awarded this writ of error.

The case was submitted to the jury upon the first count of the declaration, which alleges, inter alia, that the defendant was operating an amusement park and therein operated a certain ride called "The Top," on which passengers were carried for hire, and that the defendant was then and there a common carrier of passengers for hire and reward, and that it was then and there the duty of the defendant to exercise the highest degree of care consistent with the practical operation of their ride and mode of conveyance adopted for the safety of its passengers. The count then described the construction and mode of operating the ride. It alleges, further, that on September 6, 1929, the plaintiff entered the ride, paid his fare and entered one of the cars of the ride and "that as soon as he

202 E.A. 652

BOOK COMPANY

entered the car and while he was in the act of becoming seated and adjusting himself comfortably in the seat on a side of the car opposite to the platform and adjacent to the guide board aforesaid and before the plaintiff had gotten his feet into the place in said car provided for passengers' feet, the defendant by its servants and agents then and there suffered and permitted and carelessly and negligently caused the said cars and train to start with a violent jerk in a forward direction and as a direct and proximate result of which the plaintiff's right foot became caught between the outer edge of said car and the guide board alongside of said car and he was dragged by the motion of said train with his foot between the side of the car and the guide board aforesaid for a distance of over a thousand feet at a high rate of speed and as a direct and proximate result thereof his foot was torn, crushed, lacerated, broken, wounded and crippled," etc. The count also alleges that the plaintiff was in the exercise of ordinary care for his own safety at and before the time of the accident. The defendant filed a plea of the general issue.

The bill of exceptions shows that at the time of the hearing of the motion for a new trial the sole ground urged by the defendant in support of the motion was "that the verdict was not supported by a preponderance of the evidence." The plaintiff strenuously insists that the defendant is therefore in no position to urge, in this court, other alleged errors committed by the trial court. As the defendant was represented by an able attorney who has had years of experience in the trial of personal injury cases, it is evident that the contention of the plaintiff raises a question of great importance to the bench and litigants. We think there is merit in the contention, but as we find no merit in the four contentions raised by the defendant in this court, it is unnecessary for us to pass upon the plaintiff's contention.

entered the car and while he was in the act of becoming seated and adjusting himself comfortably in the seat on a side of the car opposite to the platform and adjacent to the guide board stairs and before the plaintiff had gotten his foot into the place in said car provided for passengers' feet, the defendant by its servants and agents then and there withdrew and permitted and negligently and negligently caused the said car and train to start with a violent jerk in a forward direction and as a direct and proximate result of which the plaintiff's right foot became caught between the outer edge of said car and the guide board stairs of said car and he was dragged by the motion of said train with his foot between the side of the car and the guide board stairs for a distance of over a thousand feet at a high rate of speed and as a direct and proximate result thereof his foot was torn, crushed, lacerated, broken, wounded and crippled," etc. The record also alleges that the plaintiff was in the exercise of ordinary care for his own safety at and before the time of the accident. The defendant filed a plea of the general issue.

The bill of exceptions shows that at the time of the hearing of the motion for a new trial the sole ground urged by the defendant in support of the motion was "that the verdict was not supported by a preponderance of the evidence." The plaintiff strenuously insists that the defendant is incorrect in no position to urge, in this court, other alleged errors committed by the trial court. As the defendant was represented by an able attorney who has years of experience in the trial of personal injury cases, it is evident that the contention of the plaintiff raises a question of great importance to the court and litigants. We think there is merit in the contention that as we find no merit in the four contentions raised by the defendant in this court, it is unnecessary for us to pass upon the plain-

The defendant, in its statement of the case, states, that "the principle point upon which the defendant relies for a reversal is: "The verdict for the plaintiff in this case is manifestly against the overwhelming weight of the evidence." But four errors are assigned in the brief, viz: "I. The trial court should have directed a verdict for the defendant. II. Where an accident can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and where nothing is done out of the usual course of business, unless that course itself is improper, negligence cannot be presumed. III. The court erred in permitting Dr. Sydney S. Greenspahn, expert, who was called on behalf of the plaintiff to examine him for the sole purpose of testifying, to express an opinion that the plaintiff was permanently injured as a result of the accident in question. IV. The court erred in refusing to instruct the jury in regard to the illumination or lighting furnished by the White City Amusement Company." The defendant's "argument" takes up only these four points. Neither in its brief nor argument has the defendant made the point that the verdict is manifestly against the overwhelming weight of the evidence. While it thus appears that the defendant thereby abandoned this point, nevertheless, we have seen fit to consider it as still in the case, and after a careful examination of the evidence we are satisfied that there is no merit in it.

Counsel for the defendant has burdened this court with many pages of argument devoted to subjects entirely irrelevant to the simple issue involved in this case. Much space is devoted to showing that there was no defect in the construction, maintenance or mechanical operation of the ride and that the cars were in good working condition the night of the accident. Neither in his declaration nor his brief has the plaintiff made any claim that there was any defect in the construction, maintenance or mechanical operation of the ride in

The defendant, in the statement of the case, states that the principal point upon which the defendant relies for a reversal is "the verdict for the plaintiff in this case is manifestly against the overwhelming weight of the evidence." The four errors are assigned in the brief, viz: "I. The trial court should have directed a verdict for the defendant. II. There an accident can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and where nothing is shown out of the usual course of business, unless that source itself is improper, negligence cannot be presumed. III. The court erred in permitting Dr. Sydney A. Greenbaum, expert, who was called on behalf of the plaintiff to examine him for the sole purpose of testifying to an opinion that the plaintiff was permanently injured as a result of the accident in question. IV. The court erred in refusing to instruct the jury in regard to the illumination of lighting furnished by the White City Amusement Company." The defendant's "argument" takes up only these four points. Neither in the brief nor argument has the defendant made the point that the verdict is manifestly against the overwhelming weight of the evidence. This is thus apparent that the defendant thereby abandoned this point. Nevertheless, we have used it to consider it as still in the case, and after a careful examination of the evidence we are satisfied that there is no merit in it.

It cannot be that the defendant has purchased this court with money. The argument devoted to subjects entirely irrelevant to the legal issues involved in this case. Much space is devoted to showing that there was no defect in the transportation, maintenance or mechanical condition of the ride and that the cars were in good working condition on the night of the accident. Neither in his declaration nor his brief does the plaintiff make any claim that there was any defect in the transportation, maintenance or mechanical condition of the ride in

question. Moreover, the court instructed the jury that there was no evidence in the case to justify them in finding that the ride was negligently or unskillfully constructed or was defective in any way. The defendant asserts that to make out a case the plaintiff was compelled to rely upon the doctrine of res ipsa loquitur and it then proceeds to argue that doctrine at length. Neither in the declaration nor in the evidence does the plaintiff rely upon that doctrine. Other irrelevant questions are argued by the defendant. The defendant concedes, as it must, that it was a common carrier of passengers for hire, and was required to exercise the highest degree of care consistent with the practical operation of the ride and the mode of conveyance used for the safety of its passengers. (O'Callaghan v. Bellwood Park Co., 242 Ill. 336; Arndt v. Riverview Park Co., 259 Ill. App. 210, 219.) In O'Callaghan v. Bellwood Park Co. the court approved two instructions given to the jury at the request of plaintiff, "holding, in effect, that it was the duty of the appellant, in operating the scenic railway, to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance could reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on its cars." In the instant case the trial court instructed the jury, at the request of the defendant, that it was a common carrier and that it owed "to a passenger upon one of its cars the duty of exercising the highest degree of care reasonably consistent with the character and mode of conveyance and the practical operation of its cars and the conduct of its business to carry safely the passengers on his or her ride on said amusement device." The defendant, in its brief, thus describes the ride in question: "Defendant in this case, operated as one of the amusement devices in the park, a ride known as 'The Pep.' This ride has been in continuous operation during the summer months

question. Moreover, the court instructed the jury that there was no evidence in the case to justify them in finding that the ride was negligently or wantonly operated or was defective in any way. The defendant answers that he made out a case for the plaintiff. The defendant is compelled to rely upon the testimony of John Jones and it is his purpose to show that testimony is untrue. Neither in the decision nor in the evidence does the plaintiff rely upon that testimony. Other relevant questions are asked by the defendant. The defendant concludes, as it must, that it was a common carrier of passengers for hire, and was required to exercise the highest degree of care consistent with the practical operation of the ride and the state of knowledge used for the safety of its passengers. O'Callaghan v. O'Callaghan, 111 Cal. 2d 111, 338 P.2d 111, 112. The court approved two instructions given to the jury at the request of plaintiff, holding in effect, that it was the duty of the operator, in operating the scenic railway, to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance could reasonably be, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on the cars. In the instant case the defendant instructed the jury, at the request of the defendant, that it was a common carrier and that it owed "to a passenger upon one of its cars the duty of exercising the highest degree of care reasonably consistent with the character and mode of conveyance and the practical operation of the cars and the conduct of its business to carry safely the passengers on his or her ride on said scenic railway." The defendant, in its brief, has described the ride in question: "Defendant in this case, operated an amusement device in the park known as 'The Top'." This ride has been in continuous operation during the summer months

for the past eight years. It carries on the average of about 630,000 people in a season. During the season of 1929 it carried approximately a half a million people. It is a short, snappy ride, circular in form and with dips in it. The total distance around the ride from start to finish is about a half a mile and the ride is operated on the principle of gravity. The cars are started on a level place and by means of a cog chain are pulled up to the top of the incline, higher than any other part of the ride. After they reach the top of the incline they operate from that point on by gravity. They travel in a circular route with dips and finally come back to the receiving platform. The purpose of the ride is to give the passengers a thrill such as is produced by sharp descents, dips and turns, and the sensation produced by the descent of the cars at high speed under the force of gravity. * * * The cars after going all the way around the ride come back by means of a circular track to the unloading platform which is just about 20 feet back of the loading platform. As the passengers unload, the cars are then run onto the loading platform. * * * From the point where the cars are loaded, that is, from the end of the braking device which holds the cars in position while they are being loaded, to the foot of the incline where the cog chain is and where these steel side rails or flanges are, is exactly 28 feet. Each car is about 9 feet long. The whole train about 13 feet long. * * * After the cars are loaded the man releases the brake handle and goes to the car and gives it a little push; there is a slight incline there down which the car slowly coasts until it reaches the foot of the incline. It then catches on the cog chain which pulls it up the incline. * * * The car then travels about 180 feet from the bottom of the incline to the top of the incline." The accident in question occurred at night but the evidence of both sides shows that the premises were well lighted. There was a carnival in progress at White City at the time

for the past eight years. It carries on the average at about
 100,000 people in a season. During the season of 1929 it carried
 approximately a half a million people. It is a short, steep ride,
 situated in town and with dips in it. The total distance around
 the ride from start to finish is about a half a mile and the ride is
 operated on the principle of gravity. The cars are started on a
 level plane and by means of a cog chain are pulled up to the top of
 the incline, higher than any other part of the ride. After they
 reach the top of the incline they operate from that point on by
 gravity. They travel in a circular route with dips and finally come
 back to the receiving platform. The purpose of the ride is to give
 the passengers a thrill such as is produced by many amusement rides
 and turns, and the sensation produced by the descent of the cars at
 high speed under the force of gravity. * * * The cars after going
 all the way around the ride come back by means of a circular route
 to the unloading platform which is just about 25 feet back of the
 loading platform. As the passengers unload, the cars are then run
 onto the loading platform. * * * From the point where the cars
 are loaded, that is, from the end of the loading device which holds
 the cars in position while they are being loaded, to the foot of
 the incline where the cog chain is and where these steel cars take
 off, the distance is exactly 25 feet. Each car is about 9 feet long.
 The cars travel about 15 feet long. * * * After the cars are loaded
 the cars release the brake handle and go to the top and give it
 a little push; there is a slight incline down from which the cars
 start. * * * The cars are pulled up to the top of the incline. It then
 comes on the cog chain which pulls it up the incline. * * * The
 cars travel about 150 feet from the bottom of the incline to
 the top of the incline. * * * The accident in question occurred at night
 but the evidence of both sides and the evidence were well
 lighted. There was a carnival in progress at White City at the time

and there was a large crowd on the loading platform of the ride at and before the time of the accident. As one of the witnesses testified: "There was an awful big crowd that night." O. O. Tuttle, a witness for the defendant, was the starter of the cars. The following are excerpts from his testimony: "Q. This particular night you were loading passengers at the time of this occurrence, or just before, you were loading those cars just as fast as you could put one in there, load it and send the cars out? You had people waiting all the time, didn't you? A. Yes, sir. Q. As quick as people got in one car, you started it? A. Not until the other car got over the chain. Q. What was that? A. Until the other cars got up the incline. Q. Just as fast as the other car was on the incline - you said it would take one-quarter minute? A. Yes, sir. Q. It takes about that long for a car to load, doesn't it? A. It would take longer than that to load and get them to the chain. Q. Any car that had gone before the next one came in would be on the incline before you started up? A. Most of the time we had to hold the cars until the other car got to the top. Q. As a matter of fact, just as quick as the cars came in, people rushed in pell mell? A. Yes, sir. Q. And out the cars went? A. Yes, sir. Q. As they came in, they didn't come in in any order in which to get into the car? A. No, sir. Q. As the crowd got in there, it was a question of who got in there first? A. Yes, sir." The plaintiff, eighteen years old, and two other boys, about the same age, were together. They paid their fares and entered the loading platform. Plaintiff, in the lead, stepped into the front of the second car of the train. The two other boys tried to get in the same car but so many of the crowd "scrambled" in ahead of them that they were unable to do so. A tall, slim man got in the seat on which plaintiff intended to sit. This man "sprawled" his legs on the seat and before the plaintiff could seat himself the train was started.

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 at and before the time of the accident. As one of the witnesses
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 Justice, a witness for the defendant, was the starter of the train.
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 Q. But car that had gone before the next one came in would be on
 the incline before you started up? A. Most of the time we had
 to hold the cars until the other car got to the top. Q. As a
 matter of fact, just as quick as the cars came in, people rushed in
 and all right? A. Yes, sir. Q. And out the cars went? A. Yes,
 sir. Q. As they came in, that didn't seem to be any crowd in there,
 to get into the cars? A. No, sir. Q. As the crowd got in there,
 it was a question of who got in there first? A. Yes, sir. Q. The
 first, at eleven years old, and two other boys, about the same
 age, were together. They paid their fares and entered the loading
 platform. Initially, in the first, stopped just in front of the
 second car of the train. The two other boys went to get in the same
 car but as many of the crowd "swarmed" in ahead of them that they
 were unable to do so. A girl, also was not in the crowd in which
 initially intended to sit. She was "swarmed" and fell on the seat
 and before she initially could reach the seat, she was killed.

and while the plaintiff was in a half standing and half sitting position the cog chain caught the car and the plaintiff was thrown. His feet "flew up" and one of them came down outside of the car and was caught between the car and a guide board, and he was severely injured. He kept "hollering" for help, but neither the man that started the cars nor any other employee of the defendant heard him, and all of the employees who testified stated that they did not know anyone was injured until they saw a lot of blood in the car when the ride was finished and the car had been unloaded. As has been stated, it is 130 feet from the bottom to the top of the incline, and from defendant's exhibit 3 it clearly appears that when the front car reaches the cog at the commencement of the incline it suddenly ascends at a very sharp angle, and it is perfectly apparent that any passenger on a car who was not seated would be thrown. The plaintiff's evidence was to the effect that the train in question was loaded with the front end of the first car "about five, six or seven feet" from the foot of the incline. The defendant's evidence is to the effect that from the place where the cars are loaded to the cog chain is 28 feet. The rapidity with which the defendant was loading cars and starting them on their journey, at the time in question, is well illustrated by the testimony of the starter. According to his testimony a train of cars was moved from the unloading platform to the loading platform, then loaded and started on its journey by the time that the preceding train had reached the top of the incline. This witness also testified that three trains of cars were kept constantly moving on the ride on the evening in question. The testimony shows that when the front car of the train in question reached the bottom of the incline, and as the cog took hold of the car, the train gave a jerk and started up the incline, and it was at that moment that the plaintiff was thrown. The starter knew that after the train started it took but a second or two before the front

and while the plaintiff was in a half standing and half sitting position the car chain caught the car and the plaintiff was thrown. His feet "flew up" and one of them came down outside of the car and was caught between the car and a single wheel, and he was severely injured. He kept "holloing" for help, but neither the men that started the car nor any other employee of the defendant heard him, and all of the employees who testified stated that they did not know anyone was injured until they saw a lot of blood in the car when the car was finished and the car had been unloaded. As has been stated, it is 180 feet from the bottom to the top of the incline, and from defendant's exhibit it clearly appears that when the train was reached the top of the incline it was only about 100 feet from the top of the incline, and it is perfectly apparent that any passenger at a very sharp angle, and it is perfectly apparent that any passenger on a car who was not seated would be thrown. The plaintiff's evidence was to the effect that the train in question was loaded with the trunk end of the first car "about five, six or seven feet" from the top of the incline. The defendant's evidence is to the effect that from the place where the cars are loaded to the top of the incline is 180 feet. The rapidly with which the defendant was loading cars and unloading them on their journey, at the time in question, is well illustrated by the testimony of the witness. According to his testimony a train of cars was moved from the unloading platform to the loading platform, then loaded and started on its journey by the time that the preceding train had reached the top of the incline. This witness also testified that three trains of cars were kept continuously coming on the side on the evening in question. The testimony shows that when the front car of the train in question reached the bottom of the incline, and as the top of the incline was at the rear of the train a jerk and started up the incline, and it was at that moment that the plaintiff was thrown. The expert knew that when the train started it took but a second or two before the train

car reached the cog chain and that at that point the train would receive a jerk and would at once start up the incline at a very sharp angle. In one of the exhibits introduced by the defendant there appears a large sign, hung over the track at the loading platform and a few feet in front of the point where the incline commences. Upon this sign appear, in very large letters, the following words: "DANGER DO NOT STAND UP IN CARS." Under the facts of this case it was the manifest duty of the defendant to see that the passengers in the car were seated before the train was started. It knew that when a car was "grabbed" by the cog and started up the incline a person standing in a car would be thrown.

The defendant contends that "the trial court should have directed a verdict for the defendant." There is not the slightest merit in this contention. Under the facts of this case it is idle for the defendant to argue that it exercised the highest degree of care and caution for the safety of its passengers and that it did all that human foresight and vigilance could reasonably do, consistent with the mode of conveyance and the practical operation of said conveyance, to prevent an accident to its passenger - the plaintiff. The jury were justified, under the proof, in finding the defendant guilty of gross negligence. They have found, by their verdict, that the plaintiff was in the exercise of ordinary care for his own safety at the time of and just prior to the accident in question, and we approve of that finding. In support of the instant contention the defendant has burdened this court with arguments and citations that have no application to a case like the instant one. To illustrate: The defendant argues that there is "no presumption of negligence from 'sudden start' of car," and in support of this argument many railroad cases are cited. The defendant also argues that "the leading authorities now hold that, in view of the necessity of furnishing rapid transportation to the public, there is no impropriety in moving a car after a passenger is fairly

car reached the top of the incline and then as the train would
 receive a jerk and would be once again up the incline at a very
 steep angle. In one of the exhibits introduced by the defendant
 there appears a large sign, hung over the track at the loading
 platform and a few feet in front of the point where the incline
 commenced. Upon this sign appear, in very large letters, the
 following words: "DANGER DO NOT STAND UP IN CARS." Under the facts
 of this case it was the manifest duty of the defendant to see that the
 passengers in the car were seated before the train was started. It
 knew that when a car was "released" by the cog and started up the in-
 cline a person standing in a car would be thrown.

The defendant contends that "The trial court should have
 directed a verdict for the defendant." There is not the slightest
 merit in this contention. Under the facts of this case it is idle for
 the defendant to argue that it entailed the slightest degree of care
 and caution for the safety of its passengers and that it did all that
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 negligence. They have found, by their verdict, that the plaintiff was
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 in support of this argument many railroad cases are cited. The defend-
 ant also argues that "the loading instructions now held that, in view
 of the necessity of furnishing rapid transportation to the public,
 there is no responsibility in moving a car after a passenger has fairly

on the car, and without waiting for the passenger to reach a seat," and cites many railroad cases in support of this argument. Railroads run on the surface or on a level, while, according to defendant's counsel, "the purpose of the ride is to give the passengers a thrill such as is produced by sharp descents, dips and turns, and the sensation produced by the descent of the cars at high speed under the force of gravity." In support of the instant contention the defendant seeks to inject a question of alleged variance. The defendant states that the declaration charges that the cars were started with a violent jerk, as a result of which the plaintiff's right foot became caught between the car and the adjacent guide board, and it contends that "the proof shows that the cars were not started out with a violent jerk but were started by being pushed by an attendant so that they rolled slowly (at the rate of about 3 miles per hour) under the force of gravity for a distance of approximately 28 to 30 feet after which they hit the cog-chain at the foot of the incline which pulls the cars up the incline. It was this natural jerk at the foot of the incline together with the fact that plaintiff had voluntarily placed himself in a half-standing, half-sitting position for the purpose of pulling up his pants-leg which caused him to be thrown off balance with the resulting injury. The evidence clearly shows that the jerk which precipitated his injury occurred at the foot of the incline when the car hit the cog-chain, and that he was not injured by a violent jerk of the cars when the train was started." It is a sufficient answer to this contention to say that in the trial of the instant case the defendant did not raise, in any way, the question of variance. In fact, it did not raise that question in the assignment of errors. It is settled law that if a party desires to raise the question of variance he must indicate it specifically in an objection made, and point out in what it consists, so as to enable the court to pass upon the question intelligently and also to enable the plaintiff to amend the pleadings

on the one, and without waiting for the passenger to reach a seat,"
and after many reasons were in support of this argument. Bell-
made two or three excuses as a lawyer, while, according to the
and, however, "the purpose of the rule is to give the passenger a
which such as is produced by sharp depressions, dips and turns, and the
causation produced by the descent of the cars at high speed under the
force of gravity." In support of the inference concerning the defendant
need to inject a question of alleged variance. The defendant states
that the testimony changes that the cars were started with a violent
start, as a result of which the plaintiff's right foot became caught
between the car and the adjacent guide posts, and it contends that
"the proof shows that the cars were not started out with a violent
start but were started by being pushed by an attendant so that they
started slowly (at the rate of about 3 miles per hour) under the force
of gravity for a distance of approximately 25 to 30 feet after which
they hit the cog-chain at the foot of the incline which falls the same
up the incline. It was this natural jerk at the foot of the incline
together with the fact that plaintiff had voluntarily placed himself
in a half-standing, half-sitting position for the purpose of pulling
up his pants-leg which caused him to be thrown off balance with the
resulting injury. The evidence clearly shows that the jerk which
precipitated his injury occurred at the foot of the incline when the
car hit the cog-chain, and that he was not injured by a violent jerk
at the top when the train was started." Is it a sufficient answer to
this contention to say that in the trial of the instant case the
defendant did not raise, in any way, the question of variance. In
fact, it did not raise that question in the assignment of errors. It
is settled law that if a party desires to raise the question of variance
he must indicate it specifically in an objection made, and point out
in what it consists, so as to enable the court to pass upon the question
intelligently and also to enable the plaintiff to amend the pleadings

so as to make them conform to the evidence. It is unnecessary to cite cases in support of this settled principle of law. We may say, however, that the only case cited by the defendant in support of its contention, Buckley v. Mandel Bros., 333 Ill. 368, supports the rule we have stated.

The defendant contends that "where an accident can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and where nothing is done out of the usual course of business, unless that course itself is improper, negligence cannot be presumed." The two cases cited in support of this contention have no application to the instant one. Plaintiff's case is not based upon presumptions nor upon the doctrine of res ipsa loquitur.

The defendant contends that "the court erred in permitting Dr. Sydney E. Greenspahn, expert, who was called on behalf of the plaintiff to examine him for the sole purpose of testifying, to express an opinion that the plaintiff was permanently injured as a result of the accident in question." This contention is without merit. In the first place, the defendant does not, in any way, question the amount of the verdict. Moreover, in the instant case, it was proper for the plaintiff to prove, by the witness, that plaintiff was permanently injured, as the fact that the plaintiff received injuries in the accident in question is not denied. Repeatedly, during the trial and in its brief, this fact is admitted. In its brief the defendant states: "The plaintiff received in this accident a serious injury to his foot. It became infected and as a result of this infection there is some limitation of motion in it." In Schlauder v. Chicago & So. Trac. Co., 253 Ill. 154, cited by the defendant in support of the instant contention, the court held that in a personal injury suit, where the defendant disputes the fact that the plaintiff was injured in the accident in question and the

as to make them contrary to the evidence. It is unnecessary to
also make in support of this settled principle of law. To say
that, however, that the only case cited by the defendant in support
of its contention, Winkler v. National Bldg. Co., 223 Ill. 348, supports
the rule we have stated.

The defendant contends that "where an accident can be
accounted for as readily on the hypothesis of pure accident and
absence of negligence as upon the ground of negligence, and where
nothing is shown out of the usual course of business, unless there
be some itself is improper, negligence cannot be presumed." The law
is also cited in support of this contention have no application to
the instant case. Plaintiff's case is not based upon presumption
but upon the doctrine of res ipsa loquitur.

The defendant contends that "the court erred in permitting
Dr. Frank W. Greenough, expert, who was called on behalf of the
plaintiff to examine him for the sole purpose of testifying, to
express an opinion that the plaintiff was permanently injured as a
result of the accident in question." This contention is without
basis. In the first place, the defendant does not, in any way,
question the amount of the verdict. Moreover, in the instant case,
it was proper for the plaintiff to prove, by the witness, that plain-
tiff was permanently injured, on the fact that the plaintiff received
injuries in the accident in question is not denied. Respectfully,
during the trial and in the brief, this fact is established. In the
brief the defendant states: "The plaintiff received in this accident
a serious injury to his foot. It became infected and as a result of
this infection there is some limitation of motion in it." In
Winkler v. Chicago & N. W. Ry. Co., 223 Ill. 348, cited by the
defendant in support of the instant contention, the court held that
in a personal injury suit, where the defendant alleges the fact
that the plaintiff was injured in the accident in question and the

evidence in its behalf tends to prove that she was not injured, it is error to permit a physician to testify that in his opinion the plaintiff was "permanently injured as a result of that accident."

The defendant next contends that "the court erred in refusing to instruct the jury in regard to the illumination or lighting furnished by the White City Amusement Company." No argument of any kind is made in support of this contention and therefore we are not obliged to notice the same. However, the case went to the jury upon the first count and there is no allegation in that count that the illumination or lighting furnished by the defendant of the premises in question was insufficient or defective. The first additional count did contain an allegation as to the illumination or lighting, but at the close of all the evidence a directed verdict was allowed as to that count. The plaintiff, in his evidence, admitted that the place was well lighted.

The record ~~XXXXXXXXXX~~ shows that this case was well tried by the trial court. The defendant was represented by an able, experienced and careful lawyer. While on the motion for a new trial the only point made was that the verdict of the jury was manifestly against the weight of the evidence, nevertheless, we have given careful consideration to the other points now urged in this court. The defendant has had a fair and impartial trial, and the judgment of the Superior court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

[illegible]

35004

GRACE LONG,
Appellee,

v.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY,
a corporation,
Appellant.

1937
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

26214.657

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Grace Long, plaintiff, sued The Great Atlantic & Pacific Tea Company, a corporation, defendant, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages in the sum of \$2,500. Judgment was entered on the verdict and defendant has appealed.

The additional narr. filed by plaintiff alleges that on June 30, 1927, "the defendant was the owner of and operated and controlled and was then in possession of a store on certain premises then and there known as 2337 E. Madison Street, in the City of Chicago; the said store then and there being run and operated for the purpose of a business for the sale of groceries, provisions and other articles to which the public generally, including the plaintiff were invited, and the plaintiff in pursuance to such invitation was then in said store for the purpose of purchasing divers articles being sold in said store and was, with due care for her own safety, then and there in the act of leaving the said store, yet the defendant, though well knowing the premises, then and there negligently, improperly and wrongfully maintained and permitted to be and remain door steps leading down from the door of said store to the sidewalk

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY,
a corporation,
Plaintiff.

Settled. 655

MR. JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.

Grace Lane, plaintiff, and The Great Atlantic & Pacific Tea Company, a corporation, defendant, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages in the sum of \$2,500. Judgment was entered on the verdict and defendant has appealed.

The additional facts, filed by plaintiff's attorney that on June 25, 1927, "the defendant was the owner of and operated and controlled and was then in possession of a store on certain premises then and there known as 2237 W. Madison Street, in the City of Chicago; the said store then and there being run and operated for the purpose of a business for the sale of groceries, provisions and other articles to which the public generally, including the plaintiff were invited, and the plaintiff in pursuance of such invitation was then in said store for the purpose of purchasing diverse articles being sold in said store and was, with due care for her own safety, then and there in the act of leaving the said store, yet the defendant, though well knowing the premises, then and there negligently, impulsively and wrongfully maintained and permitted to be and remain door steps leading down from the back of said store to the sidewalk

on the aforesaid street in such a worn, smooth, slippery, sloping and dangerous condition that by reason thereof the plaintiff, who then necessarily stepped upon one of said steps to reach the sidewalk of the said street, slipped, slid, stumbled and fell with great force and violence to the ground there and divers bones of her right leg and right heel and foot then and there became and were fractured, dislocated and broken, and divers muscles and ligaments thereof then and there became and were torn, sprained and crushed and she thereby then and there otherwise sustained severe internal and external injuries, and a severe shock to her nervous system and she thereby then and there became and was sick, sore, lame and disordered and so continued for a long space of time to-wit," etc., to the damage of plaintiff, etc.

The plaintiff's evidence tended to support the following theory of facts: On June 30, 1927, about noon, the plaintiff entered the store of the defendant at 2337 West Madison street, Chicago, and bought a can of spinach and a head of lettuce. She then started to walk out of the store. In the front of the store there was a screen door which led onto the street. Just outside of the screen door there were two cement steps leading to the sidewalk. The top step was on a level with the floor of the store and it was partly covered by an iron plate which extended from the sill at the back of the step to within two or three inches of the front edge of the step. This iron plate covered the center of the step and in its original condition was corrugated by transverse grooves which formed little elevated squares or diamonds. The purpose of the corrugation was to prevent persons who might use the step from slipping. The same plate had covered this step for at least twenty-two years. The center of it had been worn "perfectly smooth." There was a "kind of a hollow" there. A person could rub a finger over that portion

on the afternoon of about 1937, in which a woman, unnamed, allegedly, and dangerous condition that by reason thereof the plaintiff, who then necessarily stopped upon one of said steps to reach the sidewalk of the said street, slipped, fell, stumbled and fell with great force and violence to the ground there and diverse bones of her right leg and right heel and foot were broken and were fractured, dislocated and broken, and diverse muscles and ligaments thereof were torn and were bruised and were torn, sprained and crushed and the thereby then and there likewise sustained severe internal and external injuries, and a severe shock to her nervous system and the thereby then and there became sick, dizzy, lame and disoriented and as a result thereof for a long space of time so-called, etc., in the hands of plaintiff, etc.

The plaintiff's evidence tended to support the following theory of facts: On June 20, 1937, about noon, the plaintiff entered the store of the defendant at 2227 East Madison Street, Chicago, and bought a can of spinach and a bunch of lettuce. She then started to walk out of the store. In the front of the store there was a concrete base which led onto the street. Just outside of the store door there were two concrete steps leading to the sidewalk. The top step was on a level with the floor of the store and it was partly covered by an iron plate which extended from the sill of the door to the step so within two or three inches of the front edge of the step. This iron plate covered the corner of the step and in the original condition was supported by concrete bases which formed little elevated spaces or diamonds. The purpose of the construction was to prevent persons who might see the step from slipping. The concrete base covered this step for at least twenty-two years. The corner of it had been worn "potentially smooth". There was a "kind of a hollow" there. A person could put a finger over this position

of it without feeling any corrugation. When plaintiff entered the store the steps were dry, but when she left the premises they were a little wet. The plaintiff opened the screen door and as she stepped on the iron plate her foot slipped from under her and she fell. When she came to a stop after the fall she was sitting on the sidewalk "at the edge of the bottom step." The defendant concedes, in this court, that if the plaintiff is entitled to recover, the damages assessed by the jury are not excessive.

The defendant contends that "a verdict against a storekeeper will not be permitted to stand unless it be shown by a preponderance of the evidence that the storekeeper was negligent in that he failed to exercise ordinary care and prudence to render his premises reasonably safe for his invitee." The defendant, in support of this contention, argues that "to sustain the verdict in this case, the plaintiff must have proven either, first, that the water had been permitted to gather on the steps upon which plaintiff fell making them unsafe and that such water had gathered there with the knowledge of the defendant or had been there for such length of time as would have charged the defendant with notice; or, secondly, that the steps and iron place were of such faulty construction or condition that the defendant, exercising ordinary care and prudence, would have known that the same were not reasonably safe for the plaintiff's visit to the defendant's store." The evidence tends to show that the steps were wet for only about five minutes before the accident, and the defendant has seen fit to quote numerous authorities to sustain its argument that the defendant "could not be charged with having had knowledge of the wet condition of the steps of the store when such condition existed, according to plaintiff's own testimony, for less than five minutes and when during all of that five minutes the defendant's servant was engaged in waiting upon the plaintiff."

of it without feeling any discomfort. When Plaintiff entered the store the steps were dry, but when she left the premises they were a little wet. The Plaintiff opened the screen door and as she

stepped on the iron plate her foot slipped from under her and she fell. When she came to a stop after the fall she was sitting on the sidewalk "at the edge of the bottom step." The defendant says, in this court, that if the Plaintiff is entitled to recover, the damages assessed by the jury are not excessive.

The defendant contends that "a verdict against a storekeeper will not be permitted to stand unless it be shown by a preponderance of the evidence that the storekeeper was negligent in that he failed to exercise ordinary care and prudence to render his premises reasonably safe for his invitees." The defendant, in support of this contention, argues that "to sustain the verdict in this case, the Plaintiff must have proven either, first, that the water had been permitted to gather on the steps upon which Plaintiff

fell while upon the steps and that such water had gathered there with the knowledge of the defendant or had been there for such length of time as would have charged the defendant with notice; or, secondly, that the steps and iron plate were of such faulty construction or condition that the defendant, exercising ordinary care and prudence, would have known that the same were not reasonably safe for the Plaintiff's visit to the defendant's store." The evidence tends to show that the steps were wet for only about five minutes before the accident, and the defendant has been able to prove numerous authorities to sustain its argument that the defendant "could not be charged with failing to preserve of the wet condition of the steps of the store, when such condition existed, according to Plaintiff's own testimony, for less than five minutes and when during all of that five minutes the defendant's servant was engaged in waiting upon the Plaintiff."

defendant's servant was engaged in waiting upon the Plaintiff."

The plaintiff concedes that "the mere presence of water should not have constituted a cause of action," and "the presence of a little water or dampness merely increased the slipperiness, and was a contributing cause; but the plaintiff never contended that it was the presence of water which constituted actionable negligence." The mere fact that the defendant could not be charged with knowledge of the wetness of the steps and that such condition may have contributed to the accident, would not relieve the defendant from responsibility in this case if it were otherwise negligent as charged in the declaration and if such negligence was an efficient cause and without which the injury would not have occurred. (See Miller v. Kelly Coal Co., 239 Ill. 626, 629, and cases cited therein.) The defendant admits that it is a fundamental rule of law governing a case like the instant one that "'when one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them to danger and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.'" Under the plaintiff's theory of fact it would have been error for the trial court to have held, as a matter of law, that the defendant was not guilty of negligence, and we are satisfied that the questions whether the plaintiff exercised due care and whether the defendant was negligent, as charged, were for the jury, and they have decided these questions in favor of the plaintiff, and we would not be justified, under the evidence in this case, in disturbing the verdict.

The defendant contends that "an invitee treading the steps of a store, upon leaving the premises, with full knowledge of the fact that such steps had a smooth iron plate as a facing, is held to as high degree of care for her own safety as is required of the owner of the store."

In support of this contention the

The plaintiff contended that "the mere presence of water should not have constituted a cause of action," and "the presence of a little water or dampness merely increased the slipperiness, and was a contributing cause; but the plaintiff never contended that it was the presence of water which constituted a negligent negligence."

It was contended that the defendant could not be charged with knowledge of the wetness of the steps and that such condition may have been noticed in the accident, would not relieve the defendant from responsibility in this case if it were otherwise negligent as charged in the declaration and if such negligence was an efficient cause and without which the injury would not have occurred. (See Wright v. Kelly 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, and cases cited therein.) The defendant admits that it is a fundamental rule of law governing cases like the instant one that "when one negligently or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them to danger and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visitor." Under the plaintiff's theory of facts it would have been either for the trial court to have held, as a matter of law, that the defendant was not guilty of negligence, and we are satisfied that the plaintiff's burden the plaintiff excluded the case and whether the defendant and negligent, as charged, were for the jury, and they have decided these questions in favor of the plaintiff, and we would not be justified, under the evidence in this case, in disturbing the verdict.

The defendant contends that "an invitee traveling the steps of the store, upon leaving the premises, with full knowledge of the fact that such steps had a wooden iron plate as a landing, is not to be held against of care for any injury as is required of the owner of the store."

In support of this contention the

defendant argues that the plaintiff had "the same opportunity of observing and knowing the condition of the place where she claimed to have slipped as was known or should have been known by the defendant." In support of this argument defendant cites Murray v. Bedell Co., 236 Ill. App. 247, which, upon the facts, has no application to the instant one. In that case there was no defect, either from construction or from wear or want of repair, and it appeared that the plaintiff entered, on a rainy day, the vestibule of a store surrounded by display windows and extending from the sidewalk to the store proper, with full knowledge that there was mud and water on the vestibule floor, and the court held that the plaintiff, under the facts of that case, was held to as high degree of care for her own safety as was the defendant. In the instant case it appears from the plaintiff's proof that when she entered the premises the steps were dry. It also appeared that the plaintiff had been in the premises in question only two or three times. In any event, under the facts of this case, it was a question for the jury to decide as to whether the plaintiff was guilty of contributory negligence. They have decided that question in favor of the plaintiff and we would not be justified in disturbing that finding.

The defendant contends that "there is no proof in the instant case that the plaintiff's shoe was free from any slippery substance which she might have had on her shoe when she entered the premises. There being no proof that the plate was other than smooth, the jury might have as reasonably speculated that the accident was caused by some foreign substance on plaintiff's shoe and a verdict based on evidence from which the jury did or might have speculated will not stand." As there is no fact or circumstance in the case to warrant the assumption that the accident occurred because of some slippery substance on the shoe of the plaintiff the instant contention is not entitled to serious consideration.

...the defendant's statement that the plaintiff had "the same opportunity of observing and knowing the condition of the place where she claimed to have slipped as was known or should have been known by the defendant." In support of this argument defendant cited Imperial v. Pacific Co., 220 Ill. App. 2d, which, upon the facts, was no application in the instant case. In that case there was no defect, either from negligence or from want of vigilance, and it appeared that the plaintiff entered, on a rainy day, the vestibule of a store, entered by sliding windows and extending from the sidewalk to the store proper, with full knowledge that there was ice and snow on the vestibule floor, and the court held that the plaintiff, under the facts of that case, was held to an high degree of care for her own safety as was the defendant. In the instant case it appears from the plaintiff's grant that when she entered the premises the steps were icy. It also appears that the plaintiff had been in the premises in question only two or three times. In any event, under the facts of this case, it was a question for the jury to decide as to whether the plaintiff was guilty of contributory negligence. They have decided that there was no fault of the plaintiff and we would not be justified in disturbing that finding.

The defendant contends that there is no proof in the instant case that the plaintiff's shoe was free from any slippery substance. With this might have had an ear then when she entered the premises, and failed to find out that the place was other than smooth, the jury has given as reasonably explained that the accident was caused by the foreign substance on plaintiff's shoe and a verdict based on the facts from which the jury did or might have speculated will not stand. As there is no fact or circumstance in the case so far as is concerned that the accident occurred because of some slippery substance on the shoe of the plaintiff the instant contention is not entitled to serious consideration.

The defendant's final contention is that "it is the duty of the appellate court to consider the testimony and if they find that the verdict and judgment are contrary to and not supported by the testimony, it should set aside such verdict and reverse the judgment." In support of this contention the defendant argues that the testimony of Theodore Sweeney, a witness for it, as to the manner in which the accident occurred, is more believable than the testimony of the plaintiff on the same subject matter. It was the province of the jury to pass upon the credibility of the witnesses and the weight, if any, that should be attached to their testimony. The jury believed the testimony of the plaintiff as to how the accident occurred, and we are satisfied that we would not be justified in disturbing the verdict.

The case seems to have been exceedingly well tried by the trial court and the record is unusually free from error. The defendant does not complain of any erroneous ruling on the admission or exclusion of evidence, nor does it claim error in the matter of instructions given or refused, nor does it claim any improper conduct on the part of the trial court or plaintiff's attorney. The defendant has had a fair trial and the judgment of the Circuit court of Cook county should be and it is affirmed.

AFFIRMED.

Gridley, B. J., and Kerner, J., concur.

The defendant's final contention is that "it is the duty of the appellate court to consider the testimony and if they find that the verdict and judgment are contrary to and not supported by the testimony, it should set aside such verdict and reverse the judgment." In support of this contention the defendant argues that the testimony of Theodore Wrensey, a witness for it, as to the manner in which the accident occurred, is more reliable than the testimony of the plaintiff on the same subject matter. It was the province of the jury to pass upon the credibility of the witnesses and the weight, if any, that should be attached to their testimony. The jury believed the testimony of the plaintiff as to how the accident occurred, and we are satisfied that we would not be justified in disturbing the verdict.

The case seems to have been exceedingly well tried by the trial court and the record is unimpaired from error. The defendant does not complain of any erroneous ruling on the admission or exclusion of evidence, nor does it claim error in the matter of instructions given or refused, nor does it claim any improper conduct on the part of the trial court or plaintiff's attorney. The defendant has had a fair trial and the judgment of the Circuit Court of Cook County should be and it is affirmed.

APPEAL.

Attorneys: W. J. and E. J. ...

35026

1947
THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
v.
FRANK BATTAGLIA,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

262 I.A. 658

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, an information was filed against the defendant, charging him with unlawfully carrying concealed, on or about his person, a deadly weapon, to wit, a revolver. A plea of not guilty was entered. The case was tried by the court, without a jury, and the defendant was found guilty and sentenced to the House of Correction for one year and to pay a fine of \$300. This writ of error followed.

After the writ was sued out, the defendant, upon leave of this court, filed a petition seeking mandamus against the trial judge to compel him to sign a bill of exceptions which the defendant had presented to him. After the trial judge filed an answer to the petition, counsel for the defendant appeared before this court and stated that the trial court had signed a bill of exceptions and that the defendant desired to dismiss the petition, and, upon his motion, it was dismissed.

The defendant does not contend that the evidence was not sufficient to warrant the finding of the court that the defendant was guilty. In fact, the question of his guilt or innocence of the charge, under the proof, is not argued nor even raised in his brief.

17

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

FRANK H. TAGGART,
Plaintiff in Error.

ORDER TO RECONVICT

COURT OF CHICAGO.

262 I.A. 658

MR. JUSTICE GORDON DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, on September 1, 1911,

Frank H. Taggart, defendant, was arraigned and pleaded guilty to the charge of

carrying a concealed weapon, to-wit, a

revolver. A plea of not guilty was entered. The case was

tried at the court, without a jury, and the defendant was found

guilty and sentenced to the House of Correction for one year and

to pay a fine of \$500. This writ of error followed.

After the writ was issued, the defendant, upon leave

of said court, filed a petition seeking judgment against the trial

Judge to compel him to sign a bill of exceptions which the defendant

had presented to him. After the trial judge filed an answer to

the petition, counsel for the defendant appeared before this court

and stated that the trial judge had signed a bill of exceptions

and that the defendant desired to examine the petition, and, upon

his motion, it was dismissed.

The defendant does not contend that the evidence was not

sufficient to warrant the finding of the court that the defendant

was guilty. In fact, the question of his guilt or innocence of

the charge, under the facts, is not argued nor even raised in his

brief.

The defendant contends that "in all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel," and that this right was denied him, but the record recites that the defendant was represented by counsel upon the trial of the cause. The record of a court imports ^{absolute} verity and cannot be contradicted or amended except by other matter of record or under the authority of the court. (The People v. Washington, 342 Ill. 350.) Moreover, the bill of exceptions shows that when the case was called for trial the defendant asked for a continuance on the ground that "he had not ample time to take counsel" and that thereupon the court told him to go back into the lockup and talk to his counsel, Attorney Filiti; that an hour later the case was again called for trial and Attorney Filiti then appeared and represented the defendant during the trial of the cause. The instant contention of the defendant is not sustained by the common law record nor the bill of exceptions.

The defendant contends that he was entitled to a reasonable continuance to prepare his defense and that the trial court denied him this right. The bill of exceptions shows the following: "The Court: Then as I understand it, there are two charges; one for carrying concealed weapons, and two, for assault. Mr. Mast (Assistant's State's Attorney): Shall we proceed with the trial? The State is ready. The Court: We might as well hear the evidence in both cases at the same time, if there is no objection. Att'y Filiti (attorney for defendant): We would like to have a continuance, but if the Court is going to proceed, we might as well hear the evidence in both cases. The Court: Let the witnesses be sworn. (Witnesses Sworn)." This statement of defendant's attorney could scarcely be called a motion for a continuance. No affidavit in support of a continuance was presented, nor was there any request made for time to prepare an affidavit, nor did the counsel state

The defendant contends that "in all criminal proceedings, the accused shall have the right to appear and defend in person and by counsel," and that this right was denied him, but the record reflects that the defendant was represented by counsel upon the trial of the accused. The record of a court implicitly and cannot be contradicted or amended except by other matter of record or under the authority of the court. (The People v. Washington, 262 Ill. 380.) Moreover, the bill of exceptions shows that when the case was called for trial the defendant asked for a continuance on the ground that "he had not ample time to take counsel," and that thereupon the court told him to go back into the lockup and talk to his counsel. Attorney Tillet then appeared and represented the defendant during the trial of the accused. The instant contention of the defendant is not sustained by the common law record nor the bill of exceptions.

The defendant contends that he was entitled to a continuance to prepare his defense and that the trial court denied him this right. The bill of exceptions shows the following: "The Court: Then as I understand it, there are two charges; one for carrying concealed weapons, and two, for assault. Mr. Ward (Assistant State's Attorney): Shall we proceed with the trial? The State is ready. The Court: We might as well hear the evidence in both cases at the same time, if there is no objection. Tillet (attorney for defendant): We would like to have a continuance, but if the Court is going to proceed, we might as well hear the evidence in both cases. The Court: For the witnesses be sworn. (Witness sworn). This statement of defendant's attorney would scarcely be called a motion for a continuance. No affidavit is made for time to prepare an affidavit, nor did the counsel state support of a continuance was presented, nor was there any request

any reason why a continuance should be granted. The bill of exceptions further shows that after the state had presented its evidence and the court had called upon the attorney for the defendant to proceed with the defense the latter stated that the defendant wanted a continuance, but absolutely no reason was stated to the court as to why a continuance should be granted, and the bill of exceptions fails entirely to show how the defendant expected to be aided by a continuance. There is no merit in the instant contention.

The defendant next contends that "when a defendant on information in a criminal case in any Court of this State, shall fear that he will not receive a fair and impartial trial in the court in which the case is pending, because the Judge is prejudiced against him, the Court shall award a Change of Venue." The Venue act provides (ch. 146, Cahill's St., 1931, par. 20, sec. 20) that "every application for a change of venue shall be by petition setting forth the cause of the application and praying a change of venue, which petition shall be certified by the affidavit of the defendant;" and section 21 provides that "when the cause for a change of venue is the prejudice of the judge * * * the petition shall be accompanied by the affidavits of the defendant and his attorney, stating that they believe the judge * * * is so prejudiced against the applicant or his attorney that he cannot have a fair and impartial trial." It is conceded that no application, in accordance with the provisions of the statute, was made. The bill of exceptions shows that when the case was called for trial the defendant's attorney "asked for a change of venue," and that thereupon the court overruled the motion on the ground that no petition was presented to the court. No petition was thereafter presented nor was any request made for time in which to prepare one. The right to a change of venue is not absolute unless a party brings himself within the provisions

any reason why a continuance should be granted. The bill of exceptions turned down in effect the case was presented in evidence and the court had called upon the attorney for the defendant to proceed with the defense the latter stated that the defendant wanted a continuance, but absolutely no reason was stated to the court as to why a continuance should be granted, and the bill of exceptions tells entirely to show how the defendant expected to be aided by a continuance. There is no merit in the instant contention.

The defendant next contends that "when a defendant on information in a criminal case in any court of this state, shall feel that he will not receive a fair and impartial trial in the court in which the case is pending, because the judge is prejudiced against him, the court shall award a change of venue." The venue act provides (Ch. 146, Gen. Stat. 1901, Sec. 20) that "every application for a change of venue shall be by petition setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the defendant, and section 21 provides that "when the cause for a change of venue is the prejudice of the judge" - "the petition shall be accompanied by the affidavit of the defendant and his attorney, stating that they believe the judge" - "is so prejudiced against the applicant or his attorney that he cannot have a fair and impartial trial." It is contended that no application, in accordance with the provisions of the statute, was made. The bill of exceptions shows that when the case was called for trial the defendant's attorney "asked for a change of venue," and that thereupon the court overruled the motion as the ground that no petition was presented to the court. No petition was presented, and was not presented until the time in which to present was. The right to a change of venue is not absolute unless a party brings himself within the provisions

of the statute. Counsel for the defendant made no objection to the ruling of the court, and from the bill of exceptions it would appear that even the request for a change of venue was not seriously urged.

The defendant next contends that the court committed reversible error in denying the defendant a jury trial, but our attention has not been called to any part of the record that supports this contention. The record recites the following:

"Now come the people by the State's Attorney and the defendant as well in his own proper person as by counsel also comes, and said defendant being duly arraigned and forthwith demanded of and concerning the charge alleged against him in the information herein how he will acquit himself thereof for a plea in that behalf says that he is not guilty in manner and form as charged in said information.

Said defendant being duly advised by the Court as to his right to a trial by jury in this cause elects to waive a trial by jury, and this cause is, by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury."

The quotation that we have heretofore made from the opinion in The People v. Washington, supra, applies to the instant contention. We may add that there is nothing in the bill of exceptions that tends to contradict the recital in the record. However, the major argument of the defendant in connection with the instant contention is, that while a defendant may waive a jury trial in a misdemeanor case, the record must show that the waiver was in writing. In support of this argument the defendant relies upon the Act of June 17, 1893 (Laws of 1893, p. 96), which required that the waiver of a jury trial must be in writing. That act was declared unconstitutional in Sturges & Burn Mfg. Co. v. Pastel, 301 Ill. 253, and the waiver may be oral or in writing, and no particular form is necessary. (The People v. Fisher, 303 Ill. 430, 434.) There is no merit in the instant contention.

of the statute. Counsel for the defendant made no objection to the taking of the case, and from the bill of exceptions it would appear that even the request for a change of venue was not seriously considered.

The defendant next contends that the court committed reversible error in denying the defendant a jury trial, but our attention has not been called to any part of the record that suggests this contention. The record reveals the following:

"Now come the people by the State's Attorney and the defendant as well as his own proper person as by counsel also counsel, and said defendant being duly arraigned and forthwith demanded of and concerning the charge alleged against him in the information herein how he will plead himself thereto for a plea in that behalf says that he is not guilty in manner and form as charged in said information. Said defendant being duly advised by the court as to his right to a trial by jury in said cause elects to waive a trial by jury, and this court is, of agreement in open court between the parties hereto, admitted to the court the trial without a jury."

The question that we have heretofore made from the opinion in the People v. ... applies to the instant contention. We may add that there is nothing in the bill of exceptions that tends to contradict the recital in the record. However, the major argument of the defendant in connection with the instant contention is that while a defendant may waive a jury trial in a misdemeanor case, the record must show that the waiver was in writing. In support of this argument the defendant relies upon the act of June 14, 1905 (Laws of 1905, p. 92), which provided that the waiver of a jury trial must be in writing. That act was declared unconstitutional in People v. ..., 201 Ill. 253, and the waiver may be oral or in writing, and no particular form is necessary. (See People v. ..., 203 Ill. 420, 424.) There is no merit in the instant contention.

We have now considered all of the contentions raised by the defendant in his brief. Finding no merit in any of them, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

After the opinion in this case had been written and approved, and notice that it would be filed on October 9, 1931, had been published, The People filed a motion to strike the bill of exceptions from the record. This motion is denied.

We have now considered all of the connections which related
to you at this point. I would now wish to say to
you, the judgment of the medical staff of Chicago is affirmed.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

* * * * *

of expressions from the word. This action is denied.

35119

HARRY JACOBSON,
Appellee,

v.

ABRAHAM M. LIEBLING,
Appellant.

1957
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2521A.058

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 9, 1929, judgment by confession on a promissory note for \$6,480.15 was entered against Abraham M. Liebling, defendant, and in favor of Harry Jacobson, plaintiff. On December 27, 1929, the defendant moved to open the judgment and to allow him to plead and defend. This motion was supported by his amended affidavit. On January 11, 1930, the trial court denied the motion, and the defendant appealed. We held, on the appeal, that on the allegations of the amended affidavit the court should have opened the judgment and allowed the defendant to plead and have a trial upon the merits, and we reversed and remanded the cause with directions to allow the defendant to plead and to have a trial upon the merits. The mandate of this court was filed in the Municipal court, and on November 21, 1930, an order was entered vacating the order of January 11, 1930, and giving leave to the defendant to appear and defend, the judgment to stand as security, and the amended petition of the defendant, filed January 2, 1930, to stand as his affidavit of merits. Thereafter there was a trial before the court, with a jury, and there was a verdict returned finding the issues against the defendant and confirming the judgment by confession. Judgment was entered upon the verdict and the defendant has appealed.

The plaintiff's statement of claim alleges that his claim is for money due upon a certain promissory note for the sum of

2011

STATE OF ILLINOIS
JANUARY 1, 1930

COURT OF CHICAGO
JANUARY 1, 1930

v.

WILLIAM H. LINDLEY
Appellant.

2011 A. 058

MR. JUSTICE ROBERT H. LINDLEY THE CLERK OF THE COURT.

On December 2, 1929, judgment by confession on a promissory note for \$4,480.15 was entered against William H. Lindley, defendant, and in favor of Harry Jacobson, plaintiff. On December 27, 1929, the defendant moved to open the judgment and to allow him to plead and defend. This motion was supported by his amended affidavit. On January 11, 1930, the trial court denied the motion, and the defendant appealed. He held, on the appeal, that on the allegations of the amended affidavit the court should have opened the judgment and allowed the defendant to plead and have a trial upon the merits, and he reversed and remanded the cause with directions to allow the defendant to plead and to have a trial upon the merits. The mandate of this court was filed in the Municipal court, and on November 21, 1930, an order was entered vacating the order of January 11, 1930, and giving leave to the defendant to appear and defend. The judgment is deemed as security, and the amended petition of the defendant, filed January 2, 1930, to stand as his affidavit of merits. Hereafter there was a trial before the court, with a jury, and there was a verdict returned finding the issues against the defendant and confirming the judgment by confession. Judgment was entered upon the verdict and the defendant has appealed.

The plaintiff's statement of claim alleges that his claim is for money due upon a certain promissory note for the sum of

\$6,000, dated September 6, 1929, payable ninety days after date, which note was delivered to the plaintiff, who is the legal owner thereof, and that there is due the plaintiff from the defendant \$6,000, together with the sum of \$387.15 for reasonable attorney's fees provided by the note. A copy of the note and an affidavit of execution and claim are attached to the statement. The defendant's amended affidavit of merits states, inter alia, that on or about September 5, 1929, he entered into an agreement with the plaintiff whereby the latter turned over to the defendant \$6,000, upon the understanding that the defendant would purchase 200 shares of Pines Winterfront, a stock listed on the Chicago Stock Exchange; "that it was agreed by and between the plaintiff and the defendant herein that they would share equally in the profits from said stock, and it was further agreed that in case there was a loss, the defendant would stand all of the loss;" that the defendant purchased 200 shares of said stock and paid for the same with the \$6,000; that the plaintiff thereafter requested the defendant to execute a note, so that the former could have the same discounted at his bank and in that way none of his funds would be tied up in the stock transaction; that the note "was given only for the purpose of having the plaintiff discount the same at a bank, and that as between the parties hereto, it was never intended as an evidence of a debt, or that the plaintiff should ever confess judgment on the same;" that it was agreed between the plaintiff and the defendant "that said defendant would have the right to use his own judgment to sell said stock at any time and to repurchase or replace the same with other stock;" that "it was further agreed that the plaintiff would rely upon the judgment of the defendant in buying, selling or replacing said stock originally purchased;" "that during the recent collapse of the stock market, and when it became known to the plaintiff that losses were sustained in the purchase of said Pines Winterfront, the plaintiff herein demanded that the defendant

\$5,000, dated September 6, 1937, payable ninety days after date, which note was delivered to the plaintiff, who is the legal owner thereof, and that there is due the plaintiff from the defendant \$5,000, together with the sum of \$887.11 for reasonable attorney's fees provided by the note. A copy of the note and an affidavit of execution and claim are attached to the statement. The defendant's amended affidavit of merits states, inter alia, that on or about September 6, 1937, he entered into an agreement with the plaintiff whereby the latter turned over to the defendant \$5,000, upon the understanding that the defendant would purchase 500 shares of Union National, a stock listed on the Chicago Stock Exchange; that it was agreed by and between the plaintiff and the defendant herein that they would share equally in the profits from said stock, and it was further agreed that in case there was a loss, the defendant would stand all of the loss; that the defendant purchased 500 shares of said stock and paid for the same with the \$5,000; that the plaintiff thereafter requested the defendant to execute a note, so that the latter could have the same distributed at his bank and in that way some of his funds would be put up in the stock transaction; that the note "was given only for the purpose of having the plaintiff disburse the same at a bank, and that as between the parties hereto, it was never intended as an evidence of a debt, or that the plaintiff should ever exercise judgment on the same; that it was agreed between the plaintiff and the defendant that said defendant would have the right to use his own judgment as well with stock as any time and to execute at pleasure the same with other assets; that "it was further agreed that the plaintiff would rely upon the judgment of the defendant in buying, selling or disposing said stock or financial instruments; that the recent collapse of the stock market, and when it became known to the plaintiff that losses were sustained in the purchase of said stock investment, the plaintiff herein demanded that the defendant

herein repay him \$6,000; that this defendant refused to repay said \$6,000, claiming that the stock market would come back, and that there would be no losses, and that since no definite time was set when the plaintiff was to indemnify or to repay the plaintiff his money, that the plaintiff should wait a reasonable time until the market had a chance to come back;" that the plaintiff was dissatisfied with the suggestion of the defendant and that thereupon the plaintiff and the defendant agreed to arbitrate their differences, that is, the time in which the defendant should repay said \$6,000; that thereupon, on December 6, 1929, the parties agreed to arbitrate the question as to when said \$6,000 was to be repaid, or as to what length of time the defendant should wait until the stock market had a chance to become better; that on December 6, 1929, the plaintiff and defendant agreed to arbitrate the matter before Judge Fisher, a judge of the Circuit court; that the plaintiff and defendant did submit their differences to Judge Fisher and did agree to accept any decision which he would render, and also to abide by his decision; that on December 6, 1929, the plaintiff and defendant submitted to Judge Fisher, as arbitrator, their difference and dispute - that is to say, the length of time the defendant should have to repay the plaintiff the \$6,000; that Judge Fisher agreed to act as such arbitrator between the parties and that the parties presented the entire matter to him and that Judge Fisher, as arbitrator, after hearing the evidence of both plaintiff and defendant, rendered his judgment and award, in and by which judgment and award Judge Fisher, as arbitrator, decided that the said note should be returned to the defendant and that the defendant should pay to the plaintiff the sum of \$6,000, payable as follows: \$2,000 within sixty days after December 6, 1929; \$2,000 within four months after December 6, 1929, and \$2,000 within six months after December 6, 1929; that both parties accepted the said decision and agreed to abide thereby,

...that this defendant refused to repay
...claiming that the stock market would come back, and
...that there would be no losses, and that since no definite time
...was set when the plaintiff was to indemnify or to repay the plaintiff
...his money, that the plaintiff should wait a reasonable time until
...the market had a chance to come back; that the plaintiff was dis-
...satisfied with the suggestion of the defendant and that thereupon
...the plaintiff and the defendant agreed to arbitrate their differences;
...that is, the time in which the defendant would repay was to be
...that thereupon, on December 8, 1920, the parties agreed to arbitrate
...the matter as to when said \$2,000 was to be repaid, it so be that
...length of time the defendant should wait until the stock market had
...a chance to become better; that on December 8, 1920, the plaintiff
...and defendant agreed to arbitrate the matter before Judge Fisher, a
...Judge of the District Court; that the plaintiff and defendant did not
...and their differences as Judge Fisher and did agree to accept any
...decision which he would render, and also to abide by his decision;
...that on December 8, 1920, the plaintiff and defendant submitted to
...Judge Fisher, an arbitrator, their differences and dispute - that is
...to say, the length of time the defendant should wait to repay the
...plaintiff the \$2,000; that Judge Fisher agreed to act as such
...arbitrator between the parties and that the parties presented the
...entire matter to him and that Judge Fisher, as arbitrator, after
...hearing the evidence of both plaintiff and defendant, rendered his
...judgment and award, in and by which judgment and award Judge Fisher,
...an arbitrator, decided that the said note should be returned to the
...defendant and that the defendant should pay to the plaintiff the sum
...of \$2,000, payable on February 15, 1921, within sixty days after
...December 8, 1920; \$2,000 within four months after December 8, 1920,
...and \$2,000 within six months after December 8, 1920; that both
...parties accepted the said decision and agreed to abide thereby.

but that the plaintiff, in violation of the decision, confessed judgment on the note; that said judgment is void by reason of the fact that the attorney entering the appearance for defendant exceeded his authority in the cognovit.

The theory of fact of the plaintiff is that he loaned the defendant \$6,000, and that the note in question was given to evidence the debt and that it was not an accommodation note. The theory of fact of the defendant, in so far as it applied to the note, was that the note was a mere accommodation note and that it was never intended as an evidence of a debt. As the judgment in the instant case was entered upon the note, the material question for the jury to decide was, "was the note given as a mere accommodation note or as an evidence of a debt? The defendant, in his testimony, frankly admitted that he owed the plaintiff money as the result of a stock venture they made in the stock market; that the \$6,000 was given to him by the plaintiff to be used in the stock venture; that by the terms of the agreement the defendant was to stand any losses that might be sustained in the venture and that any profits that were made "were to go fifty-fifty;" that after certain stock had been purchased the plaintiff stated to him that he did not like the idea of having \$6,000 tied up and asked the defendant to give him the note in question as an accommodation note, so that he could discount it at his bank, and that it was clearly understood between them that the note was given as a mere accommodation paper and that the defendant signed the same with that understanding. As to the stock venture, the plaintiff testified, inter alia, that the defendant came to him in a stock broker's office and stated that he had a wonderful tip on a certain stock, but that he had no money and that if the plaintiff would loan him \$6,000 "he would make him a very interesting proposition;" that defendant would buy the stock and whatever profit he would make, for this favor of "loaning me \$6,000," he would give

but that the plaintiff, in violation of the decision, continued to hold the note; that said judgment is void by reason of the fact that the attorney entering the appearance for defendant exercised his authority in the premises.

The theory of that of the plaintiff is that he issued the defendant \$2,000, and that the note in question was given to defendant in full and that it was not an accommodation note. The theory of fact of the defendant, in so far as it applied to the case, was that the note was a mere accommodation note and that it was never intended as an evidence of a debt. As the judgment in the instant case was entered upon the note, the material question for the jury to decide was, "was the note given as a mere accommodation note or as an evidence of a debt?" The defendant, in his testimony, frankly admitted that he owed the plaintiff money as the result of a stock venture they made in the stock market; that the \$2,000 was given to him by the plaintiff to be used in the stock venture; that by the terms of the agreement the defendant was to return any losses that might be sustained in the venture and that any profits that were made "were to be fifty-fifty;" that after certain stock had been purchased the plaintiff stated to him that he did not like the idea of having \$2,000 tied up and asked the defendant to give him the note in question as an accommodation note, so that he could discontinue at his bank, and that it was already understood between them that the note was given as a mere accommodation paper and that the defendant and signed the same with that understanding. As to the stock venture, the plaintiff testified, under oath, that the defendant came to him in a stock broker's office and stated that he had a wonderful tip on a certain stock, and that he had no money and that if the plaintiff would loan him \$2,000 "he would make him a very interesting proposition;" that defendant would buy the stock and wherever profits he would make, for this favor of "loaning me \$2,000," he would give

the plaintiff fifty per cent of the profit and guard him against losses, to which the plaintiff replied: "Abe, that sounds like an attractive proposition, but I might not be able to spare that money for too long a term. In case you will not be able to sell the stock within that time, how will I get my money?", to which the defendant replied: "In the first place, I will give you a judgment note bearing 8% interest and if I don't sell - for ninety days; and even if I don't sell the stock within that time I will be able to pay you that money," to which the plaintiff replied: "Abe, I take you up on that," and that within a few minutes, and in accordance with the aforesaid understanding, the defendant gave him the note and he gave the \$6,000 check to the defendant. It is undisputed that the check bears date September 5, 1929, and that the note bears date September 6, 1929. The plaintiff testified that the note was given on the same day that the check was given. The defendant testified that it was given on September 6. There are certain other facts and circumstances surrounding the stock venture, but for the purposes of this appeal we do not deem it necessary to state them. The venture was a failure and the defendant frankly admits, in his testimony, that as the result of it he owes the plaintiff \$6,000.

The defendant strenuously contends that "the finding of the jury is clearly, palpably and manifestly against the great weight of the evidence, because the evidence shows that the note upon which judgment was confessed was an accommodation note, in the hands of the payee and original holder of the note." The defendant argues that because he frankly admitted that he was indebted to the plaintiff upon a partnership stock venture the jury found against him because as laymen they concluded that it made no difference whether the defendant was indebted to the plaintiff upon the note or a partnership transaction. After a careful reading of the entire evidence in this case the majority of the court are of the

the plaintiff they pay some of the profit and guard him against
losses, so which the plaintiff replied: "Yes, that sounds like
an attractive proposition, but I might not be able to agree that
away for so long a term. In some way will not be able to sell
the stock within that time, how will I get my money?" to which
the defendant replied: "In the first place, I will give you a
judgment note bearing 4% interest and if I don't sell - for ninety
days and even if I don't sell the stock within that time I will be
able to pay you that money," to which the plaintiff replied: "Yes,
I take you up on that," and that within a few minutes, and in accord-
ance with the above said understanding, the defendant gave him the
note and he gave the \$4,000 check to the defendant. It is undisputed
that the check bears date September 5, 1932, and that the note bears
date September 6, 1932. The plaintiff testified that the note was
given on the same day that the check was given. The defendant testi-
fied that it was given on September 6. There are certain other facts
and circumstances surrounding the stock venture, but for the purpose
of this appeal we do not deem it necessary to state them. The
venture was a failure and the defendant promptly admitted, in his
testimony, that on the result of it he owes the plaintiff \$4,000.
The defendant strenuously contends that "the finding of
the jury is clearly, legally and conclusively against the facts
weight of the evidence, because the evidence shows that the note
upon which judgment was entered was an accommodation note, in the
hands of the payee and original holder of the note." The defendant
argues that because he frankly admitted that he was indebted to the
plaintiff upon a partnership stock venture the jury found against
him because no lawyer they concluded that it made no difference
whether the defendant was indebted to the plaintiff upon the note
or a partnership transaction. After a careful reading of the
entire evidence in this case the majority of the court are of the

opinion that the verdict of the jury is against the manifest weight of the evidence. As this case may be tried again we refrain from commenting upon the facts and circumstances that have lead us to the conclusion that the note was a mere accommodation paper. The plaintiff, while strenuously contending that the preponderance of the evidence supports his theory of fact as to the nature of the note, he finally argues that "in this case, it is clear that by the verdict and judgment in favor of the plaintiff, substantial justice has been done, because the defendant admits that he owes the plaintiff \$6,000. His testimony is, 'I do not owe Jacobson the \$6,000.00 on the note. I do owe him \$6,000.00 on another transaction. I did not give Jacobson any receipt when I got the \$6,000.00.' This is a plain admission that he owes the plaintiff \$6,000 and it would be a denial of substantial justice to reverse the case on the ground that while the defendant is indebted to the plaintiff for that amount, he is not indebted upon the note." The argument that the defendant can sue the plaintiff upon the promissory note and recover upon the stock venture transaction, is, of course, without merit. That the plaintiff has a claim against the defendant for the \$6,000 is conceded, and even if the alleged arbitration decision of Judge Fisher was binding on the parties, it would avail the defendant nothing, as the time fixed by that decision in which the defendant should pay the plaintiff the \$6,000 has long since expired, and in view of the attitude of the defendant it is somewhat surprising that the plaintiff has not heretofore enforced his claim by appropriate action.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., concurs;

Kerner, J., dissents.

...that the verdict of the jury is against the plaintiff
...of the evidence. ... this case may be tried again ...
...from commenting upon the facts and circumstances that have
...to the conclusion that the note was a mere accommodation
...The plaintiff, while strenuously contending that the pre-
...of the evidence supports his theory of fact as to the
...of the note, he finally argues that "in this case, it is clear
...by the verdict and judgment in favor of the plaintiff, and
...that justice has been done, because the defendant admits that he
...the plaintiff \$5,000. His testimony is, 'I do not owe Jacobson
...on the note. I do owe him \$5,000.00 on another
...I did not give Jacobson any receipt when I got the
...This is a plain admission that he owes the plaintiff
...and it would be a denial of substantial justice to reverse
...the ground that while the defendant is indebted to the
...he is not indebted upon the note.' The
...that the defendant owes the plaintiff upon the promissory
...note and receipt upon the other promissory, is, of course,
...That the plaintiff has a claim against the defendant
...and even if the alleged arbitration
...of Judge Fisher was sitting on the parties, it would avail
...as the time fixed by that decision in which
...the plaintiff the \$5,000 was long since
...and in view of the attitude of the defendant it is reasonable
...that the plaintiff has not heretofore enforced his claim
...to appropriate relief.

The judgment of the United States at Chicago is reversed
and the cause is remanded.

REVEREND AND HONORABLE

... ..

Kerner, J., dissents.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:
Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

262 I.A. 658³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-------------------------|---|-------------------|
| PETER TREOLO, | : | |
| | : | |
| Appellee | : | Appeal from the |
| | : | Circuit Court of |
| vs. | : | Winnebago County. |
| | : | |
| IROQUOIS AUTO INSURANCE | : | |
| UNDERWRITERS, | : | |
| | : | |
| Appellant, | : | |

JONES J:

Suit was brought by Peter Treolo against appellant to recover on a policy of insurance issued to protect plaintiff from losses growing out of injuries to the person of others because of the operation of his automobile. An accident had occurred in which two persons who were riding with Treolo were injured. They subsequently recovered judgments against him for damages on account of their injuries. One recovered \$1350, and the other \$6,000. Prior to the trial of those causes, appellant was notified of the pendency of such suits, but refused to participate in the defense.

The insurance policy contained a provision that the insurer should not be liable for claims on account of accidents occurring while the automobile was driven by any person under the influence of intoxicating liquor at the time any loss, damage, or liability arose; or while said automobile was being used for transporting intoxicating liquor. In the case at bar, the two principal defenses urged by appellant are: first, that appellee prior to and at the time of the accident was under the influence of intoxicating liquor, and second, that the accident happened while appellee's automobile was being used for transporting intoxicating liquor.

At the close of all the evidence, appellee tendered the following instruction, which the court gave with other instructions at the close of the argument: "The Court instructs the jury that the evidence offered by the defendant in this case

Appeal from the
Circuit Court of
Winnebago County.

THE PEOPLE,
vs.
JAMES A. HARRIS,
Appellant.

107

Suit was brought by Peter Theodor against appellant
to recover on a policy of insurance issued to protect plain-
tiff from losses growing out of injuries to the person of
others because of the operation of his automobile. An acci-
dent had occurred in which two persons who were riding with
Theodor were injured. They subsequently recovered judgments
against him for damages on account of their injuries. One re-
covered \$1200, and the other \$6,000. Prior to the trial of
these cases, appellant was notified of the pendency of such
cases, but refused to participate in the defense.
The insurance policy contained a provision that the
insurer should not be liable for claims on account of injuries
occurring while the automobile was driven by any person under
the influence of intoxicating liquor at the time any loss, damage,
or liability arose; and while said automobile was being used for
transporting intoxicating liquor. In the case at bar, the two
principal defenses urged by appellant are: first, that appellee
was not at the time of the accident was under the influence
of intoxicating liquor, and second, that the accident occurred
while appellee's automobile was being used for transporting in-
toxicating liquor.
At the close of all the evidence, appellee tendered
the following instruction, which the court gave with other
instructions at the close of the argument: "The Court instructs
the jury that the evidence offered by the defendant in this case

relating to the car then driven by Plaintiff, being used for the transportation of intoxicating liquor, at the time in question, is not sufficient as a matter of law to support the plea of the defendant in this case." The Court allowed the case to go to the jury upon the other issues. The jury found a verdict for appellee and assessed his damages at \$1,000. From a judgment on the verdict this appeal is prosecuted.

It appears that in anticipation of a party at his home in Rockford, appellee had gone to Chicago to purchase supplies and to bring his sister-in-law and a nephew home with him. On the return journey, the car was wrecked and took fire. His relatives, with three little children, accompanying them, were thrown from the car and received injuries, out of which the damage suits against appellee arose. It is not contended that there was any collusion in the matter of obtaining the judgments against appellee.

The insurance policy provided for a total liability of \$10,000, not to exceed \$5,000 as to any one person. The judgment in one case against appellee was for \$6,000 and in the other case, \$1350, making in all \$7,350, but the verdict in this case was only \$6,000 and therefore within the limits of the policy.

The evidence was conflicting on the question as to whether or not appellee was under the influence of intoxicating liquor at the time of the accident. There was also a conflict in the evidence as to whether or not he was in the act of transporting intoxicating liquor. The word "transportation" is to be taken in its ordinary sense. In that sense, it comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; nor that it be incidental to a transfer of title. If one carries in his own conveyance, for his own purposes, it is transportation no less than where a public carrier, at the instance of a consignor, carries and delivers to a consignee for a stipulated charge. (Cunard S.S. Co. v. Mellon, 262 U.S. 100; 27 A.L.R. 1303; U.S. v. Simpson, 245 U. S. 465; 10 A.L.R. 511.)

relating to the car and driver is...
of intoxicating liquor, at the time in question,
is not sufficient as a matter of law to support the verdict.
The Court allowed the case to go to the
jury upon the other issues. The jury found a verdict for appellee
and assessed his damages at \$1,000. From a judgment on the ver-
dict his appeal is prosecuted.

It appears that the appellant is a member of the law
in fact, and that he is a member of the law in fact.
and to bring his father-in-law and a nephew home with him. On
the return journey, the car was wrecked and took fire. His re-
lative, with three little children, accompanying them, were
taken from the car and received injuries, out of which the damage
suit against appellee arose. It is not necessary that there was
any collection in the matter of damages and appellee's liability.

The lower court found that the car was worth \$10,000,
of \$10,000, and assessed \$1,000 as the damages. The
verdict in the case against appellee was for \$1,000 and in the
case, \$1,350, making in all \$1,350, but the verdict in this
case was only \$1,000 and therefore within the limits of the policy.

The evidence was conflicting on the question as to
whether or not appellee was under the influence of intoxicating
liquor at the time of the accident. There was also a conflict
in the evidence as to whether or not he was in the act of trans-
ferring intoxicating liquor. The evidence was conflicting on
whether in its ordinary sense. In that sense, it comprehends any
thing carrying about from one place to another. It is not
necessarily that the carrying be for hire, or by one for another,
nor that it be incidental to a transfer of title. In one sense
in the ordinary sense, the act of carrying is a transfer of title.
no less than when a public carrier, at the instance of a ship-
per, carries and delivers to a consignee the goods shipped.
See 108 U.S. 100; 232 U.S. 100; 232 U.S. 100; 232 U.S. 100.
See 108 U.S. 100; 232 U.S. 100; 232 U.S. 100; 232 U.S. 100.
See 108 U.S. 100; 232 U.S. 100; 232 U.S. 100; 232 U.S. 100.

In the wreckage of the car were watermelons, muskmelons, cabrots, cabbage, grapes, strawberries, dried fish, oranges, bananas, tomatoes, swiss chard, etc., and five gallon can of olive oil. A number of witnesses testified that in the wreckage immediately after the accident, there were also three glass jug^s, one of which was broken. One of the other jugs was cracked, but contained some liquor which smelled like wine, and in the opinion of several witnesses, contained alcohol and was intoxicating. The jug which contained the liquor was taken from the wreck by one of appellant's witnesses, and kept at his home from the time of the wreck on March 16, 1928, until about December 1st of that year. A test on the latter date by a clinical pathologist showed the liquor then contained twelve and three-tenths per cent alcohol by volume. It was red in color and a witness testified that it was what is known as "Bago Red". No suggestion is offered by appellee that these jugs might have gotten into the wreckage in any other way than from the car. We express no opinion as to the comparative weight of the evidence, but when defendant's evidence is considered alone and uncontradicted, it was sufficient for the jury to have reasonably found a verdict for appellant. (People v. Barglin, 309 Ill. 488; People v. Finley, 332 id. 40.) Where there is evidence tending to support the contention of both parties, it is error for the Court to direct a verdict. (Cline v. City of LeRoy, 204 Ill. App. 558.) A motion to direct a verdict should be denied when there is any evidence upon which, considered in its most favorable light to the opposite party, the jury could reasonably find a verdict for the opposite party. (Knotts v. Lake Shore & Mich. Southern Ry. Co., 172 Ill. App. 550; Libby, McNeill & Libby v. Cook 222 Ill. 206.) When there is conflicting evidence on any issue raised by the pleadings, the Court should submit it to the jury. (Donk Bros. Coal Co. v. Slata, 133 Ill. App. 280.)

We are of the opinion that the questions as to whether or not the plaintiff was intoxicated, and his automobile was being used for the transportation of intoxicating liquor, in violation of the terms of the insurance policy, should have been submitted to the jury. It was error to direct a verdict on that issue. The

In the wreckage of the car were watermelons, muskmelons, cantaloupes, apples, oranges, strawberries, dried fish, bananas, peaches, pears, etc., and five gallon can of olive oil. A number of witnesses testified that in the wreckage immediately after the accident, there were also three glass jugs, one of which was broken. One of the other jugs was cracked, but contained some liquor which smelled like wine, and in the other jug which contained alcohol and was intoxicating. The jug which contained the liquor was taken from the wreck by one of appellant's witnesses, and kept at his home from the time of the wreck on March 11, 1928, until about December 1st of that year. A test on the latter date by a clinical pathologist showed the liquor then contained twelve and three-tenths per cent alcohol by volume. It was noted in color and a witness testified that it was what is known as "Bago Red". No suggestion is offered by appellee that these jugs might have gotten into the wreckage in any other way than from the car. We express no opinion as to the comparative weight of the evidence, but when defendant's evidence is considered alone and uncontradicted, it was sufficient for the jury to have reasonably found a verdict for appellant. (People v. Berglin, 309 Ill. 488; People v. Hainly, 322 Ill. 40.) Where there is evidence tending to support the contention of both parties, it is error for the court to direct a verdict. (Cline v. City of LeRoy, 304 Ill. App. 520.) A motion to direct a verdict should be denied when there is any evidence upon which, considered in its most favorable light to the opposite party, the jury could reasonably find a verdict for the opposite party. (Knotter v. Lake Shore & Mich. Southern Ry. Co., 172 Ill. App. 380; Lipby, McNeill & Lipby v. Cook 222 Ill. 306.) When there is conflicting evidence on any issue raised by the pleadings, the court should submit it to the jury. (People v. Coal Co. v. State, 133 Ill. App. 280.) We are of the opinion that the questions as to whether or not the plaintiff was intoxicated, and his automobile was being used for the transportation of intoxicating liquor, in violation of the terms of the insurance policy, should have been submitted to the jury. It was error to direct a verdict on that issue. The

The Court did not err in refusing to allow the vessels of liquor which had been admitted in evidence to be taken by the jury to the jury room.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

The Court did not say in referring to these two vessels of Japan

that they had been awarded in violation of the law of the sea.

The Court said:

"The two vessels above mentioned, the Japanese is entitled

to the same treatment."

It is not necessary to say that the Japanese is entitled

to the same treatment.

It is not

necessary to say that

the Japanese is entitled

to the same treatment.

It is not necessary to say that

the Japanese is entitled

to the same treatment.

It is not

necessary to say that

the Japanese is entitled to the same treatment.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~Thirteenth~~ ^{Fifth} day of ~~February~~ ^{May}, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRED G. WOLFE

Hon. ~~FRANKLIN H. BOGGS~~, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2621A.6584

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

OSCAR E. SHARP,

Appellee,

-vs-

THEODORE BLECH and
SAM JACOBSON,

Appellant.

Appeal from the Circuit

Court of Lake County.

Jett, P. J.

Oscar E. Sharp, appellee, brought suit in the Circuit Court of Lake County against Theodore Blech and Sam Jacobson, appellants, to recover for services claimed to have been rendered as a real estate broker. The declaration contains the common counts only. Appellee filed an affidavit of claim in which the amount stated to be due was \$2200.00. Subsequently he filed a bill of particulars in the words and figures following:

"We expect to show that the plaintiff undertook to sell some real estate to certain parties and that a written contract was entered into in connection therewith.

"Later, while the plaintiff and Theodore Blech, one of the defendants were returning to Waukegan from Chicago on a Chicago, Milwaukee and North Shore train, where they had been for the purpose of consummating the deal in question, there was a conversation had concerning the reliability of the purchaser or purchasers. Mr. Blech stated to the plaintiff that he had no confidence in the purchasers and it was agreed by Mr. Blech and the plaintiff that no commission would be charged in the event that there was no sale, and no expense money would be demanded, but Mr. Blech agreed to and with the plaintiff that whatever sum of money was put up for the purpose of binding the bargain, was in the event that the sale did not go through, to be paid to the plaintiff. Later, the proof will show the sum of Two Thousand (\$2,000.00) Dollars was put up by the prospective purchasers and that they later defaulted, and that the money was taken down by Mr. Blech in whole or in part and devoted to his own use; that said sum of \$2,000.00 was to be paid to Blech in case of default and was to become the property of Blech."

Appellants filed pleas and an affidavit of defense denying that they had agreed at any time with appellee to pay said sums of money as set forth in the declaration and bill of particulars; they denied being indebted to appellee and charged appellee was not a duly licensed broker as averred in his declaration,

OSCAR E. SHARP,

Appellee,

-vs-

THEODORE BLECH and
SAM JACOBSON,

Appellants.

Appeal from the Circuit

Court of Lake County.

Just. P. . .

Oscar E. Sharp, appellee, brought suit in the Circuit Court

of Lake County against Theodore Blech and Sam Jacobson, appellants,

to recover for services claimed to have been rendered as a real

estate broker. The declaration contains the common counts only.

Appellee filed an affidavit of claim in which the amount stated

to be due was \$2300.00. Subsequently he filed a bill of partic-

ulars in the words and figures following:

"We expect to show that the plaintiff undertook
to sell some real estate to certain parties and that
a written contract was entered into in connection
therewith.

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one of the defendants were returning to Waukegan from
Chicago on a Chicago, Milwaukee and North Shore train,
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deal in question, there was a conversation had concerning
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sum of \$2,000.00 was to be paid to Blech in case of default
and was to become the property of Blech."

Appellants filed plea and an affidavit of defense denying

that they had agreed at any time with appellee to pay said sum

of money as set forth in the declaration and bill of particulars;

they denied being indebted to appellee and charged appellee was

not a duly licensed broker as stated in his declaration.

A jury trial was had resulting in a finding in favor of appellee in the sum of \$500.00. Judgment was rendered upon the verdict of the jury and this appeal followed.

Appellee testified in his own behalf and the appellant, Theodore Blech, testified on the part of appellants. No other witnesses were heard.

Appellee testified he resided in Waukegan and was a real estate broker and had been engaged in that line of business for a number of years; that he was acquainted with the appellants; that the transaction forming the basis of the instant suit arose about six months or more before the trial of the case; that it concerned the sale of sub-divided property, a large number of acres at Lake Villa, known as the Sherwood tract; that Blech was not the owner of the property but that it was owned by his father-in-law who is co-defendant in this suit; that he had a conversation with appellant Blech in which Blech directed him to sell the property; that a written contract was entered into between himself and the appellant Jacobson; that the contract provided that neither of the appellants was to pay any commission but when the deal was concluded the purchaser of the property was to pay the commissions; that a contract was entered into for the sale of the premises; that a controversy arose as to the conditions of the sale and certain requirements and the deal was not consummated; that about three weeks prior to the time the contract was drawn he had a conversation with appellant Blech while returning from Chicago to Waukegan, at which time Blech expressed some dissatisfaction with the prospective purchaser and said that if the deal did not go through he did not want to pay any commissions; that he, appellee, said he did not intend to charge any commissions if the deal was not closed but for his services he would take the money put up as earnest money and that Blech consented thereto; that there was deposited the sum of \$2,000.00 as earnest money. Appellee further testified that he had another conversation with Blech and that Blech told him the appellant Jacobson had received \$1,000.00 of the earnest money and had returned \$1,000.00 to the purchaser; that appellant Blech told him he would give him

A party trial was had resulting in a finding in favor of appellee in the sum of \$800.00. The court was requested to award costs and fees and the usual allowance.

Appellee testified in his own behalf and the usual testimony was heard.

Appellee Blech, testified on the part of appellants. No other witnesses were heard.

Appellee testified he resided in Waukegan and was a real estate broker and had been engaged in that line of business for a number of years; that he was acquainted with the appellants; that the transaction forming the basis of the instant suit arose about six months or more before the trial of the case; that it concerned the sale of subdivided property, a large number of acres at Lake Villa, known as the Sherwood tract; that Blech was not the owner of the property but that it was owned by his father-in-law who is co-defendant in this suit; that he had a conversation with appellant Blech in which Blech directed him to sell the property; that a written contract was entered into between himself and the appellant Jacobson; that the contract provided that neither of the appellants was to pay any commission but when the deal was concluded the purchaser of the property was to pay the commissions; that a contract was entered into for the sale of the premises; that a controversy arose as to the conditions of the sale and certain requirements and the deal was not consummated; that about three weeks prior to the time the contract was drawn he had a conversation with appellant Blech while returning from Chicago to Waukegan, at which time Blech expressed some dissatisfaction with the prospective purchaser and said that if the deal did not go through he did not want to pay any commissions; that he, appellee, said he did not intend to charge any commissions if the deal was not closed but for his services he would take the money put up as earnest money and that Blech consented thereto; that there was deposited the sum of \$2,000.00 as earnest money. Appellee further testified that he had another conversation with Blech and that Blech told him the appellant Jacobson had received \$1,000.00 of the earnest money and had returned \$1,000.00 to the purchaser; that appellant Blech told him he would give him

\$500.00 when he could get the money and that he agreed to take \$500.00.

On the part of the appellants that portion of the written contract providing for payment of commissions was by agreement read and received in evidence. Appellant Blech testified that he was not the owner of the property which formed the basis of the transaction; that it was owned by his co-defendant Jacobson; that he did not sign the contract with appellee relative to compensation for his services or commissions; that he did not have a conversation with appellee to the effect appellee would be permitted to keep and retain the earnest money deposited; that a controversy arose as to the signatures to the contract of sale for the property and the deal fell through; that Jacobson received \$1,000.00 but that he, Blech, did not receive any portion of it and had no agreement about its disbursement.

A number of reasons are assigned and argued for a reversal of the judgment.

The testimony is conflicting. We are not inclined to disturb the verdict of the jury on the question of fact.

It is the contention of appellant that the verdict of \$500.00 was based upon a different theory than that set out in appellee's declaration and affidavit. In support of this contention it is urged the court admitted testimony of an alleged offer of compromise. We have examined the record relative to this contention and there is no basis for it. The evidence to which objection is made by the appellant was admitted only for the purpose of showing an admission of liability on the part of the appellant Blech. The fact the verdict is for a less amount than the amount sued for might be complained of by appellee but appellants are in no position to object to the verdict because of its inadequacy. By reason of the action of the court in admitting the alleged testimony complained of appellants requested leave to have a juror withdrawn with a view of having the case continued. This leave was denied by the trial court, and we think properly so, because there was no error in the admission of said testimony and there was no attempt made to recover on any claim other than that set out in the declaration.

It is also contended that appellee did not show he was a duly licensed broker and is, therefore, not entitled to recover.

fully licensed broker and is, therefore, not entitled to recover.

It is also contended that appellee did not show he was

any claim other than that set out in the petition.

misstatement of said testimony and there was no attempt made to recover
out, and we think properly so, because there was no error in the

during the case considered. This leave was denied by the trial

appellee requested leave to have a further witness with a view

tion of the court in the alleged testimony considered.

ject to the verdict because of its inadequacy. By reason of the

complaint of by appellee but appellants are in no position to

of the verdict is for a less amount than the amount sued for might

admission of liability on the part of the appellant Bloch. The

by the appellant was admitted only for the purpose of showing

there is no basis for it. The evidence to which objection is

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cellee's declaration and affidavit. In support of this contention

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It through; that Jacobson received \$1,000.00 out of the \$1,000.00

signatures to the contract of sale for the property and the bank

a certain money deposited; that a controversy arose as to the

refuse to the effect appellee would be permitted to keep and retain

voices on consignment; that he did not have a conversation with

on the contract with appellee relative to consignment for his

at it was owned by his co-defendant Jacobson; that he did not

a owner of the property which formed the basis of the transaction;

received in evidence. Appellant Bloch testified that he was not

direct provision for payment of consignment was by agreement and

On the part of the appellee that portion of the written

100.00 when he could not find the money and that he agreed to take 1000.00

It is not necessary for a real estate broker to show, as part of his prima facie case in his action to recover commissions for services, that at the time of rendering such services he had procured a certificate of registration; that where the requirement as to the procuring of a license or of a certificate of registration is laid down in a statute, the presumption will be that such license has been procured or that registration has been had in compliance with such statute, until the contrary is shown, in any case where the question arises only collaterally such as in a suit by one subject to such ~~stat~~ statute to recover fees, commissions or other compensation. Bird vs. Trench, 240 Ill. App. 363.

The record is free from any substantial error and the judgment of the Circuit Court of Lake County is affirmed.

Judgment affirmed.

is not necessary for a well educated person to know, at least at

the time these facts in the action of the court are considered for

the purpose of the trial of the case and the fact that the

fact of the trial of the case is not a matter of course

to the knowledge of a person who is not a member of the

of the court is a matter of course, the court will not

be bound to accept of the testimony of the witness and in

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

118 7
AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2021A, 059

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|-------------------------|---|------------------|
| CHARLES GENSCHOW and | : | |
| ROSE GENSCHOW, | : | |
| | : | |
| Appellees, | : | APPEAL FROM THE |
| | : | |
| vs. | : | CIRCUIT COURT OF |
| | : | |
| FIRST TRUST JOINT STOCK | : | IROQUOIS COUNTY. |
| LAND BANK OF CHICAGO, a | : | |
| Corporation, | : | |
| | : | |
| Appellant | : | |

Jett, J.

This is an appeal by the First Trust Joint Stock Land Bank of Chicago, appellant, to have reviewed a decree entered against it in the suit of Charles Genschow and Rose Genschow, appellees.

It appears that in the year 1928, Charles Genschow and Rose Genschow, appellees, had arranged to purchase certain lands belonging to the heirs of one William Genschow which were located in the Counties of Iroquois and Kankakee; that at that time the Bank of Chebanse was functioning in the Village of Chebanse, Illinois, with Carl T. Porch the president thereof and James W. Porch, his son, cashier; that Charles Genschow did most of his banking business at the Bank of Chebanse; that Carl T. Porch and James W. Porch, president and Cashier respectively, also had a hardware store in the Village of Chebanse; that in November 1928, Charles Genschow, one of the appellees, while in said Hardware Store informed Carl T. Porch that he was thinking of buying out the heirs of the William Genschow Estate and inquired of him ^{whether} that he thought of the transaction; that Porch inquired of Genschow as to where he was going to obtain the money, to which Genschow replied that he was expecting to get it from a private party in Kankakee; that Porch conversed with him about obtaining a Federal loan instead of a private one, and during the conversation between Genschow and Carl T. Porch, James W. Porch joined them and suggested he thought he could get the amount of money which was required through the First Trust Joint Stock Land Bank of Chicago, the appellant herein; that a few days later James W. Porch explained to Genschow the advantage of a Federal Farm Loan over a private loan; that Genschow went into the Bank of Chebanse where Porch had the application blanks of the appellant company and applied

CHARLES GENSCHOW and
ROSE GENSCHOW,
Appellees,

vs.

FIRST TRUST JOINT STOCK
LAND BANK OF CHICAGO, a
Corporation,
Appellant

APPEAL FROM THE
CIRCUIT COURT OF
TROPICIS COUNTY.

1937, 1.

This is an appeal by the First Trust Joint Stock Land Bank of Chicago, appellant, to have reviewed a decree entered against it in the suit of Charles Genschow and Rose Genschow, appellees.

It appears that in the year 1928, Charles Genschow and Rose Genschow, appellees, had attempted to acquire certain lands belonging to the heirs of one William Genschow which were located in the Counties of Tropicis and Kanakkee; that at that time the Bank of Chicago was conducting its business in the Village of Ubeanas, Illinois, with Carl T. Porch as president and James W. Porch, his son, cashier; that during the year 1928 and at the beginning of the year 1929, Carl T. Porch and James W. Porch, president and cashier respectively, also had a hardware store in the Village of Ubeanas; that in November 1928, Charles Genschow, one of the appellees, called in said hardware store and through Carl T. Porch that he was thinking of buying out the heirs of the William Genschow estate and invited of him that he might be interested in the matter; that Porch invited of Genschow as to where he was going to obtain the money, to which Genschow replied that he was conversing to get it from a private party in Kanakkee; that Porch conversed with him about obtaining a Federal loan instead of a private one, and during the conversation between Genschow and Carl T. Porch, James W. Porch joined them and suggested he thought he could get the amount of money which was required through the First Trust Joint Stock Land Bank of Chicago, the appellant herein; that a few days later James W. Porch explained to Genschow the character of a Federal loan over a private loan; that Genschow went into the Bank of Chicago where Porch had the solicitation clause of the appellant company and applied

for a loan of \$7,000; that the application was dated January 11th, 1929, and was forwarded to appellant by the Bank of Chebanse.

It further appears that after the application was received by the appellant an appraiser went to Chebanse to look over the land; that the appraiser made his report and the First Trust Joint Stock Land Bank of Chicago instructed the Bank of Chebanse to secure an abstract to the lands and mail it to them for their attorneys to examine. This was done by the cashier of the Chebanse Bank. The abstract was finally approved, the note and mortgage executed and they, together with the abstract of title were mailed to the appellant. In a letter to the appellant from the Bank of Chebanse signed by James W. Porch, the bank requested that the proceeds of the loan be deposited to its credit in the First National Bank of Chicago. On March 4th, 1929, the appellant deposited the sum of \$6979, the proceeds of said loan, less the sum of \$21 for certain items of expense, in the First National Bank of Chicago to the credit of the Bank of Chebanse, and on the same day wrote a letter to the Bank of Chebanse advising it what had been done and enclosing a duplicate deposit slip for said amount. In this same letter the appellant also instructed the Bank of Chebanse to file and record the deed and to have the abstract brought down to date. Appellant also enclosed a check to the Bank of Chebanse for \$35.00 to cover its commission, advising the bank that they relied upon them to have done all matters contained in said letter as instructed, and to make sure that the appellant received the recorded mortgage. This letter was received by the Bank of Chebanse on March 5th, 1929, and upon receipt of said letter and duplicate deposit slip the cashier of said Chebanse Bank debited the account of the First National Bank and credited the account of Charles Genschow for said amount. The said cashier made no report at this time to the appellant nor to appellees that this had been done. On March 7th, 1929, the Bank of Chebanse closed its doors and on March 20th, following, John J. Ruckrigel was appointed receiver of said bank. Upon his appointment as such receiver Ruckrigel called for Genschow's bank book and after balancing same returned it to Genschow on March 25th, 1929, at which time Genschow signed a receipt for the same. After receiving the bank book from the receiver, on examination of the

for a loan of \$5,000; that the application was dated July 11, 1932, and was forwarded to applicant by the Bank of Chicago. It further appears that after the application was received by the applicant an associate went to Chicago to look over the land; that the applicant also his report and the First Trust Bank and Bank of Chicago instructed the Bank of Chicago to secure an abstract to the lands and mail it to them for their attorneys to examine. This was done by the cashier of the Chicago Bank. The abstract was finally approved, the note and mortgage executed and they, together with the abstract of title were mailed to the applicant. A letter to the applicant from the Bank of Chicago dated in 1932, the bank requested that the proceeds of the loan be deposited to the credit in the First National Bank of Chicago. On March 4th, 1932, the applicant deposited the sum of \$8,879, the proceeds of said loan, less the sum of \$21 for certain items of expense, in the First National Bank of Chicago to the credit of the Bank of Chicago. And on the same day wrote a letter to the Bank of Chicago advising that what had been done and enclosing a duplicate deposit slip for said amount. In this same letter the applicant also instructed the Bank of Chicago to file and record the deed and to have the abstract brought down to date. Applicant also enclosed a check to the Bank of Chicago for \$2,500 to cover its commission, advising the bank that they relied upon them to have done all matters contained in said letter as instructed, and to make sure that the applicant received the recorded mortgage. This letter was received by the Bank of Chicago on March 5th, 1932, and upon receipt of said letter and duplicate deposit slip the cashier of said Chicago Bank debited the account of the First National Bank and credited the account of Charles Genschow for said amount. The said cashier made no report at this time to the applicant nor to applicant that this had been done. On March 7th, 1932, the Bank of Chicago closed its doors and on March 20th, following, John J. Rockriegel was appointed receiver of said bank. Upon his appointment as such receiver Rockriegel called for Genschow's bank book and after balancing same returned it to Genschow on March 25th, 1932, at which time Genschow signed a receipt for the same. After receiving the book from the receiver, on examination of the

same Genschow first learned that the proceeds of the loan had been deposited to his account. He did not know that appellant had deposited said proceeds in the First National Bank of Chicago to the credit of the Bank of Chebanse nor did he know that the Bank of Chebanse had secured the said funds from said appellant and deposited them to his account until said 25th day of March 1929.

The entire transaction regarding said proceeds was made by the appellant and said Bank of Chebanse without the consent or knowledge of appellees or either of them. After Genschow learned from the bank that said deposit had been made to his credit on March 25th, he entered upon an investigation to learn how the proceeds had reached the Bank of Chebanse and found that they reached said bank in the manner hereinbefore stated. He then made demand upon said appellant for said proceeds but was refused and instituted this proceeding in the Circuit Court of Iroquois County to have said note and mortgage set aside and cancelled.

To the bill of appellees answers were filed by the First Trust Joint Stock Land Bank, appellant, and by the receiver of the Chebanse Bank. A cross bill was also filed by the First Trust Joint Stock Land Bank which among other things alleged that the funds on deposit in the Chebanse Bank to the credit of Genschow should be regarded to be a trust fund and that the receiver should be directed to pay the same over to Genschow as a preferred claim. Genschow and the receiver of the Chebanse Bank filed separate answers to said cross bill. On hearing the court decreed that the mortgage and trust deed be cancelled and released and further found and held that the fund in question was not held in trust and dismissed said cross bill, and this appeal followed as hereinbefore stated.

It is the contention of the appellant that the Chebanse Bank or Porch was agent of Genschow and that the payment to said bank was the payment to Genschow. The evidence shows that the Chebanse Bank had been representing the First Trust Joint Stock Land Bank and had taken thirty or forty applications for loans for said bank. The Chebanse Bank was paid a commission for its services in obtaining the loan. We have examined the record carefully and we are of the opinion that the Chebanse Bank was not the agent of Genschow but was the agent of the First Trust Joint Stock Land Bank

and another that stated that the proceeds of the loan had been
deposited in the account. He did not know that appellant had de-
posited said proceeds in the First Trust Joint Stock Bank.

Appellant had received the said funds from said appellant and deposited
them in his account with said bank.

The said transaction regarding said proceeds was made
by the appellant and said Bank of Chebanne without the consent or
knowledge of appellees or either of them. After Geneshow learned

that said bank that said deposit had been made to his credit on March
1, he entered upon an investigation to learn how the proceeds had
been deposited in the Bank of Chebanne and found that they reached said bank
in the manner hereinbefore stated. He then made demand upon said

bank for said proceeds but was refused and instituted this
suit in the Circuit Court of Lincoln County to have said note
declared null and void and cancelled.

To the bill of appellees answers were filed by the First
Trust Joint Stock Bank, appellant, and the receiver of the
said bank. A cross bill was also filed by the First Trust Joint
Stock Bank which among other things alleged that the funds on
deposit in the Chebanne Bank to the credit of Geneshow should be re-
turned to be a trust fund and that the receiver should be directed to
pay the same over to Geneshow as a preferred claim. Geneshow and

the receiver of the Chebanne Bank filed answers to said
cross bill. On hearing the court decreed that the mortgage and
note be cancelled and released and further found and held
that the fund in question was not held in trust and dismissed said
cross bill, and this appeal followed as hereinbefore stated.

It is the contention of the appellant that the Chebanne
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bank had been representing the First Trust Joint Stock Bank
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The Chebanne Bank was also a commission for its services in op-
erating the loan. It was examined the record carefully and we
of the court that the Chebanne Bank was not the agent of
Geneshow but was the agent of the First Trust Joint Stock Bank.

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of Chicago, appellant. The First Trust Joint Stock Land Bank cannot be held to have paid the money to Genschow.

The important question arising on this record is, who is entitled to the fund in question. The receiver of the Chebanse Bank claims it as a part of the general funds of the Bank of Chebanse; that the same was placed there as a general deposit and that it was not impressed with a trust and should not be paid to appellees or to the appellant.

Without discussing further the evidence in the case, we are of the opinion that the court properly held that the note and mortgage should be cancelled and the mortgage should be released. It remains now to determine whether or not the appellant is entitled under its cross bill to the proceeds of the loan, on the ground that it was a trust fund. If this relief is granted to the appellant it necessarily will have to be allowed under the general prayer for relief in the cross bill.

The receiver sustains the same relation to the deposit as the bank sustained. We have been under what circumstances the fund in question was deposited.

When a person obtains legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interest of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction and fasten it upon his conscience and convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the real party in interest. Allen vs Jackson 122 Ill. 567.

It is very evident that Genschow did not authorize the deposit of this fund to his credit. It is also true that the appellant had no knowledge that any such use would be made of the fund. And it is likewise true that the application of this fund by the receiver to the payment of the general debts of the Bank of Chebanse would work a fraud upon appellees and appellant because it is shown by the testimony that the Bank of Chebanse had knowledge of the fact that the loan in question was a Federal Farm Loan; that the land

of Chicago, appellant. The first thing that I saw when I went to Chicago, appellant. The first thing that I saw when I went to Chicago, appellant.

The important question arising on this record is, who

is entitled to the fund in question. The receiver of the Chicago

trust claims it as a part of the general fund of the trust of Chicago;

that the same was placed there as a general deposit and that it was

not loaned with a trust and should not be sold as securities in

or to the appellant.

Without discussion further the evidence in the case, we

are of the opinion that the court properly held that the same

mortgage should be satisfied and the mortgage should be released.

It remains now to determine whether or not the appellant is entitled

under the trust bill to the proceeds of the fund, or the fund

that it was a trust fund. If this bill is granted to the appellant

it necessarily will have to be allowed under the general trust for

relied in the trust bill.

The receiver satisfied the same relative to the deposit

as the fact ascertained. We have seen under what circumstances the fund

in question was deposited.

Now a person having legal title is entitled to the

of a confidential relation and payment, under such circumstances

that he might not, according to the rules of equity and good

science, to hold and enjoy the beneficial interest in the property,

a court of equity, in order to administer complete justice between

the parties, will raise a trust in conscience and equity, if upon

his conscience and equity he has a trustee in the legal title,

and order him to hold it or to execute the trust in such manner as

to protect the rights of the real party in interest. *Allen vs Jackson*

127 Ill. 527.

It is very evident that receiver did not administer the

deposit of this fund to his credit. It is also true that the appellant

had no knowledge that any such use would be made of the fund. And it

is likewise true that the application of this fund for the payment

to the payment of the general debts of the trust of Chicago would

would a trust upon conscience and equity because it is shown in

the testimony that the trust of Chicago had received of the fund

that the loan in question was a Federal Reserve loan; that the fund

bank had no right or authority to loan or deal with funds except for that special purpose, and knowing these facts it took the deposit impressed with the trust. The letter of the cashier of the Bank of Chebanse shows that they were holding the papers for the benefit of the Genschow heirs; that the Bank of Chebanse had paid out a certain sum of money on the transaction; that it desired the funds for the use in closing the entire transaction. The transaction in which he made a partial payment already thereon was for the borrower and it acknowledges that the proceeds of the loan in question were to be applied to its credit in the First National Bank of Chicago so that it might use that fund for the purpose of closing up the purchase by Genschow of the farm from the Genschow heirs and not for a general deposit to the account carried by Genschow.

The money in question was transferred in the usual and customary way. The evidence shows that after the transfer of the \$7,000 the Bank of Chebanse still had a credit after it closed its doors in excess of \$20,000 with the First National Bank of Chicago, and this \$20,000 was a part of the resources of the Bank of Chebanse. One of the fundamental principles in a claim of this kind is the ability to trace the fund. The record here shows that upon receiving the notes and mortgage at the request of the Bank of Chebanse, the appellant bank deposited the net proceeds of the loan in the First National Bank of Chicago for the credit of the Bank of Chebanse on the account of the Genschow loan. The land bank then sent the deposit slip in its letter of March 4th, evidencing the deposit of this amount to the credit of the Bank of Chebanse on account of the Genschow loan by the First National Bank of Chicago as directed. When the Bank of Chebanse received the letter, enclosing the duplicate deposit slip evidencing the proceeds of the loan in the First National Bank of Chicago to the credit of the bank, in the Genschow matter, Porch, a representative of the bank, stated: "I debited to the account of the First National Bank of Chicago and credited it to Charles Genschow. Yes, Genschow did have an account in our bank at that time; I made no report whatever to the First Trust Joint Stock Land Bank of that."

A review of the evidence leaves no dispute as to the

time; I made no report whatever to the First Trust Bank. Yes, Genschow did have an account in our bank at that of the First National Bank of Chicago and credited it to Charles Forch, a representative of the bank, stated: "I debited to the account Bank of Chicago to the credit of the bank, in the Genschow letter, Genschow also evidencing the proceeds of the loan in the First National when the Bank of Chicago received the letter, containing the proceeds Genschow loan by the First National Bank of Chicago as directed. This account to the credit of the Bank of Chicago on account of the Genschow slip in its letter of March 4th, evidencing the deposit of the account of the Genschow loan. The land bank then sent the National Bank of Chicago for the credit of the Bank of Chicago on appealant bank described the net proceeds of the loan in the First the notes and mortgage at the request of the Bank of Chicago, the ability to trace the fund. The record here shows that upon receiving One of the fundamental principles in a claim of this kind is the and this \$20,000 was a part of the resources of the Bank of Chicago. Genschow in excess of \$10,000 with the First National Bank of Chicago. \$7,000 the Bank of Chicago still had a credit after it closed its customary way. The evidence shows that after the transfer of the The money in question was transferred in the usual and

Genschow. Netta and not for a general deposit to the account carried by Genschow up the purchase by Genschow of the farm from the Genschow Bank of Chicago so that it might use that fund for the purpose of in question were to be applied to its credit in the First National for the answer and it acknowledges that the proceeds of the loan transaction in which he made a partial payment directly Netta was the funds for use in clearing the estate transaction. The said out a certain sum of money on the transaction; that it desired the benefit of the Genschow letter; that the Bank of Chicago had the Bank of Chicago shows that they were holding the proceeds for Genschow transferred with the trust. The letter of the transfer of for that special purpose, and holding these funds it was the bank had no right or authority to loan or deal with funds except

fact that this particular account has been traced and identified directly from the land bank into the hands of the receiver of the Bank of Chebanse. It is to be kept in mind that the Bank of Chebanse had requested that the money be turned over to it to apply on a certain and particular transaction. From the evidence no other conclusion can be reached than that this money in the manner in which it came to the bank was placed there for a certain and particular purpose, and that purpose was to pay the Genschow heirs for their interest in the land that was purchased by the appellees.

The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered with a trust in favor of the principal no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, any right, any more valid claim in respect to it than they had before such change. An abuse of a trust can confer no right on the party abusing or on those who claim any privity with him. This principle is fully recognized at law in all cases where it is susceptible of being brought out as a ground of action or of defense in a suit at law. In courts of equity it is adopted with a universality of application." Vol. 2-Storey Equity Jurisprudence, Sec. 1258. The above rule is sustained in Woodhouse vs Grandall, 197 Ill. 104; White vs. Sherman, 168 Ill. 589; Breit vs. Yeaton, 101 Ill. 242; 2 Perry on Trusts, Secs. 835-836; National Life Ins. Co. v. Mather, 118 Ill. App. 491.

The receiver took the fund subject to the same rights of appellant that existed against it in the hands of the bank. Link Belt Machinery Co. vs. Hughes, 174 Ill. 155; Union Trust Co. vs. Trumbull, 137 Ill. 146; National Life Ins. Co. supra.

This sum of money in question constituted a part of the funds that passed into the hands of the receiver and the general creditors had no right to it. It was not necessary that appellant should be able to trace and identify particular pieces of money in the bank. The bank having at all times thereafter had more than that amount in cash on hand the presumption is that what money was paid out by the receiver after receiving this fund was its own money which it might lawfully pay out and not the trust money. Wood-

and that this particular account has been traced and identified
directly from the bank into the hands of the receiver of the
bank of Chicago. It is to be kept in mind that the bank of Chicago
had requested that the money be turned over to it to apply on a cer-
tain and particular transaction. From the evidence on other con-
ditions can be reached that this money in the hands of the receiver
came to the bank was placed there for a certain and particular
purpose, and that purpose was to pay the Chicago bank for their
interest in the land that was purchased by the appellee.
The general proposition which is maintained both at law
and in equity upon this subject is that if any property is in the
legal estate and then is converted into a trust in favor of the appel-
lee or an assignee of that estate and then is placed in the hands of
the agent or trustee converting it, or those who represent
him, any right, any more valid claim in respect to it than they
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principle is fully recognized at law in all cases where it is ap-
plicable of being brought out as a ground of action or of defense
in a suit at law. In cases of equity it is applied with a differ-
ent result of application. Vol. 2-2nd ed. Equity Jurisprudence, Sec.
1182. The above rule is established in Wood v. Wood, 117
Ill. 104; White v. Sherman, 127 Ill. 621; White v. York, 127 Ill.
104; Eddy on Trusts, Sec. 212-213; Callahan v. Life Ins. Co. v.
Lester, 118 Ill. App. 481.
The receiver took the fund subject to the same rights
of appellant that existed against it in the hands of the bank. White
v. Machinery Co. v. Hughes, 127 Ill. 125; Union Trust Co. v.
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paid out by the receiver after receiving the land and the
money which it might lawfully pay out and the trust money. Wood.

In view of the rule as we understand it we think the equities of this case are with the complainant in the cross bill. The fund is one that is easily identified and one that the bank was not entitled to, therefore its creditors are not entitled to it.

We conclude, therefore, that the decree of the Circuit Court of Iroquois County should be affirmed in so far as it directs that the mortgage deed be released and note cancelled; that the said decree should be reversed in so far as it dismisses the cross bill and finds that the fund was not held in trust. A decree should be entered, in addition to the cancelling of the note and releasing of the mortgage or trust deed, decreeing that the fund was impressed with a trust and that it should be paid by the receiver to the appellant.

Decree affirmed in part and reversed in part and remanded with directions to enter a decree as herein indicated.

Reversed and remanded with directions.

In view of the rule as we understand it we think the

entireties of this case are with the claimant in the same bill.

The fact is one that is easily identified and one that the bank was

not entitled to, therefore its creditors are not entitled to it.

It is concluded, therefore, that the decree of the circuit

court of Lincoln County should be affirmed in so far as it directs

that the mortgage deed be released and note cancelled; that the

said decree should be reversed in so far as it directs the cross

bill and finds that the fund was not held in trust. A decree should

be entered, in addition to the cancelling of the note and releasing

of the mortgage or trust deed, declaring that the fund was impressed

with a trust and that it should be paid by the receiver to the

appellant. *Reversed and affirmed in part and reversed in part and*

remanded with directions to enter a decree as herein indicated.

The court affirmed or reversed and remanded with directions.

Reversed and remanded with directions.

Reversed and remanded with directions.

Reversed and remanded with directions.

Reversed and remanded with directions.

Reversed and remanded with directions.

The receiver of the fund was directed to pay the same to the

appellant that existed at the time of the filing of the bill.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 LA. 659²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

SADIE VANCE MAYALL

Pltf. in error

Error to the Circuit Court of
Mercer County.

vs.

JOHN H. DINGS, et al

Defts. in error

Opinion by Fred G. Wolfe, Justice.

The plaintiff in error herein referred to as the complainant, filed her bill in the circuit court of Mercer County on June 16, 1928, to enforce the payment of a legacy of \$4000 given to her by her mother, Mary J. Vance, now deceased, in paragraph B of clause 5 of her last will and testament. Said paragraph reads as follows: "In the event of my decease before the decease of my said husband; or, in the event of my said husband's decease before my decease, and the failure from any cause of my said daughter to have, receive and get from the estate of my said husband, the sum of \$4000.00 in cash, I hereby give and bequeath to my said daughter, the sum of \$4000; payable, if out of my estate in accordance with the above, by my son, Elmer Scott Vande, (without interest) within one year after my decease (if I survive my said husband), and one year after the decease of my said husband (if my said husband survives me). And the said payment of said \$4000.00, in accordance with the above, is hereby made a special charge, incumbrance, and lien upon the real estate devised to my said son, in and by, or under the terms of this will, till paid in accordance with the above provisions. Said above provisions being made and intended to carry out the joint purpose and intent of myself and husband to assure to our said daughter from our combined estate (now held by us severally and individually) the sum of \$4000.00, over and above the real estate and personalty, other than money, to her given, bequeathed and devised, in and by this will, and the will of my said husband, executed by him of even date herewith; and

SADIE VANCE MAYALL

AT A TERM OF THE COURT

Plff. in error

Error to the Circuit Court of

held at Ottawa, on Tuesday, the 10th day of May, 1908, at 10 o'clock, A.M.
JOHN H. DINGS, et al
the year of our Lord one thousand nine hundred and eight-
Defts. in error
within and for the Second District of the State of Illinois
Opinion by Fred G. Wolfe, Justice.

The plaintiff in error herein referred to as the

complainant, filed her bill in the circuit court of Mercer

County on June 12, 1908, to enforce the payment of a legacy

of \$4000 given to her by her mother, Mary J. Vance, now deceased,

in paragraph B of clause 5 of her last will and testament.

Said paragraph reads as follows: "In the event of my decease

before the decease of my said husband; or, in the event of my

said husband's decease before my decease, and the failure from

any cause of my said daughter to have, receive and get from

the estate of my said husband, the sum of \$4000.00 in cash, I

herely give and bequeath to my said daughter, the sum of \$4000;

payable, if out of my estate in accordance with the above, by my

son, Elmer Scott Vance, (without interest) within one year after

my decease (if I survive my said husband), and one year after the

decease of my said husband (if my said husband survives me).

And the said payment of said \$4000.00, in accordance with the

above, is hereby made a special charge, incumbrance, and lien

upon the real estate devised to my said son, in and by, or under

the terms of this will, till paid in accordance with the above

provisions. Said above provisions being made and intended to

carry out the joint purpose and intent of myself and husband to

secure to our said daughter from our combined estate (now held

by us severally and individually) the sum of \$4000.00, over and

above the real estate and personally, other than money, to her

given, bequeathed and devised, in and by this will, and the will

of my said husband, executed by him of even date herewith; and

said provisions, as well as the others contained in this will, and the provisions in said will of my husband, taking into consideration, certain gifts and advancements heretofore made to our said children, viz: a 160 acre farm to our said son, and \$5000.00, to our said daughter."

The testatrix, Mary J. Vance, died February 12, 1909, and devised all her real estate, consisting of 160 acres situated in Mercer County to her husband, James B. Vance, during his lifetime and after his death to her son, Elmer S. Vance, in fee simple. The object of this suit is to raise by a sale of the real estate so devised the amount of the legacy of \$4000.00. James B. Vance died testate on March 24, 1913, leaving the complainant and said Elmer S. Vance as his only heirs at law. Elmer S. Vance died intestate on June 2, 1928, and surviving are his widow, Clara B. Vance, and Alta L. Vance and Verna Vance Smith, his children and only heirs at law.

On January 5, 1928, having previously disposed of his personal property, Elmer Vance, conveyed all his real estate to John H. Dings, as trustee, for himself during his lifetime and for the use of his heirs after his death. No administrator has been appointed of the estate of Elmer S. Vance. On February 25, 1928, Elmer S. Vance and his wife and said trustee conveyed the real estate in question by deeds to M. H. Mack in compliance with a contract of sale made by Elmer S. Vance on November 4, 1927. Under the terms of an instrument, designated in the record as a stipulation and dated February 27, 1928, the unpaid balance of \$19,000.00, due from M. H. Mack to Elmer S. Vance as the purchase price of said real estate, was paid to Mr. Dings. The stipulation provides that Mr. Dings is to make certain payments out of the \$19,000.00, consisting of certain debts and obligations of Elmer S. Vance and the taxes on his real estate; what then remains thereof is to be held by him until such time as the title to the real estate conveyed to Mr. Mack shall be found satisfactory, and the residue, if any, Mr. Dings shall apply in compliance with a trust agreement dated January 5, 1928. The

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lifetime and after his death to her son, Elmer S. Vance, in fee
vested in Meigs County to her husband, James B. Vance, during his
and devised all her real estate, consisting of 180 acres sit-
The testatrix, Mary J. Vance, died February 12, 1908,
to our said daughter."

stipulation bears the signature of Elmer S. Vance, Clara Vance, Alta L. Vance and Verna Vance Smith and M. H. Mack by their respective attorneys. The evidence shows that Mr. Dings has on hand of the \$19,000.00, the sum of \$4200.00 which he holds to protect Mr. Mack against the alleged claim of the complainant of a lien against the real estate for the payment of the \$4000.00 legacy; that Mr. Mack knew at the time the stipulation and deeds were executed, that the complainant claimed that the \$4000.00 legacy had never been paid.

The bill alleges that the estates of Mary J. Vance and James B. Vance have been fully settled, the personal representatives thereof discharged, and that complainant has not received from said estates, nor has she been paid by any one the \$4000.00, or any part thereof, given to her by her mother's will. Clara Vance, M. H. Mack, Alta L. Vance, Verna Vance Smith, John H. Dings, and John H. Dings as trustee, of Elmer Scott Vance, are made parties defendant to the bill. The bill prays that an account may be taken and for a decree in favor of the complainant for the amount found due; that complainant be decreed to be entitled to a lien and to the foreclosure of such a lien upon the premises in question for the amount found to be due within such time as may be fixed by the court; that in default of payment, said premises be sold to satisfy such amount with costs.

To the bill the defendants filed their answer, to which the complainant interposed her replication. The cause was referred to the Master in Chancery to take evidence and report the same with his conclusions of law and facts. The Master found that the legacy had been paid and recommended that the bill be dismissed for want of equity. Objections of the complainant to the Master's report were overruled. The objections were ordered to stand as exceptions, overruled by the court, and the court ordered the bill dismissed for want of equity. From the order of dismissal, the complainant sued out a writ of error to obtain a review and a reversal of the decree of the lower court.

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The bill alleges that the estates of Mary L. Vance and James B. Vance have been fully settled, the personal representatives thereof discharged, and that complainant has not received from said estates, nor has she been paid by any one the \$4000.00 or any part thereof, given to her by her mother's will. Clara Vance, M. H. Mack, Alta L. Vance, Verna Vance Smith, John H. Dings and John H. Dings as trustee, of Elmer Scott Vance, are made parties defendant to the bill. The bill prays that an account may be taken and for a decree in favor of the complainant for the amount found due; that complainant be decreed to be entitled to a lien and to the foreclosure of such a lien upon the premises in question for the amount found to be due within such time as may be fixed by the court; that in default of payment, said premises be sold to satisfy such amount with costs.

To the bill the defendants filed their answer, to which the complainant interposed her replication. The cause was referred to the Master in Chancery to take evidence and report the same with his conclusions of law and facts. The Master found that the legacy had been paid and recommended that the bill be dismissed for want of equity. Objections of the complainant to the Master's report were overruled. The objections were ordered to stand as exceptions, overruled by the court, and the court ordered the bill dismissed for want of equity. From the order of dismissal, the complainant sued out a writ of error to obtain a review and a reversal of the decree of the lower court.

In their answer the defendants allege payment of the legacy. In their printed argument filed in this court they concede that the legacy was not paid before the year 1919. It is not claimed nor urged by the defendants that the legacy, or any part of it, was paid out of the estate of Mary J. Vance. It is the contention of the defendants that the complainant has received from the estate of James B. Vance, \$4000, in cash as is provided in the will of Mary J. Vance and that therefore no lien attached to testatrix's real estate securing the payment of the legacy of \$4000.00.

John B. Vance devised and bequeathed his residence property, being all of his real estate, and also his personal effects, household goods, furniture, etc., and supplies in, about and appurtenant to his residence property to the complainant. His will names Elmer Scott Vance as residuary legatee and contains no bequest of money or cash to complainant other than the legacy of \$4000.00. Paragraph C. of clause 5 of his will is the same as paragraph B. of clause 5 of the will of Mary J. Vance, excepting that the word "wife" is used in the place of the word "husband" wherever the same appears in the latter paragraph.

The evidence shows that upon the final distribution of the assets of the estate of James B. Vance, on May 8, 1919, the complainant signed and gave to Elmer S. Vance, executor of the last will of James B. Vance, a receipt for \$9000.00 and which stated that the amount was in full of her distributive share of said estate. The will of Mary J. Vance provided that if the complainant did not receive \$4000.00 in money from the estate of James B. Vance, the cash legacy of \$4000.00 was payable by Elmer S. Vance. The will, as hereinbefore stated, did not bequeath any specific money legacy to the complainant, exclusive of the \$4000.00 legacy. Therefore, we are of the opinion that the receipt of the complainant for \$9000.00 from the estate of James B. Vance, is prima facie evidence of the discharge of the land from any lien for the payment of the legacy by Elmer S. Vance, and, if standing without impeachment as shown by the

In their answer the defendants allege payment of the legacy. In their printed argument filed in this court they concede that the legacy was not paid before the year 1919. It is not claimed nor urged by the defendants that the legacy, or any part of it, was paid out of the estate of Mary J. Vance. It is the contention of the defendants that the complainant has received from the estate of James B. Vance, \$4000, in cash as provided in the will of Mary J. Vance and that therefore no lien attached to testatrix's real estate securing the payment of the legacy of \$4000.00.

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evidence in the record, the receipt is a bar to the recovery by the complainant in this suit. Whether or not the receipt is by the evidence impeached, contradicted or explained, under the rule governing the force of oral evidence as against a written receipt, in such a manner as to deprive it of its legal effect, or is the question presented on review.

The net assets of the estate of James B. Vance consisted of a promissory note of the Rock Island Plow Company for \$6000; certificates of bank deposits to the amount of \$3000.00, and which were carried in the final report filed in the estate as cash; and also \$149.81 which amount Elmer S. Vance retained as his distributive share of the estate. The \$9000.00 mentioned in the receipt of the complainant included the note for \$6000 and the certificates of deposit for \$3000.00. The evidence introduced by the defendants shows conclusively that the note for \$6000.00 was first made on September 20, 1917, and payable to James B. Vance on September 20, 1918. At its maturity the note was renewed by a note payable to Elmer S. Vance, as executor of the last will of James B. Vance, and payable September 20, 1919. The last renewal note, on the day of the distribution of the estate of James B. Vance, was endorsed by Elmer S. Vance as executor, to the complainant. A renewal note was given to the complainant by the Plow Company on September 20, 1919, payable to her one year from its date, and paid in full, with all interest thereon, by the Plow Company on September 20, 1920, There is no denial in the evidence of the statement by the complainant in her receipt that she received \$3000.00, or the certificates of deposit representing that amount. The only evidence bearing on this point being the testimony of Benjamin Shriver, who acted as attorney for the complainant and Elmer S. Vance in the settlement of their parents' estates, and who testified that he did not remember if the certificates were or were not endorsed to the complainant by Elmer S. Vance.

In the receipt dated May 6, 1919, the complainant waived notice and consented to the immediate closing of the estate

evidence in the record, the receipt is a bar to the recovery by the complainant in this suit. Whether or not the receipt is by the evidence impeached, contradicted or explained, under the rule governing the force of oral evidence as against a written receipt, in such a manner as to deprive it of its legal effect, or is the question presented on review.

The net assets of the estate of James B. Vance consisted of a promissory note of the Rock Island Plow Company for \$6000; certificates of bank deposits to the amount of \$3000.00, and which were carried in the final report filed in the estate as cash; and also \$149.81 which amount Elmer S. Vance retained as his distributive share of the estate. The \$8000.00 mentioned in the receipt of the complainant included the note for \$6000 and the certificates of deposit for \$8000.00. The evidence introduced by the defendant shows conclusively that the note for \$8000.00 was first made on September 20, 1917, and payable to James B. Vance on September 20, 1918. At its maturity the note was renewed by a note payable to Elmer S. Vance, as executor of the last will of James B. Vance, and payable September 20, 1919. The last renewal note, on the day of the distribution of the estate of James B. Vance, was endorsed by Elmer S. Vance as executor, to the complainant. A renewal note was given to the complainant by the Plow Company on September 20, 1919, payable to her one year from its date, and paid in full, with all interest thereon, by the Plow Company on September 20, 1920. There is no denial in the evidence of the statement by the complainant in her receipt that she received \$5000.00, or the certificates of deposit representing that amount. The only evidence bearing on this point being the testimony of Benjamin Shriver, who acted as attorney for the complainant and Elmer S. Vance in the settlement of their parents' estates, and who testified that he did not remember if the certificates were or were not endorsed to the complainant by Elmer S. Vance.

In the receipt dated May 8, 1919, the complainant consented to the immediate closing of the estate

of James B. Vance. In his report, Elmer S. Vance reported to the court that he and the complainant are the only heirs of James B. Vance and that they have agreed by and between themselves as to a settlement and division of said estate and that each have filed their receipts therefor in full satisfaction of their claims in said estate. This statement in the report is based upon a contract dated May 6, 1919, and executed by the complainant under the terms of the will of James B. Vance was bequeathed the sum of \$9000.00; that Elmer Scott Vance feels that same was not an equitable and just division of said estate and for the purpose of making an equitable division, he agrees, in addition to the sum allowed the party of the second part, under the terms of the last will and testament of James B. Vance, to turn over and assign all his interest, right and title to one certain promissory note for \$6000.00 given by the Rock Island Plow Company, and \$11,000.00 payable on or about one year from the date of the agreement, to-wit: May 6, 1919, with interest at the rate of 5 $\frac{1}{2}$ % per annum as evidenced by one certain promissory note of even date herewith given by Elmer S. Vance to the complainant; it being mutually understood and agreed that the agreement is made for the express purpose of making an amicable and just settlement of the estate of James B. Vance and for no other purpose.

Elmer S. Vance as executor of the will of James B. Vance filed in the Probate Court of Rock Island County at the December term, 1920, a report showing that he had made distribution of the assets of the estate of James B. Vance according to the receipt signed by the complainant and his own receipt for \$149.81, which he recited was done according to their respective interests in said estate as determined by the laws of descent of the State of Illinois.

The evidence mainly relied upon by the complainant to sustain her side of the case is the testimony of Benjamin Shriver. Mr. Shriver testified that he acted as the attorney for the complainant and Elmer S. Vance in the matter of the settlement of their parents' estates, but that he is not now

of James B. Vance. In his report, Elmer S. Vance reported to the court that he and the complainant are the only heirs of James B. Vance and that they have agreed by and between themselves as to a settlement and division of said estate and that each have filed their receipts therefor in full satisfaction of their claims in said estate. This statement in the report is based upon a contract dated May 8, 1919, and executed by the complainant under the terms of the will of James B. Vance was bequeathed the sum of \$9000.00; that Elmer Scott Vance feels that same was not an equitable and just division of said estate and for the purpose of making an equitable division, he agrees, in addition to the sum allowed the party of the second part, under the terms of the last will and testament of James B. Vance, to turn over and assign all his interest, right and title to one certain promissory note for \$8000.00 given by the Rock Island Plow Company, and \$11,000.00 payable on or about one year from the date of the agreement, to-wit: May 8, 1919, with interest at the rate of 8 1/2 per annum as evidenced by one certain promissory note of even date herewith given by Elmer S. Vance to the complainant; it being mutually understood and agreed that the agreement is made for the express purpose of making an equitable and just settlement of the estate of James B. Vance and for no other purpose.

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The evidence mainly relied upon by the complainant to sustain her side of the case is the testimony of Benjamin Shriver. Mr. Shriver testified that he acted as the attorney for the complainant and Elmer S. Vance in the matter of the settlement of their parents' estates, but that he is not now

acting as complainant's attorney and that he had no interest whatsoever in the outcome of the suit at bar as her attorney.

That the firm of Shriver and Shriver were writing to John H. Dings, as trustee, as late as March 30, 1928, pressing the payment of the legacy on behalf of the complainant, appears from letters introduced in evidence by the complainant. In the additional abstract of the record filed by the defendants there appears in full the objections taken in the case to the Master's report, and to which the firm name of Shriver and Shriver is signed. In the reply brief on the complainant, Mr. J. J. Neiger, attorney of record for the complainant, states positively that Benjamin Shriver is not and has not been attorney for the complainant in the case at bar and that the name of Shriver and Shriver appears inadvertently to the objections filed to the Master's report. Mr. Shriver also testified that when he learned that he would probably be a necessary witness in the matter of forcing the payment of the \$4000.00, he withdrew as attorney for the complainant and told her she would have to go to some other attorney, because he could take no further part in the matter.

It is insisted by defendants that Mr. Shriver's testimony should be given but slight weight because he assumes the double burden of representing the complainant and by his testimony furnishing evidence to insure the success of the suit. To so hold would be to find that Mr. Shriver had deliberately sworn to a falsehood when he testified that he had no interest in the outcome of the suit, and had withdrawn as attorney for the complainant before the suit was instituted.

It appears from the evidence that Mr. Shriver acted as the attorney for Elmer S. Vance as executor of the wills of Mary J. Vance and James B. Vance, and both the brother and sister relied upon Mr. Shriver for a just and legal settlement and adjustment of their interests in the estates of their mother and

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whatsoever in the outcome of the suit at bar as her attorney.
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S. Vance and James S. Vance, and both the brother and sister
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justment of their interests in the estates of their mother and

father, including the payment of the \$4000.00 legacy. Under the circumstances, and the further fact that complainant's case rests largely on the testimony of Mr. Shriver, it seems inconceivable that an attorney would swear falsely that he had withdrawn from the case and had no interest as an attorney in it. We will, therefore, consider Mr. Shriver's testimony free from the criticism that he appears as attorney for the complainant in this suit.

The evidence to support the complainant's case that this legacy of \$4000 had not been paid and the evidence of the defendant that it has, is in such conflict that it is hard to say where the preponderance lies. It is doubtful whether the evidence is sufficient to overcome the prima facie case made by the defendants, when they introduced the receipt signed by the complainant showing that she had received her full share of the estate of her father. Some of Mr. Shriver's testimony tends to corroborate her claim, but there are other facts and circumstances in the case that seem to discredit this testimony. A great many of the conversations and transactions testified to, occurred quite a number of years before the time of the trial and of course the details of many of the transactions are forgotten, so that it leaves the evidence in an unsatisfactory state. We are called upon to review the whole record de novo after both the master and the chancellor have decided the controversy adversely to the complainant. The master's findings are opposed to the testimony of the complainant and Mr. Shriver in contradicting the receipt. The conclusion of the master in his report, which was sustained by the decree of the chancellor, is entitled to weight in this court in deciding this issue of fact. (Warren vs. First National Bank, 149 Ill., 9)

Owing to the discrepancies and uncertain state of the evidence this court might well conclude as was said in Siegel vs. Andrews, 181., Ill., 356. "The first contention raises the question of fact which has been passed upon adversely to the appellants by the master. This finding has been approved by

father, including the payment of the \$4000.00 legacy. Under the circumstances, and the further fact that complainant's case rests largely on the testimony of Mr. Shriver, it seems inconceivable that an attorney would swear falsely that he had withdrawn from the case and had no interest as an attorney in it. We will, therefore, consider Mr. Shriver's testimony free from the criticism that he appears as attorney for the complainant in this suit.

The evidence to support the complainant's case that this legacy of \$4000 had not been paid and the evidence of the defendant that it has, is in such conflict that it is hard to say where the preponderance lies. It is doubtful whether the evidence is sufficient to overcome the prima facie case made by the defendants, when they introduced the receipt signed by the complainant showing that she had received her full share of the estate of her father. But there are other facts and circumstances corroborate her claim, but there are other facts and circumstances in the case that seem to discredit this testimony. A great many of the conversations and transactions testified to, occurred quite a number of years before the time of the trial and of course the details of many of the transactions are forgotten, so that it leaves the evidence in an unsatisfactory state. We are called upon to review the whole record de novo after both the master and the chancellor have decided the controversy adversely to the complainant. The master's findings are opposed to the testimony of the complainant and Mr. Shriver in connection with the receipt. The conclusion of the master in his report, which was sustained by the decree of the chancellor, is entitled to weight in this court in deciding this issue of fact.

(Warren vs. First National Bank, 149 Ill., 9)

Owing to the discrepancies and uncertain state of the evidence this court might well conclude as was said in Siegel vs. Andrews, 187, Ill., 356. "The first contention raises the question of fact which has been passed upon adversely to the complainants by the master. This finding has been approved by

the chancellor, and, after a careful reading, and consideration of the evidence, we cannot say that its weight is manifestly and clearly against the finding, and that being so, we should not and will not disturb it.' (Ruddy vs. McDonald, 244 Ill., 494)

We cannot say that the findings of the master is manifestly and clearly against the weight of the evidence in this case. The judgment of the circuit court of Mercer County is hereby affirmed.

Affirmed.

the Chancellor, and after a careful reading, and consideration
of the evidence, we cannot say that its weight is manifestly and
clearly against the finding, and that being so, we should not
and will not disturb it. (Ruddy vs. McDonald, 244 Ill. 494)
We cannot say that the findings of the jury is
manifestly and clearly against the weight of the evidence in
this case. The judgment of the circuit court of Mercer County
is hereby affirmed.

Affirmed.

The evidence in support of the
this legacy of \$4000 had not been paid and the evidence of the
testimony that it had, in such a case, is not sufficient
to show the propriety of the legacy. It is doubtful whether
of fact is sufficient to overcome the presumption that the
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time and the Chancellor has decided the controversy in
favor of the complainant. The answer, findings and reasons
of the Chancellor of the complainant and Mr. Sawyer in con-
firming the record. The conclusion of the matter in his
favor, which was sustained by the decree of the Chancellor,
is to be weight in this court in deciding this issue of fact.

Two First National Bank, 148 Ill. 9

Going to the discrepancies and uncertain state of the
evidence, which might well conclude as was said in the
181 Ill. 388. The first contention raised the
question of the validity of the will. This contention has been
sustained by the evidence.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

THE

OF THE

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120
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 659³

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 20 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

...the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:
The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
E. L. WETTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois
Second District
May Term, A. D. 1931.

Elizabeth Nellie Crittenden

Plaintiff in error

vs.

Lucille Kingsbury and Albert
Kingsbury,

Defendants in error,

Error to the Circuit Court
of Winnebago County.

Opinion by Fred G. Wolfe, Justice.

The plaintiff in error Elizabeth Nellie Crittenden, filed a petition in the circuit court of Winnebago County, Illinois, for a writ of habeas corpus to get possession of her minor child Virginia Elizabeth Crittenden, who, at the time of the institution of the proceedings was three years of age. The child, together with her parents and sisters had lived in Sheboygan, Wisconsin, until sometime in the spring of 1930. The father of the child had been committed to a reformatory at Green Bay, Wisconsin, for contributing to the delinquency of a minor child. At the time of the filing of the petition and the hearing on the same he was still confined in the reformatory.

While the family were living in Sheboygan, Wisconsin, the mother of the child became ill. Their source of income was very meager and the family became a public charge, depending upon the contributions of the Salvation Army and other charitable Institutions. The father contracted a communicable venereal disease during the time that he lived with his family in Sheboygan. The plaintiff in error permitted the father to use certain articles of clothing of the child in question in treating himself for said disease, so that the child became infected with

In the Appellate Court

of Illinois

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May Term, A. D. 1931.

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Defendants in error.

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While the family were living in Sheboygan, Wisconsin, the mother of the child became ill. Their source of income was very meager and the family became a public charge, depending upon the contributions of the Salvation Army and other charitable institutions. The father contracted a communicable venereal disease during the time that he lived with his family in Sheboygan. The plaintiff in error permitted the father to use certain articles of clothing of the child in question in treating himself for said disease, so that the child became infected with

this same venereal disease. The defendant, who is the grandmother of the child on its father's side, learning of the deplorable condition existing in the home of the son's family had the family come to her home in Rockford, Illinois, and gave them medical assistance, and food and clothing for the family. While the mother and child were at the home of the defendant, arrangements were made for the grandmother to keep the youngest child. The child was taken into the home of the defendant at Rockford and given food and clothing and also medical attention. During the time defendants have had possession of the child she has largely recovered her health and the evidence shows that the child has been properly cared for during the time that she has been with her grandmother. The child is still being treated for the disagreeable disease that was communicated to her at the home of her parents, but reports are favorable for her complete recovery.

The plaintiff in error has made lengthy arguments bearing upon the question of the right of the parents to their child. We recognize the general rule that the parents are entitled to the care, custody and possession of their children, unless there is some reason why they should be deprived of such care, custody and possession. The defendants in error do not dispute that this is the law. There is a further rule of law which this court recognizes. That is, when the court comes to deal with infants the principal question to be considered is, 'What is for the best interests of the child involved?' That is the only question involved in this case. The trial court heard the evidence in this case and had an opportunity to see and hear the witnesses, and decided it was for the best interest of the child that it remain in the care and custody of its grandmother. We have examined the record filed in this case and we cannot say that the court erred in his findings.

We are of the opinion that it is for the best interest

We are of the opinion that it is for the best interest cannot say that the court erred in his findings. mother. We have examined the record filed in this case and we of the child that it remain in the care and custody of its grand- hear the witnesses, and decided it was for the best interest the evidence in this case and had an opportunity to see and only question involved in this case. The trial court heard for the best interests of the child involved? That is the infants the principal question to be considered is, 'What is court recognizes. That is, when the court comes to deal with this is the law. There is a further rule of law which this and possession. The defendants in error do not dispute that some reason why they should be deprived of such care, custody care, custody and possession of their children, unless there is We recognize the general rule that the parents are entitled to the upon the question of the right of the parents to their child. for The plaintiff in error has made lengthy arguments bearing favorable for her complete recovery. communicated to her at the home of her parents, but reports are still being treated for the disfigureable disease that was time that she has been with her grandmother. The child is shows that the child has been properly cared for during the child she has largely recovered her health and the evidence tion. During the time defendants have had possession of the Rockford and given food and clothing and also medical atten- child. The child was taken into the home of the defendant at arrangements were made for the grandmother to keep the youngest While the mother and child were at the home of the defendant, them medical assistance, and food and clothing for the family. the family come to her home in Rockford, Illinois, and gave pleasurable condition existing in the home of the son, family had mother of the child on its father's side, learning of the de- this same venereal disease. The defendant, who is the grand-

of the child for it to remain in the care and custody of the defendants, and the order and judgment of the circuit court of Winnebago County is hereby affirmed.

Affirmed.

on the father's side, testimony of the fact of the child for it to remain in the care and custody of the father, and the order and judgment of the circuit court of Lincoln County is hereby affirmed. for the family.

Mother and child were at the home of the defendant, parents were made for the child. affirmed. as to keep the youngest

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question. The law, there is a further rule. That is when the court comes to deal with the principal question to be considered is, What is the best interests of the child involved? The trial

and the court in this case. It is the best interests of the child to be with the mother and the child to be with the mother.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

I, JIMMY E.

of the State of Illinois, and the county of Cook, do hereby certify that

In Testimony Whereof, I hereunto set my hand and seal the day and date first above written, at Chicago, Illinois.
Attest my hand and seal this _____ day of _____, 19____.
JIMMY E. _____

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2021A.059⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 2. 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HIRAM COOPER,
Appellee,

vs.

BRADY-WAXENBERG COMPANY,
a corporation,
Appellant

Appeal from the Circuit Court
of Rock Island County.

Opinion by Fred G. Wolfe, Justice.

The plaintiff, Hiram Cooper, was standing at the intersection of Forty-fourth Street and Seventh Avenue in the City of Rock Island, Illinois. While he was standing there a street car came along and stopped. While the street car was standing at the intersection a truck of the defendant which was being driven by his servant, Clinton Crawford, was driven upon the curbing where the plaintiff was standing. The truck struck the plaintiff and knocked him down and injured him. The plaintiff's testimony, which is undisputed, is: That the truck struck him and knocked him down, that he was lying on the grass and was stunned; that his right arm hurt him badly; that his nose was broken and his right side hurt him; that he had a sharp pain above his hip which lasted about four months; and that his nose hurt him. That the pain in his nose lasted two or three weeks; that the pain in his arm continued about two months; that the bruises on his arm and side were black and blue; his arm was swollen and the doctor lanced it three times. That he was a patient in St. Anthony's hospital on account of such injuries six days; that the hospital bill was \$37.00; that after he left the hospital he was treated by Dr. De Silva several times a month for a month and a half; that after the injury it was two or three months before he was able to do any heavy work without pain; that he has no ill effects from his nose being broken aside that it is crooked; that there is a little difficulty in breathing; he finds

Appeal from the Circuit Court
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vs.

BRADY-WAXENBERG COMPANY,
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Opinion by Fred G. Wolfe, Justice.

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that it is a little harder to breathe.

Dr. De Silva was called as a witness and corroborated the plaintiff in his testimony relative to the injuries, and described the treatment that was applied, and also that the amount of his charge for his services was \$84.00. The doctor in his testimony says: "There was a slight deformity in the nose after Mr. Cooper recovered from his injury, such as a slight angulation in the right lateral cartilage. The bones in his nose, where they were crushed were pushed over and broken into bits. His nose was over on the left side of his face and also under the eye, but we brought that back, but there is some slight angulation". "The angulation is permanent."

The case was tried before a jury in the circuit court of Rock Island County, and they found the issues for the plaintiff and assessed his damages at \$1000.00. After a motion for a new trial and arrest of judgment was overruled, the court entered judgment on the verdict for the plaintiff in the sum of \$1000.00, and the case is now brought to this court on appeal.

The appellant assigns two causes of error, viz: First- The court erred in giving instructions tendered by the plaintiff on the question of recovery of damages. Second- That the amount of the damage is excessive.

The instructions are not numbered in the abstract as required by the rules of this court and it entails considerable additional work upon the court to locate the instructions which are under discussion and consideration. If the attorneys would be more careful in this regard, it would greatly facilitate the work of the court in passing upon the instructions under consideration. The instructions complained of enumerate the various items upon which recovery may be had in the event the verdict of the jury is in favor of the plaintiff. There are two criticisms made against this instruction. The first is that it authorizes the recovery on bodily and mental pain

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plaintiff in his testimony relative to the injuries, and described

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two criticisms made against this instruction. The first is

that it authorizes the recovery on bodily and mental pain

suffered, if any in the future. An examination of the instruction discloses that it is not subject to this criticism, because recovery is limited to such suffering in mind and body as the plaintiff has already endured. The cases cited by the appellant in support of their contention is where the court gave an instruction relative to a recovery for future pain and suffering, and the courts have uniformly held that such an instruction is bad.

The other criticism of the instruction is that no recovery can be had for scars, and disfigurements, is not supported by the authorities. The case of the Chicago City Railway vs. Anderson, 300 Ill. App., 74; the case of Fitzgerald vs. Davis, 237, App., 488; and the Chicago Consolidated Traction Company vs. Schritter, 223 Ill., 364, all lay down the doctrine that the plaintiff may recover for a disfigurement resulting from the accident. It is not disputed in this case that the plaintiff's nose is crooked and will be disfigured for life. We think the jury were properly instructed relative to the elements of damage to be considered by the jury in making up their verdict.

The jury who saw and heard the different witnesses testify, and also saw what disfigurement there was to the plaintiff's nose, assessed plaintiff's damages at \$1000.00. It was the province of the jury under the instructions and advisement of the court to assess the plaintiff's damage, and unless this court believes it is manifestly against the weight of the evidence, the verdict should not be disturbed. From an examination of the record in this case we are of the opinion that the verdict is not excessive; that there is no reversible error in the case. The judgment of the circuit court of Rock Island County is affirmed.

Judgment affirmed.

...that it authorizes the jury to ...
two criticisms were raised: first
verdict of the jury is judgment affirmed.
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examination of the record in this case we are of the opinion
of the evidence, the verdict should not be disturbed. From an
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plaintiff's case, assessed plaintiff's damages at \$1000.00.
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up their verdict. ...
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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

1227
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2621A. 639

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 1931

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

Hon. NORMAN

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON

E. J. WELTER, Sheriff.

that afterwards, to-wit: On
the opinion of the Court was filed in the
the office of said Court, in the words and figures

DAN C. FRIEDINGER,
WILLIAM BISHOP,
Appellants

vs.

ERDIE SIMMONS, MATTHEW
KAER, et al.,
Appellees

Appeal from the
Circuit Court of
Livingston County.

Opinion by Fred G. Wolfe, Justice.

The appellants, Dan C. Friedinger and William Bishop, filed their bill in the circuit court of Livingston County, against Erdie Simmons and Matthew Kaer, et al. They alleged that a contract entered into between the appellants and the appellee, Erdie Simmons, on the eighth day of June 1925, should be cancelled and declared null and void as a cloud on the title to certain property of appellants. The bill prays that appellants title be quieted in them and they be restored to full possession of the premises described in their bill of complaint.

It is alleged in the bill that the appellants were the owners of certain premises as therein described; that the appellants entered into an agreement with Erdie Simmons whereby they contracted and agreed to sell to her the premises in question for the sum of \$5,000.00. The contract provided that the \$5000.00 should be payable in \$50.00 installments; that the first payment was to be paid on November 10, 1925. Fifty dollars each month following, in advance, at the rate of six per cent per annum. The interest to be payable every six months and upon payment of full amount appellants were to convey said premises to appellee by giving a good and sufficient warranty deed. The appellee further alleges that possession was to be given to Mrs. Simmons on the 10th of November, 1925; that she paid the sum of \$50 on November 10th, 1925; that she entered

Appeal from the
Circuit Court of
Livingston County.

DAN G. FRIEDINGER,
WILLIAM BISHOP,
Appellants

vs.

ERDIE SIMMONS, MATTHEW
KATER, et al.,
Appellees

Opinion by Fred G. Wolfe, Justice.

The appellants, Dan G. Friedinger and William Bishop, filed their bill in the circuit court of Livingston County, against Erdie Simmons and Matthew Kater, et al. They al-
leged that a contract entered into between the appellants and the appellees, Erdie Simmons, on the eighth day of June 1925, should be cancelled and declared null and void as a cloud on the title to certain property of appellants. The bill prays that appellants title be quieted in them and they be restored to full possession of the premises described in their bill of complaint.

It is alleged in the bill that the appellants were the owners of certain premises as therein described; that the appellants entered into an agreement with Erdie Simmons whereby they contracted and agreed to sell to her the premises in question for the sum of \$5,000.00. The contract provided that the \$5000.00 should be payable in \$50.00 installments; that the first payment was to be paid on November 10, 1925. Fifty dollars each month following, in advance, at the rate of six per cent per annum. The interest to be payable every six months and upon payment of full amount appellants were to convey said premises to appellee by giving a good and sufficient warranty deed. The appellees further alleges that possession was to be given to Mrs. Simmons on the 10th of November, 1925; that she paid the sum of \$50 on November 10th, 1925; that she entered

into possession and now occupies said premises; that she has no other claim or demand other than by said contract; that she paid the monthly installments regularly until October, 1929; that she paid the interest on the principal sum until the tenth day of May 1929, when she defaulted and paid only a portion thereof; that from the said 24th day of November, 1925, she was wholly defaulted in paying the installments or any of the interest and by reason of such default the said contract has been rescinded and become null and void.

The bill further alleges that the appellee Simmons had the contract recorded; that the said contract is wholly void and should be removed as a cloud upon the title to the premises. There are numerous other things alleged in the bill but they are not important for consideration in the decision of this case. The appellees filed answers to the bill denying that the appellants were entitled to the relief prayed for. The case was referred to the master who heard the testimony and reported his findings and conclusions to the court, and held adversely to the claims of the appellants. Objections and exceptions were filed to the masters report, which were overruled by the court and decree was entered confirming the findings of the master.

The records in this case disclosed that the appellee Simmons had two contracts with appellants which she assigned to one J. A. O'Neil, and that he made the payments on the contracts for some time. Subsequently he transferred or assigned the contracts to the appellee Matthew Kafer. Matthew Kafer in his answer denied the making of the contract of November 10th as recited in the bill of complaint, and alleged that on the 8th day of June 1925, a contract was entered into between the appellant and the appellee Eric Simmons for said premises for a consideration of \$5000, \$1000 to be paid cash on delivery of the contract, receipt of which was acknowledged, and the balance in payments of \$500 annually on the 8th day of June in each year. The first payment was to be in 1926, said sum to draw interest at six per cent per annum on all deferred payments.

into possession and now occupies said premises; that she has no other claim or demand other than by said contract; that she paid the monthly installments regularly until October, 1932; that she paid the interest on the principal sum until the tenth day of May 1933, when she defaulted and paid only a portion thereof; that from the said 24th day of November, 1932, she was wholly defaulted in paying the installments or any of the interest and by reason of such default the said contract has been rescinded and become null and void.

The bill further alleges that the appellee Simmons had the contract recorded; that the said contract is wholly void. There are numerous other things alleged in the bill but they are not important for consideration in the decision of this case. The appellees filed answers to the bill denying that the appellants were entitled to the relief prayed for. The case was referred to the master who heard the testimony and reported his findings and conclusions to the court, and held adversely to the claims of the appellants. Objections and exceptions were filed to the master's report, which were overruled by the court and decree was entered confirming the findings of the master. The records in this case disclosed that the appellee Simmons had two contracts with appellants which she assigned to one J. A. O'Neill, and that he made the payments on the contracts for some time. Subsequently he transferred or assigned the contracts to the appellee Matthew Kaler. Matthew Kaler in his answer denied the making of the contract of November 10th as recited in the bill of complaint, and alleged that on the 8th day of June 1932, a contract was entered into between the appellant and the appellee Etiole Simmons for said premises for a consideration of \$5000, \$1000 to be paid cash on delivery of the contract, receipt of which was acknowledged, and the balance to be paid \$500 annually on the 8th day of June in each year. The first payment was to be in 1932, said sum to bear interest at six per cent per annum on all deferred payments.

Ercle Simmons was to pay the taxes and assessments subsequent to 1925. A copy of this contract was attached to the answer of Kafer.

The appellee Kafer filed a cross-bill setting up the fact that the original complainants had filed their bill to which he had filed an answer. The cross-bill also sets up the contract entered into between the appellants and appellee Simmons, on the 8th of June 1925; also alleges that a supplemental contract was entered into between the same parties on the 10th of November 1925, concerning the same property and the same premises involved in this suit. The prayer of the cross bill was for an accounting between the parties, and that appellants Bishop and Friedinger be required to deed the premises to Kafer and to comply with the conditions of the two contracts.

On a hearing of the case the court found in favor of the appellees and against the appellants and entered a decree finding the sum or sums that had been paid and the sums that were still due, and ordered that the sums due be paid within a certain time therein fixed by the court. If the payments were made as ordered, then the appellants were to deed the property to Kafer. The court denied the prayer of the appellants to have the contract declared null and void. It is from this decree that the appellants prosecute this appeal.

Practically the only controversy before this court is as to the payment of \$1000 at the time the contract was entered into by the appellants and appellee Simmons on June 8, 1925, and as to the application of \$125 payments made by the appellee Simmons. The appellee Kafer claims that this \$125 should have been credited to payments on the principal sum, due, thereby reducing the amount of the principal by \$125. Both the appellants and the appellees have assigned errors as to the application of this last mentioned sum.

Appellants strenuously contend that the \$1000 in controversy was never paid to them by Mrs. Simmons. It is just as strenuously contended by the appellees that this \$1000 was paid

Simon was to pay the taxes and assessments subsequent to 1925. A copy of this contract was attached to the answer of Kater.

The appellee Kater filed a cross-bill setting up the fact that the original complainants had filed their bill to which he had filed an answer. The cross-bill also sets up the contract entered into between the appellants and appellee Simon, on the 8th of June 1925; also alleges that a supplemental contract was entered into between the same parties on the 10th of November 1925, concerning the same property and the same premises involved in this suit. The prayer of the cross bill was for an accounting between the parties, and that appellants Bishop and Friedinger be required to deed the premises to Kater and to comply with the conditions of the two contracts.

On a hearing of the case the court found in favor of the appellees and against the appellants and entered a decree finding the sum of \$1000 that had been paid and the sum that was still due, and ordered that the sum due be paid within a certain time therein fixed by the court. If the payments were made as ordered, then the appellants were to deed the property to Kater. The court denied the prayer of the appellants to have the contract declared null and void. It is from this decree that the appellants prosecute this appeal.

Practically the only controversy before this court is as to the payment of \$1000 at the time the contract was entered into by the appellants and appellee Simon on June 8, 1925, and as to the application of \$125 payments made by the appellee Simon. The appellee Kater claims that this \$125 should have been credited to payments on the principal sum, due, thereby reducing the amount of the principal by \$125. Both the appellants and the appellees have assigned errors as to the application of this last mentioned sum.

Appellants strenuously contend that the \$1000 in controversy was never paid to them by Mrs. Simon. It is just as strenuously contended by the appellees that this \$1000 was paid.

by Mrs. Simmons to the appellants. This item is the main question that this court is called upon to determine. The evidence as to the payment of this \$1000 item is very conflicting. Mrs. Simmons testified that she paid the \$1000 in question and in addition thereto paid \$8.05 at the same time. The \$8.05 was the pro rata value of an insurance policy that was due the appellants; she testified that she borrowed \$1000 in cash from Mathew Kafer, and that she paid this money to the appellants. Mathew Kafer corroborated Mrs. Simmons in this testimony and testified that he loaned her \$1000 for the purpose of making the first payment on this property. An examination of the contract between the parties that was entered into on the 8th of June 1925, discloses that it recites in the contract, and on that day, (June 8, 1925) \$1000 ~~dollars~~ cash was paid and the receipt thereof was acknowledged by the appellants. The appellants in their testimony denied that they ever received any part of this \$1000 or that the same was paid to them by Mrs. Simmons. From examination of the whole of the evidence we are of the opinion that it fairly shows that this one thousand dollar item was paid to appellants as claimed by the appellees.

Before the contract was assigned to the appellee Kafer, he required that the consent of the appellant be procured before he accepted the assignment. The contract of June 8th 1925, was attached to the contract of November 10th 1925. The appellants gave their written consent to the assignment at that time and certainly had knowledge of what the contracts contained. The record failed to disclose at the time of the assignment that the appellants made any objections whatsoever as to what the recitals were in the contract of June 8th 1925. It stated that \$1000 had been received by the appellants as a payment upon the contract. This, in our opinion, would justify the chancellor in finding that the item of \$1000 had been paid upon this contract.

Much has been said in the arguments by the respective

by Mrs. Simmons to the appellants. This item is the main

question, but this count is called upon to determine. The evi-

dence as to the payment of this \$1000 item is very conflicting.

Mrs. Simmons testified that she paid the \$1000 in question and

in addition thereto paid \$8.08 at the same time. The \$8.08

was the pro rata value of an insurance policy that was due the

appellants; she testified that she borrowed \$1000 in cash from

Matthew Kater, and that she paid this money to the appellants.

Matthew Kater corroborated Mrs. Simmons in this testimony and tes-

tified that he loaned her \$1000 for the purpose of making the

first payment on this property. An examination of the contract

between the parties that was entered into on the 8th of June

1935, discloses that it recites in the contract, and on that

day, (June 8, 1935) \$1000 ~~in cash~~ cash was paid and the re-

ceipt thereof was acknowledged by the appellants. The appellants

in their testimony denied that they ever received any part of

this \$1000 or that the same was paid to them by Mrs. Simmons.

From examination of the whole of the evidence we are of the

opinion that it fairly shows that this one thousand dollar

item was paid to appellants as claimed by the appellee.

Before the contract was assigned to the appellee Kater,

he required that the consent of the appellant be procured.

Before he accepted the assignment. The contract of June 8th

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appellants gave their written consent to the assignment at that

time and certainly had knowledge of what the contract contained.

The record failed to disclose at the time of the assignment

that the appellants made any objections whatsoever as to what

the recitals were in the contract of June 8th 1935. It stated

that \$1000 had been received by the appellants as a payment

upon the contract. This, in our opinion, would justify the

chancellor in finding that the item of \$1000 had been paid upon

this contract.

It has been said in the arguments by the respective

parties that the contract of June 8th 1935 was not a loan

solicitors, relative to the application of the \$125 in controversy. It is the contention of the appellants that the \$125 was paid as rent and should not have been allowed by the chancellor as an interest charge. It is also the contention of the appellee that the item of \$125 should not be credited to the interest account, but should be credited to the payment upon the principal sum. The rule is that usually where the evidence in a chancery case is conflicting and the chancellor has confirmed the findings of the master, this court will not disturb the decree unless the facts are against the weight of the evidence. (Siegal vs. Anderson, 181 Ill., 356; Ruddy vs. McDonald, 244 Ill., 494.) This court recognizes this principle of law, and if there is any evidence to support the findings of the master on this phase of the case we do not feel disposed to disturb his findings.

The master to whom the case was referred after hearing the testimony found among other things that appellee Simmons went into possession of said real estate under said contract between June 10 and June 15, 1925, she paid \$125 for which she says was neither rent nor principal; that said amount approximates the interest under said contract from June 10, 1925 to November 10, 1925, and should be applied as such.

In view of the finding of the master in chancery and from the evidence, we are not inclined to interfere with the decree entered relative to the item of money referred to by the chancellor. The decree of the Circuit Court of Livingston County will therefore be affirmed.

Judgment affirmed.

affidavit, relative to the application of the \$125 in controversy. It is the contention of the appellants that the \$125 was paid as rent and should not have been allowed by the chancellor as an interest charge. It is also the contention of the appellees that the item of \$125 should not be credited to the interest account, but should be credited to the payment upon the principal sum. The rule is that usually where the evidence in a chancery case is conflicting and the chancellor has confirmed the findings of the master, this court will not disturb the decree unless the facts are against the weight of the evidence. (Siegel vs. Anderson, 181 Ill., 328; Ruddy vs. McDonald, 244 Ill., 494.) This court recognizes this principle of law, and if there is any evidence to support the findings of the master on this phase of the case we do not feel disposed to disturb his findings. The master to whom the case was referred after hearing the testimony found among other things that appellee Simmons went into possession of said real estate under said contract between June 10 and June 15, 1935, she paid \$125 for which she says was neither rent nor principal; that said amount approximates the interest under said contract from June 10, 1935 to November 10, 1935, and should be applied as such. In view of the finding of the master in chancery and from the evidence, we are not inclined to interfere with the decree entered relative to the item of money referred to by the chancellor. The decree of the Circuit Court of Livingston County will therefore be affirmed.

Judgment affirmed.

That \$125 had been received by the appellee from the appellant. This is not in dispute. The appellee is not to be credited with the \$125 as interest.

It has been held in the authorities

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

NOTICE TO THE PUBLIC

TO BE HAD OF THE

AND SECOND DISTRICT

OF THE DISTRICT OF COLUMBIA

1237
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois.

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 800

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 29 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

PETER TREOLO.

Appellee.

vs.

IROQUOIS AUTO INSURANCE
UNDERWRITERS.

Appellant.

Appeal from the
Circuit Court of
Winnnebago County.

Jones, P. J:

Suit was brought by Peter Treolo against Iroquois Auto Insurance Underwriters to recover on a policy of insurance issued to protect him from losses growing out of injuries to the person of others because of the operation of his automobile. An accident had occurred in which two persons who were riding with Treolo were injured. They subsequently recovered judgments against him for damages on account of their injuries. One of the judgments was for \$1350.00 and the other for \$6,000.00. Prior to the trial of those causes, defendant was notified of the pendency of such suits, but refused to participate in the defense.

The insurance policy contained a provision that the insurer should not be liable for claims on account of accidents occurring while the automobile was driven by any person under the influence of intoxicating liquor at the time any loss, damage, or liability arose; or while said ~~and~~ automobile was being used for transporting intoxicating liquor. The two principal defenses urged by defendant are: First, that plaintiff, prior to and at the time of the accident, was under the influence of intoxicating liquor; and second, that the accident happened while plaintiff's automobile was being used for transporting intoxicating liquor.

At the close of all the evidence plaintiff tendered the following instruction, which the Court gave, with other instructions at the close of the argument: "The Court instructs the jury that the evidence offered by the defendant in this case

Appeal from the
Circuit Court of
Winnebago County.

Appellee,

ILLINOIS AUTO INSURANCE
UNDERWRITERS,

Appellant,

Jones, et al.

Suit was brought by Peter Treolo against Illinois
Auto Insurance Underwriters to recover on a policy of insur-
ance issued to protect him from losses growing out of injuries
to the person of others because of the operation of his
automobile. An accident had occurred in which two persons
who were riding with Treolo were injured. They subsequently
recovered judgments against him for damages on account of their
injuries. One of the judgments was for \$1350.00 and the other
for \$8,000.00. Prior to the trial of those causes, defendant
was notified of the pendency of such suits, but refused to
participate in the defense.

The insurance policy contained a provision that the
insurer should not be liable for claims on account of accident
occurring while the automobile was driven by any person under
the influence of intoxicating liquor at the time any loss, damage
or liability arose; or while said automobile was being used
for transporting intoxicating liquor. The two principal defenses
raised by defendant are: First, that plaintiff, prior to and
at the time of the accident, was under the influence of in-
toxicating liquor; and second, that the accident occurred
while plaintiff's automobile was being used for transporting
intoxicating liquor.

At the close of all the evidence plaintiff tendered
the following instruction, which the Court gave, with other
instructions at the close of the argument: "The Court instructs
the jury that the evidence offered by the defendant in this case

relating to the car then driven by plaintiff, being used for the transportation of intoxicating liquor, at the time in question, is not sufficient as a matter of law to support the plea of the defendant in this case."

The Court allowed the case to go to the jury upon the other issues. The jury found a verdict for plaintiff and assessed his damages at \$6,000. From a judgment on the verdict this appeal is prosecuted.

It appears that, in anticipation of a party at his home in Rockford, plaintiff had gone to Chicago to purchase supplies and to bring his sister-in-law and a nephew home with him. On the return journey the car was wrecked and took fire. His relatives, with three little children, accompanying them, were thrown from the car and received injuries out of which the damage suits against plaintiff arose. It is not contended that there was any collusion in the matter of obtaining the judgments against ~~xx~~ plaintiff.

The insurance policy provided for a total liability of \$10,000, not to exceed \$5,000 to any one person. The judgment in one case against plaintiff was for \$6,000 and in the other case \$1,350, making in all \$7,350, but the verdict in this case was only \$3,000 and therefore within the limits of the policy.

In the wreckage of the car were watermelons, muskmelons, carrots, cabbage, grapes, strawberries, dried fish, oranges, bananas, tomatoes, swiss chard, etc., and a five-gallon can of olive oil. A number of witnesses testified that in the wreckage immediately after the accident there were also three glass jugs, one of which was broken. One of the other jugs was cracked, but contained some liquor which smelled like wine, and, in the opinion of several witnesses, contained alcohol and was intoxicating. The jug which contained the liquor was taken from the wreck by one of defendant's witnesses and kept at his home from the time of

the wreck, on March 16, 1928, until about December 1st of that year. A test on the latter date by a clinical pathologist showed the liquor then contained 12 2/10ths per cent alcohol by volume. It was red in color and a witness testified that it was what is known as "Dago Red". On application for rehearing, it was admitted by plaintiff that the liquor was wine.

The evidence was in conflict on the question as to whether or not plaintiff was under the influence of intoxicating liquor at the time of the accident, and the Court properly submitted that question to the jury. When there is conflicting evidence on any issue raised by the pleadings, the Court should submit it to the jury. (Donk Bros. Coal Co. v. Slata, 133 Ill. App. 280; Cline v. City of LeRoy, 204 id. 558.) After an examination of the record, we are not able to say that the verdict is against the manifest weight of the evidence on that issue.

The word "transportation" is to be taken in its ordinary sense. In that sense, it comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another, nor that it be incidental to a transfer of title. If one carries in his own conveyance, for his own purposes, it is transportation no less than where a public carrier, at the instance of a consignor, carries and delivers to a consignee for a stipulated charge. (Cunard S.S. Co. v. Mellon, 262 U. S. 100; 27 A.L.R. 1306; U.S. v. Simpson, 245 U.S. 465; 10 A.L.R. 511.) The word "used" means "employed". (Moore v. Am. Transportation Co., 24 How. (U.S) 1; 16 L. Ed. 674.) Webster's dictionary defines the meaning of the verb "used" as "act of employing anything or state of being employed; to convert to one's service; to employ; as to use a plow, a chair, a book". (Park v. Candler, 113 Ga. 647; 39 S.E. 89; McGuire v. Gallagher, 99 Me. 334; 58 Atl. 445; Bastian v. State, 175 N.Y.S. 584.)

The language employed in policies of insurance should

be interpreted so as to arrive at a fair and reasonable version of the meaning. Such policies are to be construed most strongly against the insurer. (Murray v. Kaskaskia Livestock Ins. Co. 204 Ill. App. 568.) Where the words of a contract of insurance are so framed as to leave room for construction, the courts are inclined to lean against the construction which will impair the indemnity of the insured. (The North Am. Life Ins. Co. v. Maryland Cas. Co., 213 Ill. App. 391.)

The question raised by the pleadings is whether or not under a fair and reasonable interpretation of the policy, the automobile was being used for transporting intoxicating liquor--that is, was it being employed for that purpose? The evidence shows that the purpose for which plaintiff went to Chicago was the bringing home of his relatives and a large quantity of supplies in anticipation of a feast. There is no contention here that he was in the business of transporting intoxicating liquor, or that that was the purpose of the trip. It cannot be said that merely because plaintiff also had some wine in his car, the automobile was used for the purpose of transporting the wine. The question is not whether plaintiff was in the act of transporting intoxicating liquor, but is whether or not the automobile was being employed for that purpose. It is apparent that plaintiff might have been convicted of the criminal offense of transporting intoxicating liquor in violation of the Prohibition Act, yet at the same time be entitled to recover under the terms of his policy of insurance, provided, of course, that his civil action did not grow out of the criminal offense.

A fair and reasonable interpretation of the language in the policy is, that in order to come within its meaning, the automobile must be primarily employed for the purpose of transporting intoxicating liquor, and that a mere casual or incidental transportation, such as is shown by the evidence

Such policies are to be construed most strongly against the insured. (Murray v. Naskaska Livestock Ins. Co., 213 Ill. App. 3d 111, 281 A.2d 831.) Where the words of a contract of insurance are ambiguous as to the construction which the court is inclined to lean against the construction which will impair the identity of the insured. (The North Am. Life Ins. Co. v. Maryland Cas. Co., 213 Ill. App. 3d 111, 281 A.2d 831.)

The question raised by the pleadings is whether or not under a fair and reasonable interpretation of the policy the automobile was being used for transporting intoxicating liquor--that is, was it being employed for that purpose? The evidence shows that the purpose for which plaintiff went to Chicago was the bringing home of his relatives and a large quantity of supplies in anticipation of a feast. There is no contention here that he was in the business of transporting intoxicating liquor, or that that was the purpose of the trip. It cannot be said that merely because plaintiff also had some wine in his car, the automobile was used for the purpose of transporting the wine. The question is not whether plaintiff was in the act of transporting intoxicating liquor, but is whether or not the automobile was being employed for that purpose. It is apparent that plaintiff might have been convicted of the criminal offense of transporting intoxicating liquor in violation of the prohibition law, yet is it not true that he carried wine in his car for the purpose of transporting it? It is not true that the automobile was used for the purpose of transporting intoxicating liquor.

A fair and reasonable interpretation of the language in the policy is, that in order to come within its meaning, the automobile must be employed for the purpose of transporting intoxicating liquor, and that a mere conviction of the criminal offense of transporting intoxicating liquor is not sufficient to bring the case within the meaning of the policy.

in this case, is not such a breach of the policy as to avoid it. There was therefore no evidence tending to support defendant's plea that plaintiff's automobile was at the time of the accident being used for the transportation of intoxicating liquor within the terms of the policy, and the Court did not err in directing a verdict on that issue.

There was no error in refusing to allow the vessels of liquor which had been admitted in evidence to be taken by the jury to the jury room, and we find no reversible error in the admission of testimony. The judgment of the trial court is affirmed.

Judgment affirmed.

in this case, is not a question of law, as it is a question of fact. There was therefore no evidence tending to support defendant's claim that plaintiff's automobile was at the time of the accident being used for the transportation of intoxicating liquor within the terms of the policy, and the Court did not err in directing a verdict on that issue.

There was no error in refusing to allow the vessels of liquor which had been admitted in evidence to be taken by the jury to the jury room, and we find no reversible error in the admission of testimony. The judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I herunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

202 LA. 600²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

Metropolitan Life Insurance Company,

Deft. in error,

vs.

Error to the Circuit Court

of Winnebago County.

John Versackas,

Pltf. in error,

Jones, P.J:

Metropolitan Life Insurance Company filed its bill against John Versackas, to cancel a policy of insurance on the life of one Nellie Versackas, in which defendant is the beneficiary. The policy contained an incontestability clause which reads "Said policy shall be incontestable after it shall have been in force for a period of two years from its date of issue, except for non-payment of premiums." This suit was instituted after the death of Nellie Versackas, but within two years from the date of the policy. The amended bill was not filed until more than two years after the date of the policy.

The ground relied upon by complainant in its bill is that in her application for the policy Nellie Versackas made false answers to certain questions relative to the condition of her health.

Defendant answered the bill praying the same advantage of his answer as if he had demurred generally and specifically thereto. He set up in his answer that he had begun a suit at law upon the same policy; that he had filed a declaration in said suit and a stipulation or waiver to the effect that he agreed forever in every court, and in every suit, which might be begun on the policy, to waive the incontestability clause contained in the policy.

Upon the hearing of the cause, a decree was entered in favor of complainant, cancelling the policy, ordering and directing that no suit be brought upon it, and that complainant be

Metropolitan Life Insurance Company,

Def't. in error,

Error to the Circuit Court

of Winnebago County.

vs.

John Versackas,

Pltf. in error,

Jones, P. 1.

Metropolitan Life Insurance Company filed its bill against John Versackas, to cancel a policy of insurance on the life of one Nellie Versackas, in which defendant is the beneficiary. The policy contained an incontestability clause which reads "Said policy shall be incontestable after it shall have been in force for a period of two years from its date of issue, except for non-payment of premiums." This suit was instituted after the death of Nellie Versackas, but within two years from the date of the policy. The amended bill was not filed until more than two years after the date of the policy.

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Defendant answered the bill praying the same advantage of his answer as if he had demurred generally and specifically thereto. He set up in his answer that he had begun a suit at law upon the same policy; that he had filed a declaration in said suit and a stipulation or waiver to the effect that he agreed forever in every court, and in every suit, which might be begun on the policy, to waive the incontestability clause contained in the policy.

Upon the hearing of the cause, a decree was entered in favor of complainant, cancelling the policy, ordering and directing that no suit be brought upon it, and that complainant be

entitled to have and keep said policy.

Three grounds are relied upon for a reversal. First, that the evidence relied upon for relief must be preserved in the record, either by recitations in the decree or by certificate of evidence filed during the term, or within such additional time as may be granted by the court during the term; second, that complainant had a complete and adequate remedy at law; and third, that the averments of the bill were not sufficient to justify the relief prayed for.

The prayer of the bill was that the policy of insurance be cancelled, rescinded, and declared null and void, and the defendant ordered to surrender the same, and that upon his refusal, he be perpetually enjoined from bringing a suit on the policy. The bill asked and the decree granted affirmative relief. No certificate of evidence was filed during the term and no order was entered granting an extension of time to file such certificate. The decree does not set forth any facts or testimony upon which the relief is granted. The only finding in the decree is, "And the Court having heard the evidence and argument of counsel and being fully advised in the premises finds that it has jurisdiction of the subject matter herein and of the person of the defendant and that the equities are with the complainant."

It is a general rule of chancery practice that a decree granting affirmative relief cannot be sustained, unless the evidence upon which it is based is preserved in the record or the decree finds facts which justify the relief. (*Franco American Hygienic Co. v. Chicago*, 329 Ill. 585). The recital in a decree by way of a finding that the equities of the cause are with the complainant is insufficient to support a decree granting affirmative relief. (*Franco American Hygienic Co. v. Chicago*, *supra*; *Ohman v. Ohman*, 233 Ill. 632; *Hester v. Hester*, 206 Ill. App. 541; *Neeley v. Weeley*, 233 Ill. App. 168; *French*

entitled to have and keep said policy.
Three grounds are relied upon for a reversal. First, that the evidence relied upon for relief must be preserved in the record, either by recitations in the decree or by certificate of evidence filed during the term, or within such additional time as may be granted by the court during the term; second, that complainant had a complete and adequate remedy at law; and third, that the averments of the bill were not sufficient to justify the relief prayed for.
The prayer of the bill was that the policy of insurance be cancelled, rescinded, and declared null and void, and the defendant ordered to surrender the same, and that upon his refusal, he be perpetually enjoined from bringing a suit on the policy. The bill asked and the decree granted affirmative relief. No certificate of evidence was filed during the term and no order was entered granting an extension of time to file such certificate. The decree does not set forth any facts or testimony upon which the relief is granted. The only finding in the decree is "And the Court having heard the evidence and argument of counsel and being fully advised in the premises finds that it has jurisdiction of the subject matter herein and of the person of the defendant and that the equities are with the complainant."
It is a general rule of chancery practice that a decree granting affirmative relief cannot be sustained, unless the evidence upon which it is based is preserved in the record or the decree finds facts which justify the relief. (Tranco American Hygienic Co. v. Chicago, 328 Ill. 385). The recital in a decree by way of a finding that the equities of the cause are with the complainant is insufficient to support a decree granting affirmative relief. (Tranco American Hygienic Co. v. Chicago, supra; Omaha v. Omaha, 335 Ill. 632; Hester v. Hester, 305 Ill. App. 541; Neelley v. Neelley, 335 Ill. App. 168; French

v. French, 302 Ill. 152.) It is not the duty of the party against whom the decree is rendered to preserve the evidence, but if the evidence is not properly preserved, the decree will be reversed upon appeal. (Timke v. Allen, 225 Ill. 402.)

The party in whose favor a decree is rendered, to sustain it on appeal, must preserve the evidence in a certificate of evidence or the decree must specifically find the facts that were proved on the hearing. (Standish v. usgrove, 223 Ill. 500; Torsell v. Biffert, 207 Ill. 621; Village of Harlem v. Sub. R.R. Co., 202 Ill. 301.)

The statutes of this state (Chap. 73, Para. 375, Cahill's Revised Statutes) in force at the time the policy in controversy in this cause was issued required such policies to contain the following clause: "This policy shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for the non-payment of premiums," etc. The incontestability clause in the policy in controversy provides that the policy shall be incontestable after it shall have been in force two years from its date, except for non-payment of premiums, and is more favorable to the insured than the terms of the clause required by the statute to be inserted in such policies. If complainant desired to avail itself of any right to contest its liability under the policy, except for the non-payment of premiums, it was incumbent upon it, under the terms of the policy, to begin such a contest within two years after the date of the policy, regardless of whether the insured was living or dead.

At the time this proceeding was begun no suit or action had been commenced on the policy, and the only way in which complainant could avail itself of its right to contest its liability thereunder was to file a suit to cancel the policy. (Powell v. Mutual Life Ins. Co., 313 Ill. 161; Ramsey v. Old Colony Life Ins. Co. 297 Ill. 592; Link v. Mutual Life Ins. Co.

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v. Mutual Life Ins. Co., 313 Ill. 1st; Ramsey v. Old Colony
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At the time this proceeding was begun no suit or action
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the date of the policy, regardless of whether the insured was
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of the clause required by the statute to be inserted in such
premiums, and is more favorable to the insured than the terms
in force two years from its date, except for non-payment of
that the policy shall be incontestable after it shall have been
incontestability clause in the policy in controversy provides
from its date, except for the non-payment of premiums, etc. The
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following clause: "This policy shall be incontestable after it shall
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Sut. R.R. Co., 202 Ill. 301.)
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The party in whose favor a decree is rendered, to sustain it
be reversed upon appeal. (Timke v. Allen, 225 Ill. 402.)
out if the evidence is not properly preserved, the decree will
against whom the decree is rendered to preserve the evidence;
v. French, 202 Ill. 122.) It is not the duty of the party

of New York, 234 Ill. App. 250; Joseph v. The New York Life Ins. Co., 308 Ill. 93.) The filing of the original bill within two years from the date of the policy stopped the running of the two year period named in the incontestability clause. (Joseph v. The New York Life Ins. Co., supra; Powell v. Mutual Life Ins. Co. supra.) We are of the opinion that the amended bill stated a good cause of action.

Complainant filed its motion in this Court to expunge certain parts of the transcript of the record, and defendant filed its motion here asking leave to assign as additional error the ruling of the trial court in sustaining exceptions to an addition to his answer. Inasmuch as the cause must be reversed and remanded it is unnecessary to pass upon those motion.

For the reasons above set forth, the decree is reversed and the cause remanded.

Reversed and remanded.

of New York, 234 Ill. App. 250; Joseph v. The New York Life Ins. Co., 308 Ill. 93. The filing of the original bill within two years from the date of the policy stopped the running of the two year period named in the incontestability clause. (Joseph v. The New York Life Ins. Co., supra; Powell v. Mutual Life Ins. Co. supra.) We are of the opinion that the amended bill stated a good cause of action.

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Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

1257
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

262 I.A. 660²

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29, 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

George Appel, Fred Appel, and
William Appel, as trustees of
Henry Appel, deceased,

Defendants in error

vs.

Error to Circuit Court
of Ogle County.

Mary Aykens and Henry Aykens,
(Mary Aykens, Plaintiff in error,)

Jones, P. J:

This is a suit in chancery to construe the sixth clause of the will of Henry Appel, deceased, father of all the parties to the cause. He died on January 27, 1925, and three of his sons were named as executors of the will and were trustees under the sixth clause of the same.

The only question involved in this cause is the construction of said sixth clause of the will which reads:-
"Sixth, I give and bequeath unto my executors, hereinafter named, their successors in office, the sum of Four Thousand and no¹00ths Dollars in trust, nevertheless, to be by them invested at the best legal rate of interest obtainable, real estate security preferred, and the proceeds and income therefrom to be paid to my daughter, Mary Aykens, annually during the term of her life, and from and after her death the principal sum shall be paid over to her heirs at law. In the event that said Mary Aykens should at any time be in need of money or financial assistance through sickness or otherwise then I authorize my executors to pay over to her such an amount of the principal sum as she shall or may need."

The evidence discloses that Mary Aykens was married and that her husband, Henry Aykens, owed a certain note for \$500 upon which George Appel, one of the executors and trustees, was surety. When the note came due, Appel did not

George Appel, Fred Appel, and

William Appel, as trustees of

Henry Appel, deceased,

Error to Circuit Court

Defendants in error

of Ogle County.

vs.

Mary Aykens and Henry Aykens,

Ay Aykens, Plaintiff in error.

Jones, P. 1:

This is a suit in chancery to construe the sixth clause of the will of Henry Appel, deceased, father of all the parties to the cause. He died on January 27, 1925, and three of his sons were named as executors of the will and were trustees under the sixth clause of the same.

The only question involved in this cause is the construction of said sixth clause of the will which reads:—"Sixth, I give and bequeath unto my executors, hereinafter named, their successors in office, the sum of Four Thousand and no/00 the Dollars in trust, nevertheless, to be by them invested at the best legal rate of interest obtainable, real estate security preferred, and the proceeds and income therefrom to be paid to my daughter, Mary Aykens, annually during the term of her life, and from and after her death the principal sum shall be paid over to her heirs at law. In the event that said Mary Aykens should at any time be in need of money or financial assistance through sickness or otherwise then I authorize my executors to pay over to her such an amount of the principal sum as she shall or may need."

The evidence discloses that Mary Aykens was married and that her husband, Henry Aykens, owed a certain note for \$500 upon which George Appel, one of the executors and trustees, was surety. When the note came due, Appel did not

desire to continue as surety. He paid the note without the knowledge of Henry Aykens and then procured from Henry and Mary Aykens a judgment note for the amount, and shortly afterward took judgment thereon. The home in which Mary Aykens resided with her husband and child belonged to her, and she had borrowed \$2000 thereon, securing the loan with a mortgage upon the home. The money so borrowed she used to pay notes of her husband other than the \$500 indebtedness. The trustees, out of the corpus of the \$4,000 trust fund, paid \$1,429.33 to apply on the \$2,000 mortgage indebtedness and \$43 for taxes. The judgment of George Appel was also paid out of the corpus of the trust fund.

The trial court construed the sixth clause of the will to mean that the trustees could make payments from the corpus of the trust fund to plaintiff in error only when her need was from sickness or one kindred thereto, and that the payments which had been made by the trustees were unauthorized. The decree ordered that the trustees repay to the trust fund the sum of \$2,000, to restore it to its original status.

The rule is well settled that where in a contract or other written instrument there is a general description coupled with an enumeration of specific things or kinds of property, the general description will commonly be held to embrace only those things of a like kind with those enumerated, under the rule *ejusdem generis*. (In the Matter of Charles P. Swigert, Auditor, etc., 119 Ill. 83; Crum v. Sawyer, 132 Ill. 443; Shirk v. People, 121 Ill. 61.) The doctrine has been applied to cases involving the construction of wills. (Strickland v. Strickland, 271 Ill. 614).

Under the language used in the sixth clause of the will, no language can be found, nor can any construction be placed on any language found therein, that would authorize or permit the

trustee to pay the debts of Henry Aykens, either directly or indirectly, and in making the payments which they did they acted beyond the scope of the power and authority given them by the provisions of said clause six. The construction placed upon that clause by the Chancellor was correct and the decree is affirmed. The money so borrowed shall be repaid by the trustee out of the corpus of the \$4,000 trust fund, said \$4,000 to apply on the \$2,000 mortgage indebtedness and \$2,000 in taxes. The judgment of George Appel was also set aside. The trial court committed the sixth clause of the will in that the trustees could make payments from the corpus of the trust fund to plaintiff in error only when her name was shown on one kindred thereto, and that the payments which were made by the trustees were unauthorized. The decree ordered that the trustees repay to the trust fund the sum of \$2,000, and that the rule is well settled that where in a contract or written instrument there is a general description coupled with an enumeration of specific things or kinds of property, the enumeration will commonly be held to embrace only things of a like kind with those enumerated, and this is the rule. (In the Matter of Charles F. Stewart, Auditor, 9 N.Y. 2d 35; 22 N.Y. 2d 133; 133 N.Y. 443; 22 N.Y. 2d 133.) The doctrine has been applied to cases involving the executor of wills. (Strickland v. Strickland, 271 N.Y. 2d 133.) Under the language used in the sixth clause of the will, no one can be found, nor can any construction be placed on that clause which would permit the

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 LA. 060⁴

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Richard J. T. Skinner,
a minor by John Skinner,
his father and next friend,

Appellee,

VS.

Karl Schoening,

Appellant,

Appeal from the Circuit
Court of Winnebago County.

Jones, P. J:

Plaintiff, Richard J. T. Skinner, a boy about twelve years of age, while riding a bicycle on the State Highway west of the City of Rockford, was struck and injured by a truck owned by defendant, Karl Schoening. This suit was brought to recover damages on account of such injuries. The declaration contains one count averring due care on the part of plaintiff and the negligent operation of defendant's truck, resulting in plaintiff's being struck and injured. A plea of the general issue was filed. From a verdict and judgment in favor of plaintiff for the sum of \$3,000, this appeal is prosecuted.

The only grounds for reversal urged by defendant are that the testimony on behalf of plaintiff as to the permanence of the injury is so indefinite, uncertain, and speculative as to be incompetent, and that it was error to admit the same and to permit it to remain in the record; that the court erred in admitting testimony relative to a subsequent operation for appendicitis, and in giving certain instructions on behalf of plaintiff.

The record discloses that one of the wheels of the truck ran over plaintiff's abdomen and that his liver received a severe laceration and had to be stitched. Two physicians testified in substance that there is a permanent damage to plaintiff's liver, occasioned by the injury. The testimony shows that the scar tissue will always be there, interfering

Appeal from the Circuit
Court of Winnebago County.

Richard J. W. Skinner,
Plaintiff,
vs.
John Skinnar,
Defendant.

Appellee.

Plaintiff, Richard J. W. Skinner, a boy about twelve years of age, while riding a bicycle on the State Highway west of the City of Rockford, was struck and injured by a truck owned by defendant, Karl Schenning. This suit was brought to recover damages on account of such injuries. The declaration contains the following averment: "That on the first of April, 1924, the plaintiff was struck and injured by a truck owned by defendant, Karl Schenning, and that the plaintiff has since that time been unable to work and is now suffering from the effects of such injuries." A plea of the General Issue was filed. The defendant answered and denied the averments of the plaintiff and moved for reversal of the verdict in favor of the plaintiff and for costs. This appeal is presented.

The only grounds for reversal urged by defendant are that the testimony on behalf of plaintiff as to the permanence of his injury is not sufficient, reliable, and competent as to the permanent, and that it was error to allow the same and to permit it to remain in the record; that the court erred in admitting testimony relating to a subsequent operation for the removal of the appendix, and in giving weight thereto on behalf of plaintiff.

The record discloses that on the 1st of April, 1924, the plaintiff was struck and injured by a truck owned by defendant, Karl Schenning, and that his liver received a severe laceration and had to be stitched. Two physicians testified in substance that there is a permanent injury to plaintiff's liver, and that the plaintiff is now suffering from the effects of such injuries. The defendant moved for reversal of the verdict in favor of the plaintiff and for costs. This appeal is presented.

with the blood supply to the liver; that it will not function as liver tissue and will be less resistant to disease. Such testimony is sufficient to establish the permanent character of the injury.

The accident happened on September 3rd, 1929, To stitch the liver an operation was necessary, and there was found in the abdominal cavity a large quantity of blood tinged with bile, which the testimony shows would tend to irritate the lining of the abdominal cavity and the organs with which it came in contact. During the latter part of November of the same year, an operation was performed upon plaintiff for acute appendicitis. The appendix was removed and some adjacent adhesions were found. The evidence is conflicting as to whether there was a causal connection between the injury resulting from the accident and the appendicitis which occurred some three months later. Over the objection of defendant, a surgeon was permitted to testify relative to the operation for appendicitis. If there was any error in admitting the testimony of the surgeon relative to the condition of the appendix and its removal, we are of the opinion that such error was not in this case reversible. The testimony shows that the injury to plaintiff's liver was permanent, and considering the nature of that injury alone, the verdict is not excessive. It is apparent that if another trial was had, and the evidence relative to the condition of the appendix and the operation to remove it was excluded, a jury would be warranted in finding a verdict for the same amount. We are of the opinion that defendant was not prejudiced by the admission of the testimony relative to the appendix operation. It is only when a reviewing court can see that the admission of irrelative evidence has worked, or probably did work, an injury to the party complaining that it will reverse for such error. (Peck v. Cooper, 112 Ill. 192 (195). To justify a reversal on account of error in the admission of evidence, it must appear that upon another

with the blood supply to the liver; that it will not function as
liver tissue and will be less resistant to disease. Such
evidence is sufficient to establish the permanent character of
the injury.

The accident happened on September 2nd, 1935. To effect
the liver an operation was necessary, and there was found in the
abdominal cavity a large quantity of blood tinged with bile, which
the testimony shows was not in contact with the liver at the
time of the accident. The abdominal cavity and the organs with which it came in contact.
During the latter part of November of the same year, an operation
was performed upon plaintiff for acute appendicitis. The appendix
was removed and some adjacent adhesions were found. The evi-
dence in this case is to the effect that the injury to the liver
was permanent and the injury to the appendix was not. Over the
appendicitis which occurred some three months later. Over the
evidence of the liver, a verdict was rendered in favor of
plaintiff as to the permanent character of the injury. It was
also in this case that the evidence was to the effect that
the condition of the appendix and its removal, we are of the
opinion that such error was not in this case reversible. The
evidence shows that the injury to plaintiff's liver was permanent,
and considering the nature of that injury alone, the verdict
is not excessive. It is apparent that if another trial was had,
and the evidence relative to the condition of the appendix and
the operation to remove it was excluded, a jury would be warranted
in finding a verdict for the same amount. We are of the opinion
that the evidence was not prejudiced by the admission of the testi-
mony relative to the appendix operation. It is only when a re-
view of the evidence can see that the admission of relative evidence
was error, we probably did work an injury to the party complain-
ing that it will result in a verdict in favor of the defendant. The
trial was (1935). To plaintiff a verdict was rendered in favor of
the admission of evidence, it was found that the injury to the liver

trial, if the evidence is excluded, a different result might be expected, so that the error deprived the defendant of some substantial legal right. (*People v. Weir*, 295 Ill. 268 (275).)

The fourth instruction given on behalf of plaintiff told the jury that while it is true that it was the duty of the plaintiff to use reasonable care for his own safety in driving or riding his bicycle along the public highway, still where the plaintiff was but twelve years of age at the time of the collision in question, reasonable care is measured by a different standard than in the case of adults, and in this case, if they found that the plaintiff was at the time and immediately prior to the collision in question exercising that degree of care for his own safety which a boy of his age and experience and knowledge would have ordinarily used under like or similar circumstances, then they should find that plaintiff was exercising reasonable care for his own safety, and, in other words, that the plaintiff was not guilty of contributory negligence. The instruction is subject to some criticism, but in view of the fact that the Court also gave a number of instructions for defendant which fully and correctly informed the jury on the question, it is hardly possible that they could have been misled by the instruction given at the instance of plaintiff. Instructions should be considered in a series, and when so considered, if they fairly state the law of the case without a tendency to mislead the jury, they are sufficient. (*Boden v. Kewanee Coal and Mining Co.*, 168 Ill. App. 188; *Milling v. Hillenbrand*, 156 Ill. 310 (313); *Moore v. A.E. & C. R. Co.*, 246 Ill. 56.) Even though an instruction is subject to the objection that it is abstract in form, it is not ground for reversal where other specific instructions are given in connection therewith, which correct any tendency to mislead. (*Ensminger v. Chicago Rys. Co.*, 205 Ill. App. 603; *Town of Wheaton v. Hadley*, 131 Ill. 640; *I. C. R.R. Co. v. Swearingen*, 47 Ill. 206.)

The first, second, and third instructions given on

trial, if the witness is excluded, a different result might be presented, and that the error deprived the defendant of some substantial legal right. (People v. Weir, 225 Ill. 368 (1917)).

The fourth instruction given on behalf of the plaintiff

states that while it is true that it was the duty of the plaintiff to use reasonable care for his own safety in driving

the car, the jury is instructed that the defendant was negligent in driving the car at the time it

crossed the plaintiff's car, and that the plaintiff was not negligent in driving the car at the time it

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behalf of plaintiff relate to the measure of plaintiff's damages in the event that the jury should find in his favor. It is complained that they permit the jury to assess the damages from a consideration of all the evidence in the case, instead of restricting the jury to the evidence of damages. An instruction which does not require the assessment of damages to be based upon evidence as to the damages for which the law allows recovery is improper. (Garvey v. Chicago Rys. Co. 339 Ill. 276 (289). The first instruction tells the jury that to enable them to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof and by considering them in connection with their knowledge, observation, and experience in the business affairs of life. The second instruction informs them that in assessing damages, they should consider the nature of the injuries, the pain and suffering of the plaintiff, and whether or not they believe from the evidence the injuries to be permanent, together with all the evidence in the case. The third instruction is to the effect that in determining the amount of damages, the jury should take into consideration all the facts and circumstances in evidence, the nature and extent of plaintiff's physical injuries, if any, testified about by the witnesses; his suffering, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as they may believe from all the evidence before them, he has sustained or will sustain by reason of such injuries. The three instructions taken together set out the elements of the injury which may properly be taken into consideration in estimating the amount of damages, and in effect, they limit the general statement that the jury should consider all the evidence in the case. (Garvey v. Chicago Rys. Co., supra.) No jury of ordinary intelligence could be misled by them. A similar situation arose in Rumpza v. Knickerbocker Ice Co., 148 Ill. App. 433, and it was there held that the same criticism of an instruction

was hypercritical.

There seems to be no room for the jury to have been misled by the instructions, and we hold there was no prejudicial error in giving them.

Upon a consideration of the whole evidence, it is apparent that the injury complained of is permanent and the amount of the verdict is not excessive. We should not be warranted in reversing the judgment for any of the alleged errors and the judgment is accordingly affirmed.

Judgment affirmed.

and approved.

There were no other persons present.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

127
Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

202 L.A. 660

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 11 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-----------------|---|------------------|
| Bertha Lueck, |) | |
| Appellee |) | Appeal from the |
| vs. |) | Circuit Court of |
| George Roschek, |) | Will County. |
| Appellant, |) | |

Jones, P. J:

This is an appeal by George Roschek from a judgment of \$1500 rendered against him in favor of Bertha Lueck for injuries which she claimed to have sustained by reason of the negligent operation of an automobile belonging to defendant. The declaration contained five counts. The first four counts charge common law negligence. The fifth count avers that defendant so willfully and wantonly drove, operated, propelled, managed, and controlled his automobile as to indicate a complete disregard for the safety of plaintiff and charges willful and wanton misconduct and an assault upon plaintiff by reason of such conduct. To the amended declaration, a plea of the general issue was filed and the cause was tried by a jury.

The verdict returned by the jury was a general verdict of guilty, and it is impossible to say whether the jury found defendant guilty of negligence or of a willful and wanton injury. The testimony shows that plaintiff was a passenger on a street car on Harlem Avenue, in Riverside, Cook County, Illinois. Harlem Avenue runs North and South. The street car came to a stop on the south side of Blackhawk Road, an intersecting street, which runs east and west. As she alighted from the car, a dairy truck and trailer, which had been following the street car, also stopped. Plaintiff started across the street to the sidewalk on the west side of Harlem Avenue. Defendant's automobile, which

Will County.
Circuit Court of
Appeal from the

Appel

17. 9. 1900

This is an appeal by George Roebuck from a judgment of \$1000 rendered by the Court in the case of Roebuck vs. the State of New York. The complaint charged that the defendant had been negligent in the operation of a motor vehicle and that he was liable for the damages caused by the same. The complaint contained five counts. The first four counts charged common law negligence. The fifth count charged that the defendant was liable for the damages caused by the same. The defendant moved to dismiss the complaint on the ground that it was defective in form. The court granted the motion and the defendant appealed. The court of appeals affirmed the judgment of the trial court. The court of appeals held that the complaint was defective in form and that the trial court was correct in granting the motion to dismiss. The court of appeals also held that the defendant was liable for the damages caused by the same. The court of appeals affirmed the judgment of the trial court.

The vehicle returned to the lot and a female
version of policy, and it is impossible to say whether the
very found defendant guilty or acquitted or not a verdict
and woman today. The following cases were presented by
a passenger on a street car on Harlem Avenue, in Riverdale,
Cook County, Illinois. Harlem Avenue runs North and South.
The street car came to a stop on the North side of
West Road, an intersection street, which runs East and West,
at the allotted time for the car, a daily trip was made,
and had been following the street car, also stopped.
The car started across the street to the sidewalk on the
West side of Harlem Avenue. Defendant's automobile, when

had been traveling in the rear of the truck, passed it on the right side and collided with plaintiff. The accident occasioned the injuries for which this action was instituted.

Testimony on the part of defendant is to the effect that his car had been travelling at the rate of from fifteen to twenty miles an hour; that there are three car lanes on each side of the street car track, and in order to get in the line of traffic his car was driven to the right of the truck, the driver having slowed down and released the clutch, allowing the car to drift; that when the truck started to move, he engaged the clutch again and started past it; that plaintiff came suddenly from in front of the truck, without looking to the right or left; and that the driver of defendant's car in an effort to miss her, swerved the car to the right and accelerated its speed.

There is some testimony in the record tending to show that defendant's car was being driven at the rate of thirty miles an hour. But that fact, if it be a fact, does not justify the inference that defendant willfully or wantonly injured plaintiff, or that he ran his car in such a wantonly reckless manner as to warrant the presumption of general intent to injure. Excessive speed, or the violation of the speed limit fixed by law or an ordinance, is not of itself proof of willfulness in the infliction of an injury, although such violation is an unlawful act. (Enochs v. Trevett, 239 Ill. App. 235; I.C.R.R. Co. v. Connor, 189 Ill. 559.) In the case at bar, the testimony shows that when the driver of the car first saw plaintiff, he attempted to avoid injuring her, and immediately after stopping his car, ran to her assistance. After an examination of the testimony, we are of the opinion and hold there is no evidence in the record which proves or tends to prove that appellant was guilty of a willful or wanton injury to plaintiff.

At the close of plaintiff's testimony and again at the close of all the testimony, the court overruled

had been traveling in the rear of the truck, passed it on the left side and collided with plaintiff. The accident resulted in the injuries for which this action was instituted. Testimony on the part of defendant is to the effect

that his car had been traveling at the rate of from fifteen to twenty miles an hour; that there are three car lanes on each side of the street car track, and in order to get in the line of traffic his car was driven to the right of the truck, the driver having slowed down and released the clutch, allowing the car to drift; that when the driver started to move, he stopped the car again and started again; that plaintiff came suddenly from in front of the truck, without looking to the right or left; that when the driver of defendant's car in an effort to clear the car from the right and accelerated its speed.

There is some testimony to the effect that

that that defendant's car was going at the rate of twenty miles an hour. But that fact, if it be a fact, does not justify the inference that defendant's car was traveling at excessive speed, or that it was a violation of the general reckless manner as to warrant the presumption of general intent to injure. Excessive speed, or the violation of the speed limit fixed by law, is not of itself

proof of willfulness in the infliction of an injury. Plaintiff's own testimony is to the effect that (Enclosed v. Brown, 129 Ill. App. 335; 133 R.R. Co. v. Connor, 189 Ill. 123.) In the case at bar, the testimony shows that when the driver of the car first saw plaintiff, he attempted to avoid injuring her, and immediately after stopping his car, ran to her assistance. After an examination of the testimony, we are of the opinion that there is no violation of the speed limit fixed by law, and that the driver of the car was not guilty of a violation of the speed limit. At the time of defendant's testimony, the car was

defendant's motion for a directed verdict as to each count of the declaration. Whether or not the negligent conduct of a defendant which has resulted in an injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury. (Maildren Express Co. v. Krug, 291 Ill. 473-476). But the question of whether there is any evidence legally tending to prove a fact so as to authorize the submission of the question to the jury is a question of law for the court. (Schuermann v. Dwelling House Ins. Co., 161 Ill. 437.) There is in the record no evidence to support a verdict under the fifth count of the declaration, and the court committed reversible error in refusing to take that count from the consideration of the jury.

The fact that the declaration contained other good counts charging negligence does not cure the error or tend to support the verdict. The fifth count is not of the same class as the negligence counts, and does not charge the same or a similar offense. (Robbins v. Ill. Power & Light Corp., 255 Ill. App. 106-121). Where a declaration charges general negligence, and another count of the declaration charges willful and wanton injury, the verdict cannot stand, unless plaintiff makes out a case of willful and wanton injury, because the injury could not have been caused willfully or wantonly and negligently at the same time. Willfulness signifies an intent. Negligence means carelessness. Things intended are not due to carelessness. It being impossible to tell whether or not the verdict was based upon the charge of willful and wanton conduct, of which there is no evidence in the record, it cannot be allowed to stand. (Grinestaff v. New York Central Ry. Co., 253 Ill. App. 589; Streeter v. Hamrichouse, 261 Ill. App. 586.)

defendant's motion for a directed verdict as to each count of the declaration. Whether or not the negligent conduct of a defendant which has resulted in an injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury. (Walgreen Express Co. v. Krug, 281 Ill. 473-478.) But the question of whether there is any evidence legally tending to prove a fact so as to authorize the submission of the question to the jury is a question of law for the court. (Schumann v. Dwelling House Ins. Co., 181 Ill. 437.) There is in the record no evidence to support a verdict under the fifth count of the declaration, and the court committed reversible error in refusing to take that count from the consideration of the jury.

The fact that the declaration contained other good counts charging negligence does not cure the error or tend to support the verdict. The fifth count is not of the same class as the negligence counts, and does not charge the same or a similar offense. (Robbins v. Ill. Power & Light Corp., 255 Ill. App. 106-131.) Where a declaration charges general negligence, and another count of the declaration charges willful and wanton injury, the verdict cannot stand, unless plaintiff makes out a case of willful and wanton injury, because the injury could not have been caused willfully or wantonly and negligently at the same time. Willfulness signifies an intent. Negligence means carelessness. Things intended are not due to carelessness. It being impossible to tell whether or not the verdict was based upon the charge of willful and wanton conduct, or which there is no evidence in the record, it cannot be allowed to stand. (Grinnell v. New York Central Ry. Co., 255 Ill. App. 589; Greeter v. Hurdhouse, 281 Ill. App. 556.)

The fifth instruction given on behalf of plaintiff relates to a statute prohibiting the stopping of any motor vehicle within ten feet of the running board or lowest step of a street car which has stopped to receive or discharge passengers. There is nothing in the record which shows that it is applicable to the facts in evidence, and it was error to give it. As the judgment must be reversed and the cause remanded for another trial, we express no opinion on the weight or credibility of the evidence or the amount of the verdict.

The judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

1287
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

26214.601

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 26 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Home Lumber & Supply Co.,
an Illinois corporation, et al
Appellants,
vs.

Guy Gaston, et al
Appellees

Appeal from the
Circuit Court of
Winnebago County.

Union Loan & Savings Association
of Freeport, Illinois
Appellee
vs.

John D. Sarantopoulos, et al
(Home Lumber & Supply Co.,
an Illinois Corporation, et al
Appellants)

Jones, P. J.:

Appellants, Home Lumber & Supply Company and H. A. Block, doing business as H. A. Block Fuel Company, filed their bill against Guy Gaston, a contractor, and John D. Sarantos, otherwise known as John D. Sarantopoulos, ~~otherwise known as John D. Sarantopoulos~~, and Agnes A. Sarantos, his wife, otherwise known as Agnes A. Sarantopoulos, for the foreclosure of a mechanic's liens against certain premises owned by Sarantos and his wife. Appellant, H. R. Daniels intervened and filed a petition for the foreclosure of another mechanic's lien against the same premises. After the mechanic's lien foreclosure suit was instituted, appellee, Union Loan and Savings Association of Freeport, Illinois, instituted a suit to foreclose its mortgage against the same premises. Prior to the hearing the two suits were consolidated. Upon the hearing, the chancellor entered a decree finding that the several appellants are not entitled to liens on the premises, and foreclosing the mortgage of Union Loan and Savings Association. This appeal is prosecuted from that decree.

The premises were owned by John D. Sarantopoulos and his said wife as tenants in common. On October 19, 1927, Sarantopoulos contracted in writing with Gaston for the construction of

a dwelling house to be erected on the premises. Gaston, the Contractor was named therein as the party of the first part. The contract, among other things, provided:- "The party of the first part hereto hereby agrees to construct said building according to the terms of this contract and in a good and workmanlike manner, and when the same is offered for acceptance by him, the party of the first part, to the party of the second part, it shall be free and clear from any lien, claim, or encumbrance whatsoever, and he, the party of the first part hereto, for himself, his heirs and assigns, and for any subcontractor or material man who shall furnish labor and material or either of them necessary for and incident to the construction of said residence and garage, hereby waives any and all right or claim for lien which he or any such sub-contractor or material man may have therefore, and any and all right to place a mechanic's lien on said premises which he or any subcontractor or material man may be given by the laws of the State of Illinois."

The contract was recorded in the recorder's office of Winnebago County the next day after it was executed. It was therefore filed in apt time. It was not recorded in a special book kept by the recorder for that purpose alone, but was recorded in a mortgage record and was indexed under "grantors and grantees". Other documents such as leases, ordinances, party wall agreements and other instruments were recorded in the same book.

On February 7, 1928, appellee, Union Loan and Savings Association, placed a loan of \$5,000 on the premises secured by a mortgage of the same date, which was filed for record on February 16, 1928. On or about November 2, 1927, Home Lumber and Supply Company contracted verbally with Gaston to furnish certain lumber, cement, and other building materials to be used in the erection of the dwelling. It furnished the same at intervals between that date and June 22, 1928, and on August 21, 1928, filed its claim for lien in the recorder's office of

Winnebago County. Appellant Block entered into a verbal contract with Gaston on or about May 14, 1928, for the furnishing of brick, tile, etc., for said dwelling, and said material was furnished between that date and July 3, 1928. On August 10, 1928, Block served written notice of his claim for lien upon Sarantopoulos and wife. The intervening petition of Daniels sets out that he entered into a verbal contract with Gaston on or about November 29, 1927, for the furnishing of lumber and other materials to be used in erecting said dwelling, and that such materials were furnished between that date and August 16, 1929, on which latter date the last delivery of said material was made to said premises. No question is raised as to the several amounts alleged to be owing for materials or labor to the respective lien claimants, or as to the sufficiency of the provision against liens in the contract between Sarantopoulos and Gaston.

The principal contention seems to be that the recorder did not record the contract in a special book provided by him for that purpose, but that it was recorded in the mortgage record. Sec. 21 of the Lien Act (Chap. 82, ~~page~~ 21, Revised Statutes 1929) provides: "If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a subcontractor or material man, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds of the county or counties where the house, building or other improvement is situated, prior to the commencement of the work upon such house, building or other improvement, or within ten days prior to the contract of the subcontractor or material man. And the recorder of deeds shall record the same at length in the order of time of its reception in books provided by him for that purpose, and the recorder of deeds shall index

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the same, in the name of the contractor and in the name of the owner, in books kept for that purpose, and also in the tract or abstract book ~~in~~ of the tract, lot, or parcel of land, upon which said house, building or other improvement is located, etc."

It is well settled that when the statute requires or provides for the filing and recording of any instrument and the instrument is filed within the time and with the officer and in the office designated by the statute, the party so filing the same has done all that he is required to do. The fact that the officer may have omitted to do his duty or has negligently or wrongfully performed the same will not affect the interests of the party filing the instrument, and the fact that no tract or abstract book was kept for recording such instruments could not affect the rights of the parties filing the same. (Cook v. Hall 1 Gilm. 447.) Section 30 of the Conveyance Act (Chap. 30. par. 39 Smith Hurd Rev. Stat. 1929) gives effect to all instruments the same for record, as to all creditors and subsequent purchasers without notice. No duty other than filing the same is imposed upon the holder, and when he performs that duty the instrument is effective by the express terms of the statute.

Appellants insist that because the contract between John D. Sarantopoulos and Gaston was not signed by Agnes A. Sarantopoulos, the undivided half of the property was all that could be subject to the terms of the contract, and that her share of the property should be subjected to their claim for lien. The mechanic's lien law is in derogation of the common law, and one seeking a remedy thereunder must bring himself within its terms. (Armstrong v. Obucino, 200 Ill. 140.) By Sec. 31 of the Lien Act, a subcontractor is given a lien "on the same property as provided for the contractor". In order for the original contractor to have a lien on any land, it must appear, under Sec. 1 of the Act, that his contract was made with the owner of the land or with one whom such owner has authorized or knowingly permitted to contract for the improvement, etc. It does not appear from the record either by allegation or proof that the contract with Gaston was entered into by

the same, in the name of the contractor and in the name of the owner, in books kept for that purpose, and also in the tract or abstract book in of the tract, lot, or parcel of land, upon which said house, building or other improvement is located, etc."

It is well settled that when the statute requires or provides for the filing and recording of any instrument and the instrument is filed within the time and with the officer and in the office designated by the statute, the party so filing the same has done all that he is required to do. The fact that the officer may have omitted to do his duty or has negligently or wrongfully performed the same will not affect the interests of the party filing the instrument, and the fact that no tract or abstract book was kept for recording such instruments could not affect the rights of the parties filing the same. (Cook v. Will

1 Kilm. 447.) Section 30 of the Conveyance Act (Chap. 30, par. 38 Smith Hurd Rev. Stat. 1929) gives effect to all instruments the same for record, as to all creditors and subsequent purchasers without notice. No duty other than filing the same is imposed upon the holder, and when he performs that duty the instrument is effective by the express terms of the statute. Appellants insist that because the contract between

John D. Sarantopoulos and Gaston was not signed by Agnes Sarantopoulos, the undivided half of the property was all that could be subject to the terms of the contract, and that her share of the property should be subjected to their claim for lien.

The mechanic's lien law is in derogation of the common law, and one seeking a remedy thereunder must bring himself within its terms. (Armstrong v. Opus, 300 Ill. 140.) By Sec. 31 of the lien act, a subcontractor is given a lien "on the same

property" as provided for the contractor. In order for the original contractor to have a lien on any land, it must appear under Sec. 1 of the Act, that his contract was made with the owner of the land or with one whom such owner has authorized or knowingly permitted to contract for the improvement, etc.

It does not appear from the record either by allegation or proof that the contract with Gaston was authorized by the owner of the land.

Agnes A. Sarantopoulos or with her knowledge or consent. Sec. 1 does not therefore provide a lien in this case upon the property of Agnes A. Sarantopoulos. Under the provisions of Sec. 31 of the Act, it is incumbent upon a subcontractor to show that the property on which he claims a lien is the same property as provided for the contractor. Sec. 3 of the Lien Act providing for the creation of liens where property is owned by husband and wife jointly is to be construed in connection with Sec. 1 of the Act. The liability of the wife under Sec. 3 is created because of her conduct and is in effect a statutory estoppel. (Beaudry v. Bell, 250 Ill. App. 468.) It not appearing from the record that Agnes A. Sarantopoulos consented to or knew of the contract, there is no showing that subjects her interest in the premises to the liens of appellants under any section of the Act. It has also been held that Sec. 3 of the Act applies only to original contractors. (Wolff v. Schillinger, 153 Ill. App. 91.)

It appears from the testimony of appellants that Sarantopoulos and his wife were as well known by the name of Sarantos as by their correct name, and the fact that the contract was signed by the name Sarantos could not affect appellants' rights.

The decree of the chancellor was correct and is accordingly affirmed.

Judgment affirmed.

Agnes A. Santopoulos or with her knowledge or consent. Sec.

I also have knowledge of the fact that the property of

property of Agnes A. Santopoulos. Under the provisions of

Sec. 21 of the Act, it is incumbent upon a subcontractor to

show that the property on which he claims a lien is the same

property as provided for the contractor. Sec. 3 of the Lien

Act providing for the creation of liens where property is

owned by husband and wife jointly is to be construed in

connection with Sec. 1 of the Act. The liability of the wife

under Sec. 3 is created because of her conduct and is in effect

a statutory estoppel. (Beauchamp v. Bell, 250 Ill. App. 488.)

It not appearing from the record that Agnes A. Santopoulos

consented to or knew of the contract, there is no showing that

subjects her interest in the premises to the lien of appellants

under any section of the Act. It has also been held that Sec.

3 of the Act applies only to original contractors. (Wells v.

Schilling, 153 Ill. App. 91.)

It appears from the testimony of appellants that

Santopoulos and his wife were as well known by the name of

Santopoulos as by their correct name, and the fact that the con-

tract was signed by the name Santopoulos could not affect appellants'

rights. Santopoulos

The decree of the chancellor was correct and is

accordingly affirmed.

Judgment affirmed.

The mechanic

one see

Sec. 1 of the Act

and are of a

property; or

original contractor to have

under Sec. 1 of the Act, that

owner of no land or with

Clerk of the Appellate Court

in the year of our Lord one thousand
and ~~twenty~~ thirty-one

August
said Appellate Court, at Ottawa, this
day of 29th

In Testimony Whereof, I hereunto set my hand and affix the seal of
of the said Appellate Court in the above entitled cause, of record in my office.

do hereby certify that the foregoing is a true copy of the
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
opinion

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

STATE OF ILLINOIS,
SECOND DISTRICT
ss.

129 AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2621A. 681²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

Kitty Brawn,

Appellee

vs.

Appeal from the Circuit

Court of Winnebago

County.

F. E. Jones, Doing Business

as The Jones Transfer Company,

Appellant

Jones, P.J:

An action on the case was instituted by Kitty Brawn, plaintiff, against defendant, F. E. Jones, doing business as Jones Transfer Company, to recover for damages to her automobile, growing out of a collision at the intersection of Sacramento Boulevard and Chicago Avenue in the City of Chicago. While in the intersection, plaintiff's automobile was struck by the truck of appellant and received the damages for which this suit was brought. A jury trial resulted in a verdict and judgment in favor of plaintiff in the sum of \$250. This appeal is prosecuted from that judgment.

The accident happened at about eleven o'clock in the morning on November 23, 1939. Sacramento Boulevard runs north and south and Chicago Avenue runs east and west. Plaintiff, in company with another lady, was driving north on Sacramento Boulevard. Defendant's truck, operated by one Green, was being driven east on Chicago Avenue. There are traffic lights to control the traffic at the intersection of these streets. Testimony on behalf of plaintiff is to the effect that at the time she approached and entered Chicago Avenue, no light showed toward the south, but that a red light was showing to control the east and west traffic in Chicago Avenue; that a street car headed east on Chicago Avenue had stopped and was standing at the west side of Sacramento Boulevard, and there were two rows of automobiles stopped headed west, on the north side of Chicago Avenue; that defendant's truck passed around the south

417010 oct nov 1964

Count of Winnebago

W. E. Jones, Doing Business
as the Jones Transfer Company,
Appellant

16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851

An action on the case was instituted by Kitty Brown, Plaintiff, against Defendant, W. E. Brown, Defendant, in the County of ... State of ...

[illegible]

side of the standing street car into the intersection, and ran into the left side of plaintiff's automobile.

The substance of the testimony for defendant is that the east and west light on the northeast corner of the intersection changed from red to green, and that the truck did not enter the intersection until after the light changed; that plaintiff disregarded the change in the light, passed around two cars which had already stopped ahead of her at the intersection, and without looking to the right or left, ran in front of defendant's truck.

No question is raised as to the amount of the verdict or with reference to the instructions, and it is not assigned for error that the verdict is against the weight of the evidence. The only ground for reversal urged in defendant's brief and argument is that counsel for plaintiff brought to the attention of the jury the fact that defendant's truck was covered by insurance, and that the trial court erred in denying his motion to withdraw a juror because of such misconduct.

On the examination of plaintiff, her counsel asked the following question:- "Did you hear the man driving the truck make any statement to the officer, and if so, what did he say?", to which she answered, "He said that he was in the wrong; that he had lots to do that day and not to have him arrested; that he would report to his firm and that they were well insured"; whereupon defendant moved the court to withdraw a juror and continue the case, which motion was denied.

The testimony relative to defendant's liability being covered by insurance was improper. If such testimony is inadvertently developed without counsel having any previous knowledge of the matter, he is, to a certain extent, not to blame, but an attorney owes a duty to the court and to the adverse party, as well as to his own client, to inform himself of the testimony he expects to produce, and to see to

1. The Commission will not be able to conduct any of the following activities:

and without looking to the right or left, ran in

It is a fact that the evidence is not sufficient to establish the guilt of the accused, and it is not sufficient to establish the guilt of the accused, and it is not sufficient to establish the guilt of the accused.

[illegible]

The following exhibits in attached exhibit 1 are submitted in support of the foregoing testimony. It is respectfully requested that the Court find the foregoing testimony to be true and correct and that the Court find the exhibits to be true and correct and that the Court find the exhibits to be true and correct.

it that improper and prejudicial matters are not disclosed to the jury.

It has been repeatedly held by the Supreme and Appellate Courts of this state that the bringing to the attention of a jury the fact that a defendant in a personal injury case is protected by insurance, is censurable in the highest degree. Where the reviewing court has been of the opinion that the jury might have been influenced by such misconduct, or where the case has been close on the facts, there has been no hesitancy in reversing judgments against the defendant. But it is not in every case that the court will reverse a judgment where it has been brought to the attention of the jury that the party sued is protected by insurance.

The testimony in this record shows the value of plaintiff's car before the accident to have been \$450, and that after the accident she received \$200 in trade for the car on the purchase of a new one. The damages awarded at \$250 were therefore not excessive and the amount is not challenged. It is apparent that the jury were not influenced in the amount of their verdict by the testimony relative to insurance. It is also to be observed that no motion was made by appellant to strike the objectionable testimony and to instruct the jury to disregard the same, and no written instruction to that effect was tendered.

While there is a conflict in the testimony, it is not apparent that upon another trial a different verdict would be reached if the matter complained of should be eliminated. There being no question but that the verdict is supported by the weight of the testimony, and no question being raised as to the amount of the verdict or with reference to the instructions, this court would not be justified in reversing the judgment of the trial court. (Swallen v. Aronson, 253 Ill. App. 540; Eldorado Coal and Coke Co. v. Swan, 227 Ill. 586.)

For the reasons above set forth, the judgment of the trial court is affirmed. Judgment affirmed.

It is the duty of the jury to weigh the evidence and to reach a verdict on the basis of the facts as they appear.

The jury is the trier of fact. It is the duty of the jury to weigh the evidence and to reach a verdict on the basis of the facts as they appear. The jury is the trier of fact. It is the duty of the jury to weigh the evidence and to reach a verdict on the basis of the facts as they appear.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

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NEW YORK

1900

1307
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2021A. 80P

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

City Trust and Savings Bank
of Kankakee,

Appellee,

vs.

Julia Comstock,

Appellant,

Appeal from the Circuit

Court of Kankakee

County.

JONES, P.J:

City Trust and Savings Bank of Kankakee, plaintiff, brought its suit in assumpsit against Julia A. Comstock, defendant. The declaration consisted of the common counts and a special count averring that one W. O. Nation made and delivered to defendant a check directed to the Bank of Chebanse, and then and there required said Bank to pay defendant the sum of \$2,592.50; that defendant, on March 4, 1929, endorsed and delivered said check to plaintiff for value received; that plaintiff at once, on March 6th, 1929, presented and exhibited the check to the Bank of Chebanse at its banking house during business hours and demanded payment, but payment was refused, and the check dishonored, notice of which dishonor was duly given defendant.

To the declaration, defendant filed her plea of the general issue and an affidavit of defense averring that prior to February 28, 1929, one W. O. Nation was indebted to her in the sum of \$3500, principal, for which he had given his promissory note and interest thereon at 5½% from February 28th, 1928; that prior to February 28, 1929, she left with plaintiff for collection an interest note for \$192.50, signed by Nation, representing interest for one year on said indebtedness; that on February 28, 1929, Nation made and delivered to plaintiff the check sued on for \$2,692.50; that thereupon plaintiff returned to Nation the coupon note for \$192.50; that plaintiff

City Trust and Savings Bank

of Kansas

Appellee,

Appeal from the Circuit

Court of Kansas

vs.

Julia Comstock,

County.

Appellant.

1913, 1914.

City Trust and Savings Bank of Kansas, Plaintiff,

brought its suit in reattachment against Julia A. Comstock, defendant.

The declaration contains the following allegations:

count averring that one J. O. Nation made and delivered to de-

fendant a check directed to the Bank of Chicago, and then

and there required said Bank to pay defendant the sum of

\$2,292.50; that defendant, on March 4, 1929, endorsed and

delivered said check to plaintiff for value received; that

plaintiff at once, on March 6th, 1929, presented and exhibited

the check to the Bank of Chicago at its banking house during

business hours and received payment; that plaintiff has since

and has since retained, and has since retained and sold

said check.

So the declaration, defendant filed her claim of the

general issue and an affidavit of defense averring that prior

to January 1st, 1929, she was not indebted to the bank in

the sum of \$2,292.50, and that she was not indebted to the

bank at any time and in any manner from the time January 1st,

1929, until the time of the filing of the declaration.

The motion to dismiss was denied, and the case was set for

trial on January 1st, 1929, at 10 o'clock a.m.

On January 1st, 1929, the case was called on for trial.

The check was on the 4th of March, 1929, cashed at the

bank and the money was paid to the defendant.

negligently failed to notify defendant of the receipt of Nation's check on February 28, 1929, and defendant did not know it until March 4, 1929; that on said last date, defendant was at the banking house of plaintiff and was by it informed that said check was in its possession; that she was also informed at that time that Nation had paid \$2500 on the principal of his note in addition to the interest, and she was requested by plaintiff to get said principal note, which she did, and plaintiff, by its agent, then endorsed the payment of \$2500 on the same, and thereupon delivered said check to defendant, which she endorsed, delivered to plaintiff, and received therefor the sum of \$2,692.50.

The affidavit further sets forth that on February 28th, 1929, and from thence until the Bank of Chebanse was closed by the Auditor, Nation had an account with that bank, in which there was standing to his credit a sum more than sufficient to pay the check in full; that for many years it had been the custom of said bank to remit for all checks received by it on the day following their receipt; that on February 28th, 1929, and from thence to March 7, 1929, said bank was able and willing to honor the check had the same been presented without delay; that on March 7, 1929, the business of said bank was suspended by the Auditor of Public Accounts and payment on said check refused by order of the Auditor.

Plaintiff moved to strike defendant's affidavit of merits from the files and the motion was denied. Thereupon a jury was waived and the cause was tried by the court. A stipulation was entered into between the parties covering most of the material facts above set out. It also recites that on March 4 plaintiff sent the check for collection through the City National Bank of Kankakee and the First National Bank of Chicago to the Federal Reserve Bank of Chicago, and same was presented to the Bank of Chebanse on March 6th; that it was not paid on presentation, but was dishonored by the Bank of Chebanse, protest made, and notice thereof given to all endorers on March 7th, said bank having

Plaintiff called to collect on said check on February 28, 1939, and defendant did not know
of said check on February 28, 1939, and defendant was at
the banking house of plaintiff and was by it informed that said
check was in its possession; that she was also informed at that
time that National had paid \$2800 on the principal of his note in
addition to the interest, and she was requested by plaintiff to
get said principal note, which she did, and plaintiff, by its
agent, then endorsed the payment of \$2800 on the same, and
thereupon delivered said check to defendant, which she endorsed,
and delivered to plaintiff, and received therefor the sum of \$2,250.
The affidavit further sets forth that on February 28th,
1939, and from thence until the Bank of Chebanse was closed by
the latter, said check was in the possession of the latter,
and that for many years it had been the custom of said
bank to cash all checks payable to it in the following
manner: that on February 28th, 1939, the bank was
closed, and said check was not cashed until March 7th, 1939,
and the same been presented without delay; that on March 7th, 1939,
the business of said bank was suspended by the Auditor of Public
Accounts and payment on said check refused by order of the Auditor.
Plaintiff moved to strike defendant's affidavit of merits
from the files and the motion was denied. Thereupon a jury was
called and the cause was tried by the court. A stipulation was
entered into between the parties covering most of the material
facts above set out. It also recites that on March 4th plaintiff
sent the check for collection through the City National Bank of
Chicago and the First National Bank of Chicago to the Federal
Reserve Bank of Chicago, and same was presented to the Bank of
Chicago on March 8th; that it was not paid on presentation, but
was returned by the Bank of Chicago, protest made, and notice
given to all drawers on March 7th, said bank having

been closed on March 7th as insolvent, by the banking department of the Auditor's office. The Court found the issues for plaintiff and entered judgment against defendant in the sum of \$2,869.96, from which this appeal is prosecuted.

The record discloses that on February 27th, 1929, Mrs. Comstock left the interest note of \$192.50 with plaintiff for collection. She did not leave the principal note with plaintiff nor in anywise engage its services in connection therewith, and the employment concerned only the collection of the interest note.

The principal note provided, "The maker hereof reserves the privilege of paying this note on any interest date, in multiples of \$100.00." In response to a notice from plaintiff Nation called at its banking house on February 28th, and during a conversation with its cashier, informed him that he had the privilege of making a payment on the principal at any interest paying date, and desired to pay \$2500 on the principal. He made the check sued on in the sum of \$2692.50, which included both the amount of the interest note and \$2500 to be applied on the principal note. The check was made to defendant's order, whether of his own motion or at the cashier's direction is in dispute. The check was delivered to the cashier, who surrendered the interest note to Nation. No receipt was given for the \$2500.00.

Defendant visited the safety deposit ^{box} ~~valut~~ of the bank on March 1st and March 4th, but made no inquiry and received no information or notice about the matter until the latter date, when the cashier saw her in the bank and informed her that he had a check from Nation which included \$2500 to be applied on the principal note. She did not have the note with her, but procured it and returned to the cashier, who indorsed the payment on the back of it. She received a certificate of deposit for the amount of the check, which she later cashed.

It is clear that plaintiff was the agent of defendant

was closed on March 24th as insolvent, by the banking department
of the Auditor's office. The Court found the issues for plaintiff
and entered judgment against defendant in the sum of \$2,832.98,
from which this amount is deducted.

The record discloses that on February 27th, 1923, Mrs.
[Name] left the interest note of \$125.50 with plaintiff for
collection. She did not leave the principal note with plaintiff
and in anywise engage its services in connection therewith, and
the plaintiff [Name] and the collection of the interest note.
The principal note provided, "The maker hereby reserves
the privilege of paying this note on any business day, in whole or
in part, at the option of the maker." It is further provided
at its face value on February 27th, 1923, and being a [Name]
also its cash value, [Name] and [Name] as the privilege of making
a payment on the principal at any interest paying date, and desired
to pay \$2500 on the principal. He made the check good on in the
sum of \$2500, which [Name] had the amount of the interest
note and \$2500 to be applied on the principal note. The check
was made to [Name's] order, payable at his own order, and
the cashier's direction is in dispute. The check was delivered
to the cashier, who [Name] the interest note to [Name]. No
payment was given for the \$2500.00.

[Name] stated that the cashier [Name] of the bank
in [Name] and [Name] did, but made no inquiry and [Name] as
information or advice about the matter until the [Name] date, when
the cashier [Name] her to the bank and [Name] her [Name] and a
check from [Name] which [Name] [Name] to be applied on the [Name]
principal note. She did not have any conversation with [Name] but
and returned to the cashier, who [Name] the payment of the bank
of \$2500. She received a [Name] of [Name] for the amount of
the check, which was [Name] [Name].
It is after that plaintiff was [Name] at [Name]

in the collection of the interest note of \$192.50. It is equally clear that it was in no sense her agent so far as the \$2500 was concerned. If plaintiff was anybody's agent in the \$2500 transaction, it was the agent of Nation to transmit it to defendant, but whether it was his agent in that respect, or a mere custodian of the \$2500, is immaterial to the issues in this case.

It is conceded by defendant that after her indorsement on March 4th, all due diligence was exercised in presenting the check for payment, but she contends that defendant was negligent in holding the check for five days before notifying her, and that such alleged negligence made it impossible for the check to be presented for payment within a reasonable time so as to hold the drawer. It is to be kept in mind that the rights of the parties to this cause are to be tested by the law applicable to endorser and indorsee, and whether or not the drawer of the check was discharged is not in issue.

A check is a bill of exchange drawn on a bank payable on demand. Except as otherwise provided by the Negotiable Instruments Act, the provisions of that Act are applicable to a check. Sec. 184, Neg. Inst. Act. Par. 206, Chap. 98, Rev.Stat.

In addition to the warranties mentioned in Section 66 of the Act (Par. 86, Chap. 98, Rev. Stat.) that section provides that every indorser engages that on due presentment, the instrument shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

It is provided by Section 71 of the Act (Par. 92, Chap. 98, Rev. Stat.) that where the instrument is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment

in the collection of the interest made at 1121. It is
especially clear that it was for no reason but that he was
concerned. If plaintiff was anybody's agent in the
transaction, it was the agent of the bank in the
collection, but whether it was the bank in the collection, or a
third person of the bank, is immaterial in the law.

It is suggested by defendant that either the bank or
the bank, all the bills were assigned to plaintiff, the
bank for payment, and the bank is not liable for the
in holding the bank for the bank's bill, and
that such alleged negligence made it impossible for the bank
to be prevented for payment within a reasonable time as to be
hold the drawer. It is to be kept in mind that the rights of the
bank in this case are to be tested by the law applicable to
the bank and indorsee, and whether or not the drawer of the check
was assigned is not in issue.

A check is a bill of exchange drawn on a bank payable
on demand. Except as otherwise provided by the negotiable
instrument act, the provisions of the act are applicable to a
check. Sec. 184, Neg. Inst. Act, Par. 208, Chap. 28, Rev. Stat.
In addition to the negotiable instrument act, the act of
the 1st (1891) Chap. 28, Neg. Inst. Act, Par. 208, Chap. 28, Rev. Stat.
that every instrument subject to the act is negotiable, the bank
must still be assigned as well as the bank, or the bank may be
assigned to the bank, and that it is the bank's bill and
necessarily negotiable, or it may be assigned to the bank, or
the bank's bill to the bank, or to any person's bill.

It is provided by Section 71 of the Act (Par. 28, Chap.
28, Neg. Inst. Act) that where the instrument is payable to the
payee's order and he signs within a reasonable time after the
issue, except that in case of a bill of exchange, the

for payment will be sufficient if made within a reasonable time after the last negotiation thereof. Section 185 of the Act (Par. 207, Chap. 98, Rev. Stat.) modifies this provision with respect to the drawer of a check by discharging him from liability thereon to the extent of the loss caused by any delay where not presented within a reasonable time after its issue. That section makes no such provision as to indorsers. In *German American Bank v. Wright*, 85 Wash. 640, 148 Pac. 769, it was held that while the indorsee of an overdue check is not an unqualified holder in due course, he is such holder except in so far as the drawer of the check is able to show he has been injured by the delay. This was also the rule under the law merchant. Under Section 66 of the Act, the contract of an indorser, unlike his warranties, is not confined to holders in due course, but runs to the holder or any subsequent indorser compelled to pay the instrument.

Defendant insists that on account of the alleged negligence of plaintiff, it cannot recover in this action and that proof of such negligence is admissible by way of recoupment. Recoupment is in the nature of a cross action wherein defendant alleges injury resulting from a breach of another part of the contract sued on. (*Luther v. Mathis*, 211 Ill. App. 596.) In order to invoke the doctrine of recoupment, it must appear that the demand sued for and that recouped shall arise out of the same subject matter. The foundation of recoupment is failure of consideration. It must appear that the promise for which damages are sought to be recouped was the consideration for the promise of the defendant sued on. (*Keegan v. Kinnare*, 123 Ill. 280.) The contract sued on was defendant's contract of indorsement. The contract of an indorser is an independent contract. (*Allis-Chalmers Mfg. Co. v. Hays*, 339 Ill. 230.) The consideration for her indorsement was the money paid her by plaintiff, which patently did not

1. The first group of people who are interested in the results of the research are the researchers themselves. They want to know how well the research was conducted and whether the results are reliable and valid. They also want to know how the research was interpreted and whether it is consistent with other research in the field.

fail. It is apparent that the matters set out in the affidavit of defense were not a part of the contract arising through defendant's contract of indorsement, upon which this suit is brought. Her defense is predicated upon a transaction in which she claims that plaintiff was her agent. In the indorsement contract it is clear that plaintiff was not her agent, but a principal. The same party cannot at once be a principal and the other party's agent in the same transaction. Plaintiff was not the agent of defendant in the \$2500 transaction, and the affidavit presented no defense to the action so far as that amount is concerned. By her own test the indorsement was not any part of the transaction in which plaintiff acted as her agent as to the interest note of \$192.50. We are of the opinion that defendant pleaded no matter which her affidavit supports, and set up no matter in the affidavit admissible under her plea.

Regardless of all other questions in this cause, it appears from the facts in the stipulation on file, that if defendant had refused to accept the check on March 4th, there remained sufficient time for plaintiff to have so advised Nation, and for Nation to have procured the cash from the Bank of Chebanse to meet his obligation before that bank closed. When the check was tendered defendant, two courses were open to her. She could ^{accept} ~~accept~~ it, or she had the right to refuse it and demand payment in cash. Having elected to take the check on that date, she is in no position to successfully urge that plaintiff was guilty of negligence in not informing her before March 4th that Nation had left the check there for her. If the Bank of Chebanse had closed before plaintiff notified defendant that it had the check, a different question would have been presented.

No question involving the relations between defendant and the drawer of the check sued on, or their respective rights and obligations growing out of the transaction, is in issue here, and as to such rights, and obligations, we express no opinion.

It is further stated that the defendant was not in the plaintiff's
of defense was not a part of the contract and was not
defendant's contract of insurance, and was not a part of the
transaction in which the defendant is protracted upon a transaction in which
the claim that plaintiff was her agent. In the insurance
contract it is stated that plaintiff was not her agent, and
that the same party cannot be both her agent and her
agent party's agent in the same transaction. Plaintiff was not
the agent of defendant in the same transaction, and was not
contracted in relation to the same transaction in
contracted. By her own test the insurance was not any part of
the transaction in which plaintiff acted as her agent as to the
insurance note of \$122.50. We are of the opinion that defendant
liability no matter which way plaintiff supports, and set up no
defense in the affidavit admissible under her plea.
The Regalness of all other questions in this case, it
is stated from the facts in the stipulation on file, that if
the defendant had refused to accept the check on March 4th, there
would have been sufficient time for plaintiff to have so advised Nation,
and for Nation to have presented the check to the bank.
Nations to meet his obligation before that bank closed. When
the check was tendered defendant, two courses were open to her.
She could either accept it, or she had the right to refuse it and demand
payment in cash. Defendant refused to take the check on that date,
and it is in no position to demand its cash value from plaintiff.
and failing to do so, she is now demanding that Nation should do so.
That Nation had left the check there for her. If the bank
of Nations had closed before plaintiff notified defendant that
it had the check, a different question would have been presented.
The question involving the relation between Nations
and the time of the check was not, it seems to me, a
question involving the relation between Nations and the time of the
check, and as to that relation, and obligation, we express no opinion.

Under the pleadings plaintiff was entitled to recover,
and the judgment of the trial court is affirmed.

Judgment affirmed.

There are five main points in the report of the committee on the subject of the proposed amendment to the constitution of the United States.

First point.

The committee has considered the proposed amendment in its entirety.

The committee has also considered the proposed amendment in its entirety.

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The committee has also considered the proposed amendment in its entirety.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2021.1.661⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 29 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Reuben H. Stripe,

Appellee,

vs.

Appeal from Circuit Court

City of Waukegan, Louis J.
Yager, Mayor, Albert M. Carney,
William S. Gee, Nicholas Keller
and Robert Pearsall, Commissioners,

of Lake County.

City of Waukegan,

Appellant,

Jones, P.J:

This appeal is prosecuted by the City of Waukegan from a decree entered on April 23, 1930, enjoining the city, its mayor, commissioners, and former treasurer from further carrying out the provisions of a resolution of the city council passed on July 13, 1928, for the purchase from Edith T. Higley, Frances L. Higley and Violet E. Johnstone, of certain real estate for the price of \$100,000. Under the terms of the resolution the city had paid \$20,800 of the purchase price in cash upon the delivery of a warranty deed for the premises, subject to a trust deed securing notes aggregating \$79,200, which the city assumed and agreed to pay.

The suit was instituted on July 26, 1928, by Reuben H. Stripe, a tax payer of the city, on behalf of himself and all other tax payers similarly situated. The amended bill was filed on October 16, 1928, and on October 22d an application for a temporary injunction was heard upon the amended bill without any other pleadings. The application was denied and a decree entered dismissing the original and amended bills for want of equity. From that decree complainant prayed an appeal which was allowed but never perfected. Subsequently, he sued out a writ of error from this court, upon which the decree was reversed and the cause remanded for further proceedings not inconsistent with the

James E. Smith,
Appellant.

Appeal from Circuit Court
of Lake County.

City of Waukegan, Louis E.
Jager, Mayor, Albert M. Gurney,
William S. Gee, Nicholas Keller,
and Robert Bernsall, Commissioners.

City of Waukegan,
Appellant.

James E. Smith:

This appeal is prosecuted by the City of Waukegan from a decree entered on April 28, 1930, enjoining the city, its mayor, commissioners, and former treasurer from further carrying out the execution of a resolution of the city council passed on July 26, 1928, for the purchase of the T. Smith, James E. Smith and William S. Smith, et al., certain real estate for the price of \$100,000. Under the terms of the resolution the city had paid \$20,000 of the purchase price in cash and the balance of \$80,000 in bonds. The city had also agreed to pay the purchase price in cash and the balance of \$80,000 in bonds. The city had also agreed to pay the purchase price in cash and the balance of \$80,000 in bonds.

The writ was instituted on July 26, 1928, by Nathan E. Stripe, a tax payer of the city, on behalf of himself and all other tax payers similarly situated. The amended bill was filed on January 12, 1929, and on January 22, 1929, an application for a writ of certiorari was filed with the court. The amended bill without any other pleadings. The application was denied and a decree entered dismissing the original and amended bills for want of equity. From that decree complainant prayed an appeal which was allowed but never perfected. Subsequently, he sued out a writ of error from this court, upon which the decree was reversed and the same was remanded for further proceedings and enforcement with the

views therein expressed. *Stripe v. City of Waukegan*, 254 Ill. App. 74. When the case was subsequently redocketed, demurrer to the amended bill was filed by all the defendants, relying upon the alleged lack of necessary parties. The demurrer was overruled and defendants answered.

. The answer sets forth, among other things, that on the premises deeded to the city there was a substantial two story and basement brick building, containing some eighteen rooms, easily adaptable, at small cost, for a city hall for said city; that on July 26, 1928, an appropriation ordinance was passed, appropriating \$100,000 for new city hall property; that the assessed value of the taxable property in the city of Waukegan was \$21,988,685, and the bonded indebtedness of the city was not in excess of \$320,000; that Edith T. Higley, Frances L. Higley, Violet E. Johnstone, Ernest Marshall Johnstone, her husband, grantors in the warranty deed to the city, and Phillip A. Populorum, trustee in said trust deed, are the owners and holders of the notes secured by the trust deed; that since the order dismissing complainant's original and amended bills, and before the suing out of a writ of error from this court, the building on said premises had been completely remodelled and adapted for use as a city hall for said city, and that it would be impossible to restore said premises and building to the status quo before possession was taken. To the answer is attached a copy of the deed to the city and a copy of the appropriation ordinance. No replication was filed and no testimony was taken. The cause was heard upon the bill and answer. A decree was entered enjoining defendants from in any manner carrying out the provisions of the resolution for the purchase of the property, and from paying out of the city funds any sum upon the purchase price. It is from

that decree that this appeal is taken.

It is first insisted that the bill should have been dismissed because the grantors in the deed to the city, and the trustee in the trust deed, all of whom are also the holders of the notes secured by the trust deed, and the successor to the city treasurer, were necessary parties, but were not joined as defendants. When this cause was before this court on the former occasion, counsel for defendants stated in his brief and argument, "Virtually there is but one proposition of law before the court by the record in this case, viz: Has a city, organized under the Cities and Villages Act of Illinois, the power to purchase property for a city hall, subject to a mortgage payable on or before a given date?" This is the same bill, with the same parties, that was then before this court. An examination of the brief filed on behalf of defendants on the former hearing shows that it was not contended, in support of the decree dismissing the bill, that the decree should be affirmed because of the want of necessary parties. There must be an end to litigation, and where a cause has been decided in the Appellate Court, on appeal or writ of error, that court will not review its former decision in respect of matters which were, or might have been assigned for error upon the record before the court. *Tribune Co. v. Emery Motor Livery Co.*, 338 Ill. 537; *Barrett v. Marschak*, 210 Ill. App. 171; 4 C.J., Appeal and Error, 1100. We are also of the opinion that while the parties named might have been proper parties, they were not necessary parties for the determination of the matters involved in this proceeding, and it was practically so conceded by counsel for defendants on the former hearing in this court. There being no allegation in

that it is not a trust in the law.

It is first insisted that the bill should have

been dismissed because the grantors in the deed to the city

and the trustee in the trust deed, all of whom are also the

holders of the notes secured by the trust deed, and the

successor to the city treasurer, were necessary parties,

but were not. It is also insisted that the bill should have

been dismissed because the city treasurer, who is the

trustee in the trust deed, is not a party to the bill.

It is also insisted that the bill should have been dismissed

in this case, viz: that a city, organized under the City

and Villages Act of Illinois, the power to purchase property

for a city hall, subject to a mortgage payable on or before

a given date. This is the same bill, with the same parties,

that was then before this court. An examination of the brief

filed on behalf of defendants on the former hearing shows

that it was not amended, in respect to the parties named in

the bill, and the bill should be dismissed because of the

want of necessary parties. There was no amendment to the bill

made, and there is no amendment in the parties named in

the bill, and the bill should be dismissed because of the

want of necessary parties. It is insisted that the bill should

be dismissed because the parties named in the bill are not

the parties named in the bill. The bill is dismissed because

of the want of necessary parties. The bill is dismissed because

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of the want of necessary parties. The bill is dismissed because

of the want of necessary parties. The bill is dismissed because

of the want of necessary parties. The bill is dismissed because

the bill that the treasurer had done or would do any act without lawful authority so to do, he was not a necessary party. Complete relief could be had by enjoining the city and its other officers from carrying out in any manner the provision of the resolution or paying out any of the funds of the city thereunder. In the absence of a showing that it was necessary to restrain the treasurer or his successor, neither of them was a necessary party.

When this cause was previously before this court by writ of error, it was held in the opinion rendered by the court that a municipal corporation has no power to acquire property which is subject to mortgage, and that the mayor and city council of the city of Waukegan had no power to purchase said premises subject to said mortgage indebtedness. That decision is binding upon the parties, the circuit court and this court for all time, until, if ever it is reversed by the Supreme Court. *Wolkau v. Wolkau*, 217 Ill. App. 471; *(P.C.C. & St. L. Ry. v. Cage)*, 266 Ill. 213; *Sattenstein v. Earl*, 328 Ill. 148; *Gridley v. Wood*, 220 Ill App. 46; The principles of law therein announced cannot be questioned on this appeal. *Heimann v. Wilke*, 219 Ill. 310.

The allegations pertaining to the making and delivery of the deed to the city, the taking possession and improvement of the premises *lis pendens*, and the passage of the appropriation ordinance, do not appear in the amended bill. Defendants urge that because they were not in the record when this cause was before this court on the previous occasion, the court is not bound by the rules announced in its former opinion, but must consider the entire case in view of the new facts. The amended bill alleged the contract to pay \$20,800 upon delivery of the deed, and that said sum was paid in accordance with the terms of the

contract; the language is sufficient to imply delivery of the deed, which, without a contrary showing, implies delivery of possession; the allegation that the property was improved *lis pendens* sets out nothing that could change the issue, or require a reconsideration of the holding in the former opinion. Although there was no injunction *pendente lite*, and defendants would not be liable for violating an order of the court, they took the risk, by proceeding with the improvement of the property, of being compelled to restore the condition existing when the court acquired jurisdiction; *Lambert v. Alcorn*, 144 Ill. 313; *Holden v. Alton*, 179 Ill. 318; Even though they acted under the order dismissing the bill, that order was subject to review, and in acting under it they proceeded at their own peril. *Miller v. Doran*, 245 Ill. 200.

The record shows that the contract for the purchase of the property was entered into within the first quarter of the city's fiscal year, and prior to the passage of the annual appropriation ordinance, which was also passed within the first quarter of the fiscal year. A city may, during that part of the first quarter of the fiscal year, prior to the passage of the annual appropriation ordinance, enter into any contract and incur any indebtedness, without an appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted during the first quarter of the fiscal year. *Danville v. The Danville Water Co.*, 180 Ill. 235. The city council had authority to provide for a city hall, and to include in its annual appropriation bill an item for the expense of acquiring the same, but the making of a valid appropriation for a lawful purpose, could not by any means change the void character

of a contract unlawfully entered into, or authorize the unlawful expenditure of a valid appropriation. The unlawfulness of the transaction having been settled by the former decision of this court, the allegation in the answer relative to the passage of the annual appropriation bill presents no material fact which changes the basis matter in issue, and is not sufficient to justify further consideration of the question of the validity of the contract. The case at bar does not involve the power of the city to provide a city hall, or to appropriate money for that purpose, but the object of this suit is to restrain the city and its officers from unlawfully paying out the funds of the municipality. The law applicable to the facts is set forth in the former opinion herein, and it is unnecessary to further discuss it here. The defense of laches is not set up in the answer of defendants, or specifically assigned for error on this appeal. Aside from that we are of the opinion that the record does not show such delay in instituting this suit as would justify a denial of relief.

The decree of the chancellor was correct and is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

1327
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 LA. 631

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William Nagle,

Appellee

vs.

The Minneapolis Threshing
Machine Company,

Appellant

Appeal from the
Circuit Court of
La Salle County.

Jones, P. J:

Suit was instituted by William Nagle, plaintiff, against The Minneapolis Threshing Machine Company, defendant, for the value of a second hand threshing machine, engine, etc., alleged to have been traded to defendant at a valuation of \$800; as part payment upon a new separator purchased from defendant, and to recover damages on account of defendant's failure to deliver the new machine. A jury was waived and the cause was tried by the court, resulting in a finding and judgment in favor of plaintiff in the sum of \$500. No propositions of law were submitted to the Court. This appeal is prosecuted from that judgment.

Shortly before June 16th, 1928, plaintiff talked with defendant's agent, Kelso, in relation to the purchase of a new separator. The contemplated trade was on the basis of the defendant taking plaintiff's old outfit in trade, to be applied as a credit on the purchase price of the new separator. During the negotiations Kelso brought two neighbors, Jones and Bedecker, to plaintiff's farm and sold them the old threshing machine, engine, etc. for the price of \$800, taking their order made out to defendant on one of its regular contract forms, the purchase price to be paid in installments. This order was sent to defendant by Kelso, and contained a clause that "The purchaser expressly agrees that this contract is taken subject to approval and acceptance or rejection by the Company at its

[illegible]

Shortly before June 18th, 1938, plaintiff failed to pay defendant's agent, Kelso, in relation to the purchase of a new refrigerator. The contemplated trade was on the basis of the defendant having plaintiff's old refrigerator, to be traded as a credit on the purchase price of the new refrigerator. During the negotiations Kelso brought his wife along, who was also present, in plaintiff's home. Plaintiff told her all the interesting details, and she told him all the interesting details about her own life. Plaintiff told her all the interesting details about his own life, and she told him all the interesting details about her own life. This was all done in confidence.

Kelso, and contained a clause that "The purchaser hereby agrees that this contract is taken subject to

home office at West Minneapolis, Hopkins, Minnesota, notice of which acceptance is hereby waived by the purchaser." Thereafter on June 16th plaintiff executed a similar order for the purchase of a new separator, the order reciting that plaintiff "agrees to pay to the order of the Company the sum of One Thousand DOLLARS AND grants, bargains, warrants, and defends in trade and to deliver to the Company on demand," his old threshing machine, engine etc, "outfit sold and to be delivered to Jones & Bedecker where it stands, being the aggregate of the prices agreed upon for each of the machines and articles so ordered and purchased;".

The Jones and Bedecker order was sent to defendant prior to the execution of plaintiff's order, and at the time plaintiff's order was signed, no approval or rejection of the Jones and Bedecker order had been received by Kelso or plaintiff. Plaintiff's order was for the delivery of the new separator at once, and was sent by Kelso to defendant's office at Decatur. On June 18th the Decatur office wrote plaintiff, acknowledging receipt of the order, stating that the same was being forwarded to the home office for attention, and that as soon as they heard from the home office, they would advise him. The second hand outfit embraced in the Jones and Bedecker order was removed from plaintiff's premises by Bedecker about July 1st, and has never been returned to him.

Kelso knew that the old outfit was in the possession of Jones and Bedecker. He saw it on Bedecker's premises about July 1st. Having negotiated the sale and prepared the contract therefor, it is presumable that he knew their possession was in pursuance of his acts. The record does not show that he or his principal ever objected to such possession or took any step to restore possession to plaintiff.

The new separator ordered by plaintiff was not delivered by defendant. Plaintiff testified that he did not see Kelso for about a week after the signing of his

same office at West Minneapolis, Hopkins, Minnesota, notice
of which appearance is hereby waived by the purchaser."

Plaintiff on June 18th plaintiff executed a similar order
for the purchase of a new separator, the order reciting

that plaintiff "agrees to pay to the order of the Company

the sum of One Thousand Dollars for said separator,

separators, and belanda in trade and to deliver to the Company

or agent," his old threshing machine, engine etc, "outfit

will not be delivered to Jones & Bedeker where it stands,

but the aggregate of the prices agreed upon for each of

the machines and outfit as ordered and delivered."

The Jones and Bedeker order was sent to defendant

prior to the execution of plaintiff's order, and at the

time plaintiff's order was placed on record by plaintiff

of the Jones and Bedeker order had been received by plaintiff

or defendant. Plaintiff's order was for the delivery of the

new separator at once, and was sent by Kelson to defendant's

office at Decorah. On June 18th the Decorah office wrote

plaintiff, acknowledging receipt of the order, stating that

the same was being forwarded to the home office for atten-

tion, and that they would be very sorry that the same office

they would handle it. The second order which was received by

the Jones and Bedeker order was received from plaintiff

transmitted by Bedeker about July 1st, and has never been

received by him.

Kelson says that the first order was for the purchase

of a new separator, and that he is in defendant's possession

of the same. Kelson says that he is in defendant's possession

of the same. Kelson says that he is in defendant's possession

of the same. Kelson says that he is in defendant's possession

of the same. Kelson says that he is in defendant's possession

of the same. Kelson says that he is in defendant's possession

of the same.

The new separator was received by plaintiff on July 1st

and was delivered to the Jones and Bedeker order on July 1st

order, and that when he did see him, Kelso informed him that the machine would be shipped as soon as possible, or he thought it might be on its way; that Kelso thereafter informed him that the machine should be there; and that prior to July 23rd or 24th he had no notice that either of the orders would not be accepted by defendant. On July 25th plaintiff wired defendant at its Decatur office that he would hold it for all damages in failing to ship the machine as ordered and the \$800 he had paid by his old outfit, and that unless they complied with their contract immediately, he would buy a separator elsewhere. On the same day defendant replied by wire, "If you will secure Jones and Bedecker, we will make immediate shipment," and on the next day, wrote plaintiff that his order had not been accepted by the home office and that he had been so notified. The letter further stated, "It is possible that Mr. Kelso may be able to resell our old machinery on an acceptable order and in that case we would be willing to fill your order; otherwise you can consider your order cancelled. We were very sorry indeed Mr. Nagle that we were not able to get an acceptable order for your old machinery, so that your order could have been filled." Kelso testified that about four days after the signing of plaintiff's order, he informed plaintiff that defendant had refused to accept the Jones and Bedecker order and that he thereafter repeatedly told plaintiff that it would have to be better secured if his own order was accepted. The testimony was to when plaintiff was notified that his order had not been accepted is in conflict. The trial judge evidently took the view that defendant unduly delayed notice of the rejection of the order. He saw and heard the witnesses, and we are unable to say that the finding and judgment of the court is against the manifest weight of the evidence. The telegram from defendant to plaintiff on July 25th shows

[illegible]

that up to that time his order had not been definitely rejected, but was still being entertained by the company.

By the terms of plaintiff's order notice of acceptance was expressly waived, but it contains no waiver of notice of a rejection of the order. It calls for the machinery to be shipped at once. The threshing season was at hand. The fact was a matter of common knowledge, and was undoubtedly known to defendant, who also knew that if the machinery ordered was to be of any use to plaintiff during that season, it must be delivered promptly. Under such circumstances if defendant intended to reject plaintiff's order it owed him the duty to so notify him without unreasonable delay. If plaintiff was not so notified within a reasonable time he had a right to presume that it had been accepted.

While the order provides that it is taken subject to approval and acceptance by the Company at its home office, such acceptance may be implied by a failure to reject the order within a reasonable time. Where an offer does not require a formal assent to its terms, an acceptance may be implied or inferred from the conduct of the offeree. (Atkins & Co. v. Kirk, 187 Ill. App. 310.) In ~~Ex~~ Blue Grass Cordage Company v. Luthy & Company, 98 Ky. 583, the plaintiff Luthy & Company ordered from the agent of the defendant, Blue Grass Cordage Company, a quantity of twine, by written order requiring acceptance by the Company. The order was submitted to the Company on May 9th, 1892. They failed to reject it until May 21st following, and it was held that their silence during that time warranted the conclusion that the order had been accepted. To the same effect are Robertson v. Tapley, 48 Mo. App. 239, and Phoenix Insurance Company v. Sholes, et al, 20 Wis. 35.

Being unable to say that the finding of the trial court is against the weight of the evidence, the judgment is affirmed.

Judgment affirmed.

that up to that time his order had not been definitely re-

jected, but was still being entertained by the company.

By the terms of plaintiff's order notice of acceptance

was expressly waived, but it contains no waiver of notice of a

rejection of the order. It calls for the machinery to be shipped

at once. The threshing season was at hand. The fact was a matter

of common knowledge, and was undoubtedly known to defendant, who

also knew that if the machinery ordered was to be of any use to plain-

tiff during that season, it must be delivered promptly. Under such

circumstances if defendant intended to reject plaintiff's order

it owed him the duty to so notify him without unreasonable delay.

If plaintiff was not so notified within a reasonable time he had

a right to presume that it had been accepted.

While the order provides that it is taken subject to

approval and acceptance by the Company at its home office, such

acceptance may be implied by a failure to reject the order within

a reasonable time. Where an offer does not require a formal

assent to its terms, an acceptance may be implied or inferred

from the conduct of the offeree. (Atkins & Co. v. Kirk, 187 Ill.

App. 310.) In *Five Grass Storage Company v. Lath & Company*,

98 Ky. 583, the plaintiff Lath & Company ordered from the agent

of the defendant, Five Grass Storage Company, a quantity of

twine, by written order requiring acceptance by the Company. The

order was submitted to the Company on May 29th, 1892. They failed

to reject it until May 31st following, and it was held that their

silence during that time warranted the conclusion that the order

had been accepted. To the same effect are *Robertson v. Tagley*,

48 Mo. App. 239, and *Phoenix Insurance Company v. Sholes*, et al.,

20 Wis. 35.

Being unable to say that the finding of the trial court

is against the weight of the evidence, the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois.

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

202 I.A. 202

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 2 1931
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Fremont D. Graue,
Plaintiff in Error,

vs.

Error to the
Circuit Court of
Du Page County.

Frank Z. Hanscom and
Mary C. Hanscom,

Defendants in Error

Jones, P. J.

Fremont D. Graue, plaintiff, instituted suit against defendants, Frank Z. Hanscom and Mary C. Hanscom, to recover commissions alleged to be due him as broker in a real estate transaction. The declaration originally consisted of the common counts. Subsequently, by leave of court, additional counts were filed, setting forth, in substance, that defendants entered into a verbal agreement with plaintiff by which they employed him to procure a purchaser for a tract of land in Du Page County for the sum of \$50,000, and agreed to pay plaintiff five percent commission on the purchase price; that plaintiff did procure a purchaser who was ready, willing, and able to purchase said premises, and defendants did sell the same to such purchaser for the sum of \$50,000, and thereby plaintiff became entitled to his commissions. Defendants pleaded the general issue and the cause proceeded to trial. At the close of plaintiff's testimony, the court directed a verdict for defendants. The cause comes to this court by writ of error to review the judgment upon the verdict.

The sole ground urged for reversal is that the verdict is contrary to the evidence. Upon the trial it appeared that plaintiff is a licensed real estate broker and defendants were the owners of a tract of land in Du Page County. They employed plaintiff to procure a purchaser, and he introduced one Vannerstrom as a buyer, with whom defendants subsequently entered into a contract for the sale of the premises at the price of \$50,000, payable in installments. The record

Plaintiff in Error,
 Tremont D. Grove,
 vs.
 Frank E. Hanson and
 Mary O. Hanson,
 Defendants in Error.

Error to the
 Circuit Court of
 Du Page County.

Jones, P. J.

Tremont D. Grove, plaintiff, instituted suit against
 defendants, Frank E. Hanson and Mary O. Hanson, to recover
 commissions alleged to be due him as broker in a real estate
 transaction. The declaration originally consisted of the common
 counts. Subsequently, by leave of court, additional counts
 were filed, setting forth, in substance, that defendants entered
 into a verbal agreement with plaintiff by which they employed
 him to procure a purchaser for a tract of land in Du Page County
 for the sum of \$50,000, and agreed to pay plaintiff five percent
 commission on the purchase price; that plaintiff did procure a
 purchaser who was ready, willing, and able to purchase said
 premises, and defendants did sell the same to such purchaser
 for the sum of \$50,000, and thereby plaintiff became entitled
 to his commissions. Defendants pleaded the general issue and
 the cause proceeded to trial. At the close of plaintiff's testi-
 mony, the court directed a verdict for defendants. The cause
 comes to this court by writ of error to review the judgment upon
 the verdict.

The sole ground urged for reversal is that the
 verdict is contrary to the evidence. Upon the trial it appeared
 that plaintiff is a licensed real estate broker and defendant
 were the owners of a tract of land in Du Page County. They
 employed plaintiff to procure a purchaser, and he introduced
 the Vannestrom as a buyer, with whom defendants subsequently
 entered into a contract for the sale of the premises at the

shows that no payment was made under the contract, and defendants terminated the same on account of Vannerstrom's default.

During the cross examination of plaintiff, he produced a written contract relating to the commission he claims in this proceedings. The contract was executed at the same time the contract between defendants and Vannerstrom was signed. It had been in his possession ever since and had been by his attorney filed for record in the recorder's office. It was marked for identification as defendant's Exhibit "1", but was not introduced in evidence. While being examined in relation to the commission contract, plaintiff testified in response to questions, as follows:

"Q. And that is what this contract, defendants' exhibit "1" for identification provides, is it not, that the doctor (meaning Hanscom) is to pay you--the defendant is to pay you five percent of all sums of money he receives on the contract?

A. That is what it says there.

Q. That is what you are claiming, is it not--five percent on whatever money he has received on this contract of purchase?

A. I believe so.

Q. Well, is there any doubt in your mind, Mr. Graue, as to what you are claiming?

A. The reason I am claiming five percent on the whole amount is I don't know what he has received."

Later in response to a question propounded by the court, he answered:-

"Q. Does this contract, Defendant's Exhibit 1 for identification express the contract between you and the defendant in reference to commission, Mr. Graue?"

A. It does."

It is of no consequence that the exhibit was not introduced in evidence. It sufficiently appears from the

show that no payment was made under the contract, and the
defendant testified the same in regard to the contract.
defendant.

During the cross examination of plaintiff, he
produced a written contract relating to the commission he
claims in this proceeding. The contract was executed at the
same time the contract between defendant and Vannestrom was
signed. It had been in his possession ever since and had
been by his attorney filed for record in the recorder's office.
It was marked for identification as defendant's Exhibit "1", but
was not introduced in evidence. While being examined in res-
ponse to the commission contract, plaintiff testified in response

to questions, as follows:
"Q. And that is what this contract, defendant's
exhibit "1" for identification provides, is it not, that the
doctor (meaning Hanson) is to pay you--the defendant is to
pay you five percent of all sums of money he receives on the
contract?"

"A. That is what it says there.
"Q. That is what you are claiming, is it not--five
percent on whatever money he has received on this contract of
purchase?"

"A. I believe so.
"Q. Well, is there any doubt in your mind, Mr. Grove,
as to what you are claiming?"

"A. The reason I am claiming five percent on the
whole amount is I don't know what he has received."

Later in response to a question propounded by the
court, he answered:-

"Q. Does this contract, Defendant's Exhibit 1 for
identification express the contract between you and the de-
fendant in reference to commission, Mr. Grove?"

"A. It does."
It is of no consequence that the exhibit was not
introduced in evidence. It sufficiently appears from the

testimony of plaintiff that his commission was to be based upon whatever money defendants received under their contract with Vannerstrom. The testimony shows they did not receive anything under that contract. Before plaintiff was entitled to recover, it was incumbent upon him to show that the purchase money or some part of it had been paid. This he failed to do, and in that state of the record, the court correctly directed a verdict for defendant.

The judgment of the trial court is affirmed.

Judgment affirmed.

testimony of plaintiff that his commission was to be based
on whatever money defendants received under their contract
with plaintiff. The testimony shows they did not receive
anything under that contract. Before plaintiff was entitled to
recover, it was incumbent upon him to show that the purchase
money or some part of it had been paid. This he failed to do,
and in that state of the record, the court correctly directed
a verdict for defendant.

seen by his The judgment of the trial court is affirmed.
It was marked for identification.
Judgment affirmed.

was not introduced in evidence.
The judgment of the trial court is affirmed.
The judgment of the trial court is affirmed.
The judgment of the trial court is affirmed.

percentage on whatever money/should be received on this
percentage.

Q. Well, I believe you wish to say that
the fact that you are a partner
whole amount is I don't know what the
Later in response to a question
court, he answered:-

"Q. Does this contract between you and
defendant in reference to commission Mr. [Name]
A. It does."
It is of no consequence that the [Name] was not
dressed in evidence. It is not relevantly spoken for the

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

134
202 I.A. 682²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 23 1931
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Alice Marion Mitchell,

Appellee

vs.

Appeal from Circuit Court

of Will County.

Margaret I. Spangler,

Appellant.

Jones, P. J.:

This is an appeal from a judgment for \$10,000 in favor of Alice Marion Mitchell, plaintiff, against Margaret I. Spangler, defendant, for personal injuries sustained in an automobile accident on February 9th, 1929. Plaintiff's case is based solely upon the family purpose doctrine. Defendant has filed her statement, brief and argument in this court, but plaintiff has not replied in any manner.

Each count of the declaration averred that defendant owned, possessed, and controlled a certain automobile which was kept and maintained by her for the convenience, pleasure, comfort and entertainment of her family; that Robert I. Spangler, her son and a member of her family and household, with her permission, and for his own recreation and pleasure, as a member of her family and household, was driving the car at the time of the accident. Defendant pleaded the general issue, and filed special pleas that she did not own or possess the automobile; that it was not kept and maintained by defendant for the convenience, pleasure, comfort and entertainment of her family, and that it was not being driven by her son with her permission.

The testimony shows that the automobile which was being driven by defendant's son at the time of the accident, had been purchased by defendant's husband in his lifetime. He died in August 1928, and by his will left all his property to defendant. She was appointed ad-

Alice Marion Mitchell,

Appellee

vs.

Margaret I. Spangler,

Appellant.

Appeal from Circuit Court
of Will County.

Jones, P. 3.

This is an appeal from a judgment for \$10,000

in favor of Alice Marion Mitchell, plaintiff, against
Margaret I. Spangler, defendant, for personal injuries
sustained in an automobile accident on February 23rd, 1922.
Plaintiff's case is based solely upon the family purpose
doctrine. Defendant has filed her statement, brief and
argument in this court, but plaintiff has not replied in
any manner.

Each count of the declaration averred that de-
fendant owned, possessed, and controlled a certain auto-
mobile which was kept and maintained by her for the
convenience, pleasure, comfort and entertainment of her
family; that Robert I. Spangler, her son and a member of
her family and household, while in possession, control and
possession of said automobile, as a member of her family and
household, was driving the car at the time of the accident.
Defendant claimed that her husband, who lived with her
and she did not own or possess the automobile; that it was
not kept and maintained by defendant for her convenience,
pleasure, comfort and entertainment of her family, and that
it was not being driven by her or any other person.

The testimony shows that the automobile was
not being driven by defendant's son at the time of the
accident, but been purchased by defendant's husband in his
lifetime. He died in 1921, and by his will left
all his property to defendant. She was appointed ad-

ministratrix with the will annexed on October 11, 1928. On January 3, 1929, she made application as owner of the car to the Secretary of State for a license for the same. The accident occurred on February 9, 1929. At that time the estate had not been closed. After her husband's death defendant had possession of the car, but did not drive it. It was driven from time to time by her minor sons, who usually asked her permission.

Defendant with her family lived at Plainfield, between Joliet and Aurora on state route 22. The testimony shows that Robert I. Spangler, her minor son, had, on the night of the accident, secured his mother's permission to drive the car to Joliet to see a young lady there. Upon his arrival at Joliet he was unable to locate the young lady, and a party of six young people was then made up to attend a dance at Aurora. They started for the dance about ten o'clock. Robert was driving the car. The night was cold and the windows became frosted over, except a small circle on the windshield which was kept clear. At a point about nine miles beyond Plainfield the highway is crossed by the track of the E. J. & E. Ry. Co. The highway has a gradual decline toward the railroad for about 1500 feet, with a little less than two per cent grade, and on the night of the accident was covered with ice and very slippery. The car collided with a freight train at the crossing and four of the occupants, including defendant's son, were killed. The other two, including plaintiff, were injured.

Each count of the declaration avers and plaintiff established by her proof, that at the time of the accident the car was being driven by defendant's minor son solely for his own pleasure and recreation, and there is no testimony

plaintiff with the will annexed on October 11, 1938.
On January 2, 1939, she made application as owner of the
car to the Secretary of State for a license for the same.
The accident occurred on February 9, 1939. At that time
the estate had not been closed. After her husband's
death defendant had possession of the car, but did not
drive it. It was driven from time to time by her minor
son, who usually asked her permission.
Defendant with her family lived at Plainfield,
between Joliet and Aurora on state route 22. The testimony
shows that Robert I. Spangler, her minor son, had, on the
night of the accident, secured his mother's permission
to drive the car to Joliet to see a young lady there.
Upon his arrival at Joliet he was unable to locate the
young lady, and a party of six young people was then made
up to attend a dance at Aurora. They started for the
dance about ten o'clock. Robert was driving the car.
The night was cold and the windows became frosted over,
except a small circle on the windshield which was kept
clear. At a point about nine miles beyond Plainfield the
highway is crossed by the track of the N. W. & N. Ry. Co.
The highway has a gradual decline toward the railroad for
about 1500 feet, with a little less than two per cent grade,
and on the night of the accident was covered with ice and
very slippery. The car collided with a freight train at
the crossing and four of the occupants, including defendant's
son, were killed. The other two, including plaintiff, were
injured.
Each count of the declaration avers and plaintiff
established by her proof, that at the time of the accident
the car was being driven by defendant's minor son solely for
his own pleasure and amusement, and that it was

even tending to show that he was on any business or errand for defendant. The Supreme Court of this State has in similar cases repeatedly held that the so-called "family purpose" doctrine is not the law in Illinois. *White v. Seitz*, 342 Ill. 266. (*Anderson v. Byrnes*, 344 Ill. 240.) In those cases the court announced the rule to be that a parent is not liable for the tort of his minor child merely from the relation; that the owner of an automobile who merely permits another to use it for his own purpose is not liable for the negligence of the person so using it, or for an injury occasioned by the negligent use of the machine by his servant if the servant was at the time at liberty from the services of his master and not engaged in doing his master's business, but was pursuing his own interests exclusively; and that the relation of master and servant is not established between the owner of an automobile and his minor son by the mere fact that the parent purchased the machine for the pleasure of the family, and permitted the son to use it for his own pleasure.

The declaration does not state and the proof does not show a cause of action, but the testimony affirmatively shows there is no liability on the part of defendant. Her motion for a directed verdict should have been allowed.

The judgment is reversed and cause remanded.

Reversed and remanded.

[illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

THE STATE OF ILLINOIS, ss.
I, the Clerk of the said State, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the said State.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said State at the City of Springfield, this 1st day of January, 1901.

CLERK OF THE STATE

Attest: My hand and the seal of the said State at the City of Springfield, this 1st day of January, 1901.

135 AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 002³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 23 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Harry A. Howard, Sr., Administrator
of the Estate of Harry A. Howard, Jr.
deceased,

Appellant

Appeal from the Circuit

vs.

Court of Winnebago

City of Rockford, a municipal corporation,
and Northern Illinois Supply Co.,

County.

Appellees,

Jones, P. J.:

This is an action by the administrator of the estate of Harry A. Howard, Jr., against the City of Rockford and Northern Illinois Supply Company, to recover damages on account of the death of plaintiff's intestate, who, while playing with the other children, was drowned in an attempt to get upon some floating logs or boards in a stone quarry pool averred to belong to defendants.

To the amended declaration as amended, the Court sustained a demurrer by Northern Illinois Supply Company and entered judgment against plaintiff for costs, from which this appeal is prosecuted.

The declaration consists of one count, and as finally amended, charges in substance that defendant City of Rockford owned a certain land, and that defendant Northern Illinois Supply Company owned certain other land, each of the two tracts being particularly described; that said lands are contiguous and for many years had been used for a stone quarry, from which large quantities of stone had been quarried and taken out of the lands respectively, leaving a large hole 15 to 25 feet deep, filled with water from springs and underground streams; that the pond of water has existed for many years and is close to and visible from certain public streets, and is surrounded by dwelling houses inhabited by families with numerous children; that for a number of years children of tender age have been accustomed to go upon the respective properties of

Harry A. Howard, Jr., Administrator
of the Estate of Harry A. Howard, Jr.,
deceased,

Appellant
vs.
City of Rockford, a municipal corporation,
and Northern Illinois Supply Co.,
Appellees,
County.

Jones, P. J.
This is an action by the administrator of the estate
of Harry A. Howard, Jr., against the City of Rockford and
Northern Illinois Supply Company, to recover damages on
account of the death of plaintiff's intestate, who, while play-
ing with the other children, was drowned in an attempt to get
upon some floating logs or boards in a stone quarry pool
everred to belong to defendants.
To the amended declaration as amended, the Court
sustained a demurrer by Northern Illinois Supply Company
and entered judgment against plaintiff for costs, from
which this appeal is prosecuted.

The declaration consists of one count, and as finally
amended, charges in substance that defendant City of Rockford
owned a certain land, and that defendant Northern Illinois
Supply Company owned certain other land, each of the two
tracts being particularly described; that said lands are
contiguous and for many years had been used for a stone
quarry, from which large quantities of stone had been quarried
and taken out of the lands respectively, leaving a large hole
15 to 25 feet deep, filled with water from springs and under-
ground streams; that the pond of water has existed for many
years and is close to and visible from certain public streets,
and is surrounded by dwelling houses inhabited by families with
numerous children; that for a number of years children of tender

the defendants and play with rafts made of board and logs, swim in the water and play along the shores of the pool, with the knowledge of defendants; that there is no division of any kind between the lands respectively owned by defendants, and that the pond of water is continuous over the land of both defendants; that the defendant City of Rockford had a pumping station upon its said land, built partly out over the edge of the rocky banks of the pool on the land of the City, and a platform or plank walk had been built by the City out over the water near the pumphouse; that children had been accustomed to play upon the premises of both defendants along the water's edge and upon the rocks and the pump house platform or foot-walk overhanging the pool; that the sides of the pool were steep, with perpendicular banks of rock that went down into the water to a depth of from 10 to 25 feet; that the pond was especially attractive to small children, and highly dangerous because of the steep banks surrounding the same and the cold condition of the water; that because of the attractiveness of the rocky banks and the clear pool of water where the children were for many years accustomed to fish, swim and play upon floating logs, boards and rafts, the same was an attractive nuisance, highly dangerous to children of tender age; that the pond was not fenced or guarded, and that defendants had knowledge of its dangerous condition; that on the day of his death, plaintiff's intestate went to the pond with other children for the purpose of playing in and about the pond and upon the boards, logs, and rafts floating thereon; that he was 7 years of age and escaped from the attention of his mother, passed over the land of the defendant Northern Illinois Supply Company, and upon the land belonging to the City of Rockford, and near the pump house on the land of the City, saw on the water floating logs and boards, which had been floating both on the water covering the land of the defendant Northern Illinois Supply

the defendants and play with rafts made of boards and logs, swim in the water and play along the shores of the pool, with the knowledge of defendants; that there is no division of any kind between the lands respectively owned by defendants, and that the pond of water is continuous over the land of both defendants; that the defendant City of Rockford had a pumping station upon its said land, built partly out over the edge of the rocky banks of the pool on the land of the City, and a platform or plank walk had been built by the City out over the water near the pump-house; that children had been accustomed to play upon the premises of both defendants along the water's edge and upon the rocks and the pump-house platform or foot-walk overhanging the pool; that the sides of the pool were steep, with perpendicular banks of rock that went down into the water to a depth of from 10 to 25 feet; that the pond was especially attractive to small children, and highly dangerous because of the steep banks surrounding the same and the cold condition of the water; that because of the attractiveness of the rocky banks and the clear pool of water where the children were for many years accustomed to fish, swim and play upon floating logs, boards and rafts, the same was an attractive nuisance, highly dangerous to children of tender age; that the pond was not fenced or guarded, and that defendants had knowledge of its dangerous condition; that on the day of his death, Plaintiff's intestate went to the pond with other children for the purpose of playing in and about the pond and upon the boards, logs, and rafts floating thereon; that he was 7 years of age and escaped from the attention of his mother, passed over the land of the defendant Northern Illinois Supply Company, and upon the land belonging to the City of Rockford, and near the pump house on the land of the City, saw on the water floating logs and boards, which had been floating both on the water

Company and were floating at times upon the water covering the land of the City of Rockford; that said logs and boards were not stationary, but floated with the wind upon the land of each of defendants, and that small children played upon the logs and boards upon the lands of each of the defendants at sifferent times and days, and sometimes on the same day, as they happened to find the logs, board, and floating material when they came to the pool, and the logs on which decedent desired to play, and that decedent could not reach or get onto the same from the shore, and picked up from the bank of the pool on the land of the defendant City, a long, slim pole and ran upon the board walk back of the pump house, which extended over the water and was near the floating logs on the land of said city, and with the pole reached out over the water in an effort to fish or draw in the logs or boards, so that he could walk upon the same, and while so doing, became overbalanced and fell off the plank or board on which he was standing and was drowned.

Plaintiff's theory is that the City of Rockford and Northern Illinois Supply Company are jointly liable for the death of plaintiff's intestate, on the ground that the pool on the land of both defendants was a single agency owned by the defendants jointly, and that on account of the floating boards, logs, etc., which it is averred ~~were~~ were sometimes on the land of one of the defendants, and sometimes on the land of the other, the pool was an attractive nuisance and as such was the proximate cause of the death of plaintiff's intestate.

There is no averment in the declaration that on the occasion when plaintiff's intestate went to the pond and was drowned, there was anything upon the surface of that part of the pond belonging to Illinois Supply Company which attracted him thereto. It is a necessary element of the

Company and were floating at times upon the water covering the land of the City of Rockford; that said logs and boards were not stationary, but floated with the wind upon the land of each of defendants, and that small children played upon the logs and boards upon the lands of each of the defendants at different times and days, and sometimes on the same day, as they happened to find the logs, boards, and floating material when they came to the pool, and the logs on which defendant desired to play, and that defendant could not reach or get onto the same from the shore, and picked up from the bank of the pool on the land of the defendant City, a long, slim pole and ran upon the board walk back of the pump house, which extended over the water and was near the floating logs on the land of said city, and with the pole reached out over the water in an effort to fish or draw in the logs or boards, so that he could walk upon the same, and while so doing, became overbalanced and fell off the plank or board on which he was standing and was drowned.

Plaintiff's theory is that the City of Rockford

and Northern Illinois Supply Company are jointly liable for the death of plaintiff's intestate, on the ground that the pool on the land of both defendants was a single agency owned by the defendants jointly, and that on account of the floating boards, logs, etc., which it is averred were sometimes on the land of one of the defendants, and sometimes on the land of the other, the pool was an attractive nuisance and as such was the proximate cause of the death of plaintiff's intestate.

There is no averment in the declaration that on the

occasion when plaintiff's intestate went to the pond and upon the land, there was anything upon the surface of that part of the pond belonging to Illinois Supply Company which attracted him thereto. It is a necessary element of the

liability that the thing which attracted the child was the thing which caused the injury or brought the child into the situation where it was injured. (Mindeman v. Sanitary District, 317 Ill. 529) Even if it be conceded that the portion of the pond located on the land of Illinois Supply Company was attractive to children, that attractiveness was not the proximate cause of the accident. By the averments of the declaration the accident was caused by the child's attempt to fish or draw in logs or boards so that he could walk upon them. (City Trust and Savings Bank v. Kankakee, 254 Ill. App. 489). An essential condition to liability is that the attractive thing or something inseparably connected with it must be the proximate cause of the injury. (Seymour v. Union Stockyards Co., 224 Ill. 579; McDermott v. Burke, 256 Ill. 401).

A pond of water is not of itself such an attractive nuisance as will subject the owner to liability for injuries to a child attracted to and injured by it. (Mindeman v. Sanitary District, supra; Kelley v. First Bank and Trust Co., 256 Ill. App. 439.) In ~~Pekin~~ v. McMahon, 154 Ill. 141; plaintiff McMahon recovered a judgment against the City of Pekin for the death of his 8 year old intestate who was playing at an unguarded pond wholly situated on lots belonging to defendant, and located in the thickly settled part of the city, adjacent to two streets and an alley. There were logs and planks in the water and children were accustomed to play there. Decedent stepped upon a log floating in the water, which rolled and threw him into the pond and he was drowned. In that case the court did not hold that a pond of water is an attractive nuisance, but the holding was that a pond of water in which floating logs on which children were in the habit of playing were permitted to remain, when maintained unguarded under the circumstances shown, was such a dangerous instrumentality attractive to children as to

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render the city liable. (Mindeman v. Sanitary District, supra.) In the Pekin case the court extensively reviewed the authorities on attractive nuisances, and particularly emphasized the doctrine expounded in the "turn-table" cases, which lay stress upon the facts that the turn-table was in an open or ~~f~~ frequented place; that it was dangerous, left unfastened, and when in motion, was attractive to children by reason of their love of motion by other means than their own locomotion. On page 151 of the opinion it is stated, "The love of motion which attracts a child to play upon a revolving turn table, will also attract him to experiment with a floating plank or log which he finds in a pond within easy reach." To constitute an attractive nuisance there must be something more to attract a child than a body of water.

The accident did not happen on the land of Illinois Supply Company, and it is not averred that the logs or boards were in that portion of the pond belonging to it. Water in private streams in its natural state, is not personal, but real property, and is as much a part of the land on which it is situated as the soil and rocks. At common law the title to land embraces all above it and all beneath it. (27 R.C.L. Sec. 237.) The rule at common law so far as it relates to boundaries and ownership of waters is in effect in this state. (Schulte v. Warren, 218 Ill. 108.) Each of the defendants owned the water covering its land up to the boundary between them and no farther. The Illinois Supply Company had no title to the water beyond the boundary of its property.

The mere fact that on previous occasions logs or boards had been floating on the portion of the pond belonging to Illinois Supply Company is not sufficient to constitute such portion an attractive nuisance at the time of the accident. Even if some logs and boards had been floating on that portion of the pond at that time, that fact alone

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would not be sufficient to establish liability on the part of the Illinois Supply Company without a showing that plaintiff's intestate was attracted thereby and that they were the proximate cause of the accident.

In *Morrissey v. P. & W. R. Co.*, 3 Atl. 10, a child of four years, living adjacent to a railroad, strayed across the tracks to the opposite side, where there was no fence, although it was the duty of the railroad company to maintain one. He went onto the adjoining premises, fell into a trench filled with water, and was injured. It was held that the duty of the railroad company is to keep people from danger on its own premises and not from danger on the premises of others; that the injury was caused by the fall into the trench, and was not the fault of the railroad company or consequent upon the fact that there was no fence between its property and the ditch. In the case at bar, although plaintiff's intestate first entered the premises of Illinois Supply Company, he left those premises and was not injured by anything thereon or attributable to that company.

The declaration as finally amended does not state a cause of action against Illinois Supply Company and the demurrer was properly sustained. We express no opinion as to the controversy between plaintiff and the City of Rockford. The judgment of the trial court is affirmed.

Judgment affirmed.

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Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

136 AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 602⁴

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

AUG 29 1931
Clerk's office of said Court, in the words and figures
following, to-wit:

C. E. KELLOGG,

Appellee,

vs.

ALBERT R. METZELBURG,

Appellant,

Appeal from
Circuit Court of
Will County

Jones, P. J:

An action of replevin was instituted in the justice court of Andrew Graham by C. E. Kellogg, plaintiff, against Albert R. Metzelburg, defendant, to recover possession of a floor sanding machine. A change of venue was taken to the justice court of David Fisher, from whose decision an appeal was prosecuted to the circuit court of Will County, where a jury trial resulted in a verdict in favor of plaintiff. Motions for a new trial and in arrest of judgment were denied and judgment was rendered on the verdict. The cause comes here by appeal.

It appears that prior to the bringing of this suit, Metzelburg had recovered a judgment before a justice of the peace against J. D. Kellogg son of plaintiff, for house rent, in the sum of \$102.50 and costs. On the same day an immediate execution was issued and placed in the hands of constable James D. Fox, who went to the home of J. D. Kellogg, and there served the execution and levied upon and took possession of the sanding machine in controversy. He took the machine to the home of Metzelburg, appointed him custodian thereof, and instructed him not to use it and to let nobody have it. He then made his return on the execution and filed it with the justice of the peace by whom it was issued. On the next day C. E. Kellogg began this suit by filing his affidavit for a writ of replevin.

The Constable, James D. Fox, was not made a party to the replevin suit, but it was brought against Metzelburg only.

Appeal from
Circuit Court of
Will County

G. E. KELLOGG,
Appellee,
vs.
ALBERT R. METZELBURG,
Appellant.

Jones, P. J.

An action of replevin was instituted in the justice court of Andrew Graham by G. E. Kellogg, plaintiff, against Albert R. Metzelsburg, defendant, to recover possession of a floor sanding machine. A change of venue was taken to the justice court of David Fisher, from whose decision an appeal was prosecuted to the circuit court of Will County, where a jury trial resulted in a verdict in favor of plaintiff. Motions for a new trial and in arrest of judgment were denied and judgment was rendered on the verdict. The cause comes here by appeal. It appears that prior to the bringing of this suit, Metzelsburg had recovered a judgment before a justice of the peace against J. D. Kellogg, son of plaintiff, for house rent, in the sum of \$103.50 and costs. On the same day an immediate execution was issued and placed in the hands of constable James D. Fox, who went to the home of J. D. Kellogg, and there served the execution and levied upon and took possession of the sanding machine in controversy. He took the machine to the home of Metzelsburg, appointed him custodian thereof, and instructed him not to use it and to let nobody have it. He then made his return on the execution and filed it with the justice of the peace by whom it was issued. On the next day G. E. Kellogg began this suit by filing his affidavit for a writ of replevin.

The Constable, James D. Fox, was not made a party to the replevin suit, but it was brought against Metzelsburg only.

No demand for the machine was made either upon Metzelburg or Fox before the suit was brought.

Plaintiff testified that he purchased the sanding machine from the American Floor Sanding Machine Company. There was introduced in evidence a contract of purchase, which on its face purports to be a lease, payable in monthly installments, providing that when the total payments equal the stipulated value of the machine the agreement is to be cancelled and a release furnished giving plaintiff a clear title to the machine. It also provided that no agreement of sale of said machine is implied, and that the Company and its representative might remove the machine whenever the terms of contract were violated. There is in the record no evidence of the cancellation of the agreement or of the furnishing of a release as provided in the contract, but plaintiff testified that he had paid in full for the machine by monthly checks and had not disposed of it, but at various times his son had used the machine, and had it at his house part of the time. The testimony was a sufficient prima facie showing of plaintiff's right to possession of the property. Anyone having a qualified or special interest in the property, although not the absolute owner, may maintain the action. (Milk Dealers Bottle Exchange v. Schaffer, 224 Ill. App. 411; Adams v. Combes, 260 Ill. App. 225.)

Section 4 of the Replevin Act (Par. 4, Chap. 119, /Rev. Stat.) requires, among other provisions, that the person bringing an action of replevin shall, before the writ issues, file with the justice of the peace before whom the action is brought, an affidavit showing that the property described in the writ and about to be replevined has not been seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution or attachment, nor held by virtue of any writ of replevin against such plaintiff. Plaintiff's affidavit stated that Metzelburg wrongfully detained the sanding machine but did not aver, as required by statute, that the machine had not been seized under any execution or attachment

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It also provided that no agreement of sale of said machine is

implied, and that the Company and its representative might re-

move the machine whenever the terms of contract were violated.

There is in the record no evidence of the cancellation of the

agreement or of the furnishing of a release as provided in the

contract, but plaintiff testified that he had paid in full for

the machine by monthly checks and had not disposed of it, but

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machine but did not aver, as required by statute, that the

against the goods and chattels of plaintiff liable to execution or attachment, or that it was not held by virtue of any writ of replevin against plaintiff, but did aver that it was not held by virtue of any writ of replevin against Metzelburg. The affidavit was insufficient. (McClaghry v. Gratzenberg, 39 Ill. 117; Campbell v. Head, 13 Ill. 123.). Plaintiff made no request at any stage of the proceedings for leave to amend the same. Defendant made no objection to the affidavit until the close of all the evidence. He then filed his motion to quash the writ, assigning as one of the grounds of his motion that the affidavit was defective in not negating said provisions of the statute. The Court overruled the motion. If the motion to quash had been made in apt time, it should have been granted. The record discloses that the parties appeared before the justice of the peace and engaged in a trial. It nowhere appears that any motion to quash the writ was made until all the evidence had been heard in the circuit court on appeal. It is well settled that defenses or motions of a dilatory character must be made at the earliest moment. Under the circumstances shown by the record, plaintiff waived the insufficiency of the affidavit. (Tisdale v. Town of Minonk 46 Ill. 9; Clifford v. Town of Eagle, 35 Ill. 444. Evans v. Bouton, 85 Ill. 579; Town of Canoe Creek v. McEniry, 23 Ill. App. 227.)

Defendant also assigned as one of the grounds of his motion for quashing the writ, that the suit was improperly brought against Metzelburg, and should have been brought against constable James D. Fox, the officer holding the execution. When Fox took possession of the machine, under the execution, he became the legal custodian of the same until such time as it should be advertised and sold under the execution, or until it was otherwise taken from his ~~custody~~ custody by legal proceedings, and by virtue of his writ he was entitled to its possession during that time. He was not deprived of such custody or of his possession by placing the property in the hands of a mere temporary custodian as his agent, any more than

against the goods and chattels of plaintiff liable to execution or attachment, or that it was not held by virtue of any writ of replevin against plaintiff, but did aver that it was not held by virtue of any writ of replevin against Metzelburg. The affidavit was insufficient. (McDonough v. Gratzenberg, 39 Ill. 117; Campbell v. Head, 13 Ill. 123.) Plaintiff made no request at any stage of the proceedings for leave to amend the same. Defendant made no objection to the affidavit until the close of all the evidence. He then filed his motion to quash the writ, assigning as one of the grounds of his motion that the affidavit was defective in not negating said provisions of the statute. The Court overruled the motion. If the motion to quash had been made in not time, it should have been granted. The record discloses that the parties appeared before the Justice of the Peace and engaged in a trial. It nowhere appears that any motion to quash the writ was made until all the evidence had been heard in the circuit court on appeal. It is well settled that defenses or motions of a dilatory character must be made at the earliest moment. Under the circumstances shown by the record, plaintiff waived the insufficiency of the affidavit. (Tisdale v. Town of Minook 48 Ill. 2; Clifford v. Town of Eagle, 35 Ill. 444. Evans v. Bouton, 85 Ill. 579; Town of Canoe Creek v. McNairy, 33 Ill. App. 227.) Defendant also assigned as one of the grounds of his motion for quashing the writ, that the writ was improperly brought against Metzelburg, and should have been brought against constable James D. Fox, the officer holding the execution. When Fox took possession of the machine, under the execution, he became the legal custodian of the same until such time as it should be advertised and sold under the execution, or until it was otherwise taken from his custody by legal proceedings, and by virtue of his writ he was entitled to its possession during that time. He was not deprived of such custody or of his possession by placing the property in the custody of a temporary custodian as his agent, any more than

he would have been by storing it in a building belonging to a third party. He still had control and dominion over the property. Metzelburg was a mere temporary custodian for the constable. Mere temporary custody is insufficient to constitute possession as that term is legally defined. Care, control, and management of the property must be combined with it. (Emmerson v. State, 33 Tex Cr. R. 89; 25 S. W. 389.) The element of custody and control is involved in the term "possession." (State v. Lane, 221 Mo. A. 149, 297 S. W. 708. 49 C. J. Possession 1093, Note.) Where property was in the physical possession of an agent of a mortgagee, it was held that the mortgagee was the proper party defendant in an action of replevin for the property. The possession of the agent was the possession of the mortgagee. (Richey v. Ford, 84 Ill. App. 121.) At the time the replevin suit was instituted Fox was still in the legal custody and control of the property. Metzelburg's physical possession was the possession of Fox, and the suit should have been directed against Fox, and not against Metzelburg. (Blatchford v. Boyden, 122 Ill. 657. Birma v. Muir, 152 Ill. App. 505; MacLachlan v. Pease, 63 id. 634.) The motion to quash the writ should for that reason have been allowed.

The record fails to show that any demand for the return of the property was made upon either Metzelburg or Fox before the suit was instituted, or that Fox was advised or told, either prior to or at the time he made the levy, that plaintiff claimed the property. If he had been so told then no demand would have been necessary. (Greenberg v. Stevens, 212 Ill. 606.) It is well settled that where a party obtains possession of property lawfully, an action of replevin can not be successfully maintained until a demand has been made and possession refused. (O. & M. Ry. Co. v. Nee, 77 Ill. 513.) . Where an officer levies an execution on property in the possession of the defendant in the execution, as his property, he only discharges his duty, and his possession is lawful, and if another party claims the

It would have been by storing it in a building belonging to a third party. He still had control and dominion over the property. Metzelburg was a mere temporary custodian for the constable. Mere temporary custody is insufficient to constitute possession as that term is legally defined. Care, control, and management of the property must be combined with it. (Emmerson v. State, 83 Tex Cr. 131; 25 S. W. 2d 389.) The element of custody and control is involved in the term "possession." (State v. Lane, 221 Mo. A. 148, 191 S. W. 2d 708. 49 O. 11 Possession 1023, Note.) Where property is in the physical possession of an agent of a mortgagee, it was held that the mortgagee was the proper party defendant in an action of replevin for the property. The possession of the agent was the possession of the mortgagee. (Riches v. Ford, 4 Ill. App. 121.) At the time the replevin suit was instituted, Fox was still in the legal custody and control of the property. Metzelburg's physical possession was the possession of Fox, and the suit should have been directed against Fox, and not against Metzelburg. (Blanton v. Boyden, 128 Ill. 327. Sims v. Whit, 153 Ill. App. 305; Madachian v. Pease, 68 Ill. 44.) The motion to quash the writ should for that reason have been allowed.

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property, he must make a demand before he can maintain replevin. Tuttle v. Robinson, 78 Ill. 333. Nigh v. Dovel, 84 Ill. App. 228. The possession of Fox being lawful, a demand was necessary before bringing suit, and the failure to do so is fatal to plaintiff's right to recover herein.

It may not be amiss to here remark, that while plaintiff had the right to select his remedy, if he had a cause of action, and to institute his suit for replevin, he would not, by a trial of the right of property, have fallen into the difficulties he has here encountered by reason of failing to make a demand and in instituting his suit against the wrong party. The remedy by trial of the right of property, provided by Article XIII of the Justices and Constables Act, (Chap. 79 Rev. Stat.), is simple and efficient, and completely serves the interest of all concerned, by a trial on the merits shorn of all other issues.

There was no error in refusing to admit in evidence testimony to the effect that J. D. Kellogg, son of the defendant, had made statements that he owned or had paid for the sanding machine. The statements, if made, were not in the presence of plaintiff, and were not competent.

The fourth instruction given on behalf of plaintiff was erroneous. It told the jury, in substance, that if they found from the evidence that the machine was the property of plaintiff, and was merely loaned by him to his son, they must find for plaintiff. It directed a verdict regardless of whether or not plaintiff was entitled to possession of the machine when the suit was filed, and regardless of whether or not the original taking of the constable was lawful, and whether or not a demand had been made by plaintiff for the return of the property before bringing his replevin suit. An instruction which directs a verdict in case the jury shall find certain facts must necessarily contain all the facts which will authorize the verdict so directed. (Montgomery Coal Co. v. Barringer, 218 Ill. 327.) The giving of this instruction

authorizes the verdict so directed. (Montgomery Coal Co. v.

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constitutes reversible error.

Plaintiff's fifth instruction also ignores the questions of whether or not the original taking of the machine by the constable was lawful, and whether or not a demand was made before bringing suit. These question are not covered by any of the other given instructions, and the giving of the instruction was error.

Instruction numbered six tendered by defendant, but refused, should have been given. It told the Jury, in substance, that if plaintiff was the owner of the machine when the suit was filed he could not recover unless he had a right to its possession at that time. It announced a correct principle of law and was not covered by any other given instruction.

The 10th and 11th instructions offered by defendant, and refused, were to the effect that the possession of personal property is prima facie evidence of ownership in the person possessing the same until such time as the prima facie evidence is overcome by competent evidence. The instructions were proper and should have been given. (Roberts v. Haskell, 20 Ill. 59; Gilson v. Wood, 20 Ill. 33.)

The court did not err in refusing defendant's 13th instruction. It correctly stated the law that when the possession is lawful, a demand is necessary before bringing suit in replevin, but it required the jury to find for defendant in case no demand was proven, without requiring proof that the possession was lawful. It omitted a necessary element of proof and directed a verdict.

The judgment is reversed and the cause remanded.

Reversed and remanded.

...the plaintiff's fifth instruction also ignores the
questions of whether or not the original taking of the machine
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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

137
AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 L.A. 662⁵

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

A. G. Andreen,

Appellant,

Appeal from the Circuit

vs.

Court of Knox County

L. F. O'Brien, Administrator
with the will annexed of Frank
Reavy, deceased,

Appellee,

JONES, P.J:

A. G. Andreen filed his bill of complaint against defendant, L. F. O'Brien, administrator with the will annexed of the estate of Frank Reavy, deceased. To his first and second amended bills demurrers were sustained. By leave of court, he filed his third amended bill, to which a demurrer was also sustained and a decree was entered dismissing the same for want of equity. This appeal is prosecuted from that decree.

The object of complainant's suit is to establish and enforce in his favor an alleged trust relative to certain shares of stock in a corporation. The original and amended bills asked that the stock be transferred to complainant by defendant and for an accounting as to dividends on the stock. Each of the bills was verified. The question on this appeal is whether or not complainant's pleadings sufficiently state a cause of action cognizable by a court of equity,

The third amended bill alleges, in substance, that on September 17, 1904, complainant purchased from Frank Reavy, defendant's testate, ten shares of the capital stock of Sieg Iron Company, an Iowa corporation; that he paid Reavy \$300 in cash as the full purchase price of the stock; that at the time of the sale, Reavy informed him that there was a "gentleman's agreement" between those who were then the stockholders as well as officers of the corporation, that they should respectively try to keep the stock registered

A. G. Andreen,

Appellant,

Appeal from the Circuit

Court of Knox County

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with the will annexed of Frank
Revy, deceased,

Appellee,

JONES, P. 1:

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The object of complainant's suit is to establish and enforce in his favor an alleged trust relative to certain shares of stock in a corporation. The original and amended bills asked that the stock be transferred to complainant by defendant and for an accounting as to dividends on the stock. Each of the bills was verified. The question on this appeal is whether or not complainant's pleadings sufficiently state a case of action cognizable by a court of equity.

The third amended bill alleges, in substance,

that on September 17, 1904, complainant purchased from Frank Revy, defendant's testate, ten shares of the capital stock of Sieg Iron Company, an Iowa corporation; that he paid Revy \$800 in cash as the full purchase price of the stock; that at the time of the sale, Revy informed him that there was a "gentleman's agreement" between those who were then the stockholders as well as officers of the corporation, that they should respectively try to keep the stock registered

in their own names and not to have such stock transferred on the books of the company to someone else, to the end, that the then existing management of the company might not be disturbed, and that said "gentleman's agreement" was not to be binding in the case of the death of the stockholder in whose name the stock was registered on the books of the company, or in case the directors were thereafter willing that a transfer be made; that the stockholders were limited in number and the stock closely held; that there were only nine stockholders at the time, and that each stockholder was an officer of the company; that Reavy also informed complainant that there had been no sale or transfer of any stock on the books of the company since its incorporation in the year 1888, except in one case following the death of a stockholder, and that such stock was transferred only to other stockholders or to members of such decedent's family; that no stock had ever been offered for sale to the public, and that by the terms of said "gentleman's agreement" no such sale was to be made by which any stock was transferred on the books of the company so long as the agreement continued.

That at the time of said sale Reavy informed him that in accord with said "gentleman's agreement", he would keep the stock registered in his own name on the books of the company, but that all future dividends on the same would be paid to complainant by Reavy as soon as received; that the only reason why he desired to keep the stock registered in his own name was in accord with said "gentleman's agreement"; that said stock would be transferred to complainant as soon as the moral obligations under the "gentleman's agreement" had been terminated; that in order to show that complainant had purchased said stock, Reavy proposed that he would enter into a memorandum and agreement show-

Oct. 10, 1882

in their own names and not to have such stock transferred on the books of the company to someone else, to the end, that the then existing management of the company might not be disturbed, and that said "gentleman's agreement" was not to be binding in the case of the death of the stockholder in whose name the stock was registered on the books of the company, or in case the directors were thereafter willing that a transfer be made; that the stockholders were limited in number and the stock closely held; that there were only nine stockholders at the time, and that each stockholder was an officer of the company; that Reavy also informed complainant that there had been no sale or transfer of any stock on the books of the company since its incorporation in the year 1888, except in one case following the death of a stockholder, and that such stock was transferred only to other stockholders or to members of such decedent's family; that no stock had ever been offered for sale to the public, and that by the terms of said "gentleman's agreement" no such sale was to be made by which any stock was transferred on the books of the company so long as the agreement continued.

That at the time of said sale Reavy informed him that in accord with said "gentleman's agreement", he would keep the stock registered in his own name on the books of the company, but that all future dividends on the same would be paid to complainant by Reavy as soon as received; that the only reason why he desired to keep the stock registered in his own name was in accord with said "gentleman's agreement"; that said stock would be transferred to complainant as soon as the moral obligations under the "gentleman's agreement" had been terminated; that in order to show that he would enter into a memorandum and agreement showing that complainant had purchased said stock, Reavy proposed

ing that complainant was entitled to all future dividends on the ten shares of stock; that at the same time Reavy signed a promissory note to complainant for \$800, due on demand, and also wrote and signed a memorandum as follows:- "Woodhull, Ill. 9-17, 1904. This is to certify This note given by me for the amount of \$800.00 is for 10 shares of the Sieg Iron Co. stock represented by me Frank Reavy, and that A. G. Andreen will receive all the dividends that is declared each year on the 10 shares referred to. Frank Reavy."; that at that time Reavy also informed complainant that he would give the \$800 note to show that such amount had been paid to him by complainant as the purchase price of the stock; that complainant consented to the statements made by Reavy relative to the shares remaining in Reavy's name, and relied upon his statements relative to the "gentleman's agreement"; that thereafter all dividends on the 10 shares of stock were paid by Reavy to complainant, and endorsed on the note, until the back was practically covered by the endorsements; that later complainant surrendered the note to Reavy, who gave him a new note for \$800, dated August 11, 1921, and at that time Reavy told him the "gentleman's agreement" was still existing; that the last note bears endorsements showing eleven payments ranging from \$250 to \$375 each, up to July 17, 1926; that on or about January 17, 1917, the name of the corporation was changed to Sieg Company, and that all dividends received by Reavy from the Sieg Company prior to July 17, 1926, relative to the stock involved in this suit were paid by Reavy to complainant; that prior to the date of said new note, the cash dividends paid by Reavy to complainant aggregated at least as much as \$1700, and that the grand total of all cash dividends so paid by Reavy to complainant from September 17, 1904, to July 17, 1926, amounted to at least \$4625;

ing that complainant was entitled to all future dividends on the ten shares of stock; that at the same time Reavy signed a promissory note to complainant for \$800, due on demand, and also wrote and signed a memorandum as follows: "Woodbury, Ill. 8-17, 1904. This is to certify this note given by me for the amount of \$800.00 is for 10 shares of the Sieg Iron Co. stock represented by me Frank Reavy, and that A. G. Andreen will receive all the dividends that is declared each year on the 10 shares referred to. Frank Reavy." that at that time Reavy also informed complainant that he would give the \$800 note to show that such amount had been paid to him by complainant as the purchase price of the stock; that complainant consented to the statements made by Reavy relative to the shares remaining in Reavy's name, and relied upon his statements relative to the "Gentleman's agreement"; that thereafter all dividends on the 10 shares of stock were paid by Reavy to complainant, and entered on the note, until the back was practically covered by the endorsements; that later complainant surrendered the note to Reavy, who gave him a new note for \$800, dated August 11, 1901, and at that time Reavy told him the "Gentleman's agreement" was still existing; that the last note bears endorsements showing eleven payments ranging from \$280 to \$375 each, up to July 17, 1906; that on or about January 17, 1917, the name of the corporation was changed to Sieg Company, and that all dividends received by Reavy from the Sieg Company prior to July 17, 1906, relative to the stock involved in this suit were paid by Reavy to complainant; that prior to the date of said new note, the cash dividends paid by Reavy to complainant aggregated at least as much as \$1700, and that the grand total of all cash dividends so paid by Reavy to complainant from September 17, 1904, to July 17, 1906, amounted to at least \$4623;

that on or about December 30, 1922, a stock dividend of 400% was distributed to the then listed stockholders of said Sieg Company, and thereafter the cash dividends received by Reavy up to July 17, 1926 on the 10 shares of stock and on the 40 shares received as a stock dividend were paid to complainant by Reavy; that no dividends have been received from Reavy or his estate since the payment of \$250 on July 17, 1926, but complainant believes there are other and further cash dividends received by Reavy and defendant which should be accounted for to complainant, the amount of the same being to him unknown; that Reavy represented the value of the original 10 shares of stock to be \$800; that all payments made by Reavy to complainant were in satisfaction of the dividends on said stock in accordance with their agreement, and not at all as payment of interest or principal on the note given by Reavy to complainant; that said note was merely given as further evidence of said payment of \$800 by complainant to Reavy; that it was the agreement and understanding between Reavy and complainant at the time said note was given that it was not to be negotiated or used as an ordinary promissory note; that the actual transaction between complainant and Reavy, as evidenced by the memorandum and the two notes, was to the effect that Reavy, at the time of the making of the agreement, sold complainant said 10 shares of stock with the understanding and agreement that an actual transfer of the stock on the books should not be made until agreeable to the other stockholders and directors, in accordance with said "gentleman's agreement", and with the further understanding that if not transferred prior to the death of Reavy, the stock should be transferred to complainant as soon thereafter as possible; that at the time of the original transaction and at divers times thereafter, Reavy admitted to complainant

that on or about December 30, 1928, a stock dividend of 4000 was distributed to the then listed stockholders of said Suez Company, and thereafter the cash dividends received by Reavy up to July 17, 1928 on the 10 shares of stock and on the 40 shares received as a stock dividend were paid to complainant by Reavy; that no dividends have been received from Reavy or his estate since the payment of \$250 on July 17, 1928, but complainant believes there are other and further cash dividends received by Reavy and defendant which should be accounted for to complainant, the amount of the same being to him unknown; that Reavy represented the value of the original 10 shares of stock to be \$800; that all payments made by Reavy to complainant were in satisfaction of the dividends on said stock in accordance with their agreement, and not at all as payment of interest or principal on the note given by Reavy to complainant; that said note was merely given as further evidence of said payment of \$800 by complainant to Reavy; that it was the agreement and understanding between Reavy and complainant at the time said note was given that it was not to be negotiated or used as an ordinary promissory note; that the actual transaction between complainant and Reavy, as evidenced by the memorandum and the two notes, was to the effect that Reavy, at the time of the making of the agreement, sold complainant said 10 shares of stock with the understanding and agreement that an actual transfer of the stock on the books should not be made until agreeable to the other stockholders and directors, in accordance with said "gentleman's agreement", and with the further understanding that if not transferred prior to the death of Reavy, the stock should be transferred to complainant as soon thereafter as possible; that at the time of the original transaction and at divers times thereafter, Reavy admitted to complainant

that said fifty shares of stock were to be assigned and delivered to complainant at Reavy's death, unless the same had been completed during his lifetime; and that Reavy died testate on or about the 11th day of January, 1927.

That since the incorporation of said company in the year 1888, there has been only two occasions when stock of the company, or its successor, has been transferred on the books of the company; that each of such transfers was made as the result of the death of a stockholder, and was made to members of such decedent's family or other stockholders; that the stock was not offered to the public or to any outsider; that in the past twenty years there has been but one transfer of stock on the books of the company, to-wit, in the year 1913, as the result of the death of a stockholder, and there have been only thirteen stockholders in the last seventeen years, with no sales of stock and no transfers on the books of the company in the last fifteen years. That during the whole corporate life of the company, and its successor, there has never been any exchange or place where said stock could be purchased or procured, and said stock has never had any open market value or other market value; that ever since the incorporation of said company, it has been the policy of the company, and its successor, to keep said companies close corporations, under agreement among the stockholders to not offer their stock for sale or trade during their lives respectively, and that such agreement was recognized and adhered to, generally, by the stockholders.

The original bill alleges that Reavy had the legal right to sell the stock; that the total dividends paid by the company on the ten shares of stock up to the time of filing the bill amount to at least \$5,375.00; that the present value of the ten shares of stock is about \$4,000, and that

... fifty shares of stock were to be assigned and de-
... complaint at Reavy's death, unless the same had
... completed during ...
... on or about the fifth day of January, 1937.
... That since the incorporation of said company
... in the year 1888, there has been only two occasions when
... stock of the company, or its successor, has been transferred
... on the books of the company; that each of such transfers
... was made as the result of the death of a stockholder, and
... was made to members of such decedent's family or other
... persons; that the stock was not offered to the public
... or to any outsider; that in the past twenty years there has
... been but one transfer of stock on the books of the company,
... to wit, in the year 1913, as the result of the death of a
... stockholder, and there have been only thirteen stockholders
... in the past seventeen years, with no sales of stock and no
... transfers on the books of the company in the last fifteen
... years; that during the whole corporate life of the company,
... and its successor, there has never been any exchange or
... place where said stock could be purchased or procured, and
... said stock has never had any open market value or other
... value; that ever since the incorporation of said
... company, it has been the policy of the company, and its
... successors, to keep said companies close corporations, under
... strict control among the stockholders to not offer their stock
... for sale or trade during their lives respectively, and that
... was recognized as such by the company, and its
... successors.

... The value of the stock of said company, at the time of the death of the decedent, was at least \$2,375.00; that the present value of the stock of said company is about \$4,000, and that

their value on September 17, 1904, was \$800. These allegations are not contained in the third amended bill. The first and second amended bills make no material change from the original bill other than to allege a change in the name of the corporation, a change in the par value of the capital stock, and the distribution of the stock dividend.

The allegations of the third amended bill to the effect that stock in the company is not obtainable in the open market, that it has no market value, that the only transfers on the books of the company were occasioned by the death of two stockholders, and that in each case such transfers were only to members of such decedent's family or other stockholders, were not contained in the original bill or the first two amendments.

It is a rule of equity pleading that an amended bill is a continuation of the original bill, of which it is considered a part, the two constituting one record. (*Becker v. Billings*, 304 Ill. 190; *Scalzo v. Com. Trust & Savings Bank*, 239 Ill. App. 330.) The original bill is still a part of complainant's bill, although the amended bill does not include all of its provisions. (*Rexroat v. Ford*, 201 Ill. App. 342. *Lindemann & Hoverson Co. v. Advance Stove Works*, 170 Ill. App. 423.) The amended bill is not a substitute for the original. *Lewis v. Lanphere*, 71 Ill. 187. *Lindemann & Hoverson Co. v. Advance Stove Works*, *supra*. The mere fact that the bill is verified by oath does not deprive complainant of the benefit of an amendment. He would be estopped from amending so as to contradict the statements sworn to, unless he could clearly show such statements were made in mistake. But when an amendment only enlarges and amplifies the statements, or states additional facts, the amendment is proper. (*Marble v. Bonhotel*, 35 Ill. 240.)

The amended bills do not set up a new cause of

on September 17, 1964, was \$800.00. These figures are

ent. Will be made and at least one for the...

The allegations of the third amended bill to the effect of ill intentions

continued on p. 111

of these arguments are discussed in an appendix to this paper.

2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

action, and there is no contradiction of inconsistency, and no material variance in the allegations of the several bills. The object of the bill and the basis of the relief sought was the same after the amendments as before. The allegations omitted in the last amendment are inconsequential. The matter added is germane to the original bill, and merely amplifies the statements therein by adding some new facts. When considered together, as it appears they must be under the rule, the allegations of the several bills are sufficient if proven, to warrant equitable relief. The amendments were therefore properly allowed. (Patterson v. Johnson, 214 Ill. 481.)

The showing is also sufficient to establish a trust relation to the stock in controversy. No particular words are necessary to raise a trust, and if it appears to be the intention of the parties to a contract that property is to be held or dealt with to the benefit of another, a court of equity will affix to it the character of a trust. (26 R.C.L. page 1190, Para. 18.) An equitable trust in personal property may be created by parol. (Barnes v. Barnes, 282 Ill. 593.) If a contract relative to personalty be complete so far as the purchaser is concerned, and if the seller has been paid all that he is entitled to, and the contract remains unperformed only to the extent that the property has not been delivered to the purchaser, then the seller is a trustee of the property for the benefit of the purchase. (Smurr v. Kamen, 301 Ill. 179; Parker v. Garrison, 61 Ill. 250.) The fact that Reavy gave complainant a note for \$800, which was later replaced by another for the same amount, in no way militates against the claim that the transaction was an actual sale of stock by Reavy to complainant, the notes being merely evidence of the amount which complainant paid Reavy for the stock.

A finally amended, the bill asks for an accounting of all dividends received by Reavy and his estate since July 17, 1926. None of the bills allege any certain amount as having been received. The original bill alleges the total amount to be at least \$5375. The third amended bill alleges that the amount of cash dividends paid since July 17, 1926, is unknown to complainant. In view of the other allegations of the bill it is apparent that in order to obtain the relief sought as to dividends, an accounting is required.

The right to specific performance of a contract for the sale of corporate stock depends upon the character of the stock. If the shares are readily obtainable in the open market specific performance will not be decreed, but if the shares have no market value or rating, and its value is not readily ascertainable, or the stock cannot easily be obtained elsewhere, or there is some particular and reasonable cause for a vendee to require the delivery of the stock, specific performance will be granted (*Hills v. McMunn*, 232 Ill. 488; *Smurr v. Kamen*, *supra*.) The allegations that the stock has no market value; that there was never an exchange or place where the same can be purchased or procured; that the policy of the company is to keep it a closed corporation with a limited number of stockholders; that the only transfers of stock since its incorporation have been made to members of the family of decedent stockholders or to other stockholders; and the showing that the stock paid tremendously large dividends, would, if proven, entitle complainant to a decree for specific performance.

Defendant filed in this court his motion to have taxed a printer's fee for an additional abstract filed herein by him. The original abstract filed by complainant embraced only the third amended bill. In view of the fact

that there is no material variance or inconsistency in the bills, the filing of an additional abstract was unnecessary, and defendant's motion is denied.

The chancellor erred in sustaining the demurrer to the third amended bill. The decree is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and twenty ~~two~~ thirty-one

Clerk of the Appellate Court

1387
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 T. A. 333'

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931

the opinion of the Court was filed in the

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Dorin E. Branstetter, Trustee,
et al,

Appellants,

Appeal from the Circuit Court

vs.

of Winnebago County.

Frank J. Lins, et al,

Appellees,

Jones, P.J:

This is a suit for the cancellation of a certain trust agreement, and to collect from certain stockholders of the defunct The Winnebago State Bank the amount of their liability as such stockholders. Complainants, Dorin E. Branstetter, as trustee, and five depositors or creditors of the bank, filed their bill in chancery against said bank and Frank J. Lins, et al, stockholders, together with the personal representatives of three deceased stockholders, whose stock had not been transferred on the books of the bank. Certain other stockholders who had paid their stock liability were not made defendants. A copy of the trust agreement, which had been entered into in an effort to liquidate the affairs of the bank without litigation, is attached to the bill. Branstetter is named in the agreement as trustee. A demurrer to the bill was sustained and the bill dismissed for want of equity. This appeal is prosecuted from that order.

The bill, as finally amended, alleges in substance the closing of the bank pursuant to direction of the Auditor of Public Accounts, the selection of Branstetter as trustee to liquidate the affairs of the bank, the appointment of five of the depositors as a creditors' committee, and that complainants are such trustee and creditors' committee.

The bill further alleges the organization of a new bank, and that pursuant to the trust agreement, a sale of the live assets was made to the new bank, with a resulting dividend

John A. Thompson, Plaintiff,

vs.

Appellants,

Appeal from the Circuit Court

of Winnebago County.

vs.

John A. Thompson, et al.,

Appellees.

James, P. 2:

This is a suit for the cancellation of a certain

trust agreement, and to collect from certain stockholders

of the defendant The Winnebago State Bank the amount of

their liability as such stockholders. Appellants, John

A. Thompson, et al., as trustees, in the defendant

of the bank, filed their bill in chancery against said bank and

James A. Thompson, et al., as stockholders, seeking the

representation of three deceased stockholders, whose stock had

not been transferred on the books of the bank. Certain other

stockholders who had paid their stock liability were not made

defendants. A copy of the trust agreement, which had been

admitted into evidence in the trial, was offered by the

bank without objection, as evidence in the bill. The

is made in the agreement as stated. A copy of the

bill was admitted and the bill admitted to the trial.

This appeal is presented from the trial.

The bill, as finally amended, alleges as follows:

The filing of the bank pursuant to direction of the Auditor

of Public Accounts, the collection of the same is

an illegal use of the bank, the defendant

list of the appellants as a creditors' committee, and that

appellants are not entitled to the same.

The bill further alleges that the bank is a

bank, and that payment to the bank is a

bank, and that payment to the bank is a

of fifty per cent to depositors of the defunct bank; that certain of the assets placed in the hands of the trustee have been liquidated and a further dividend of ten per cent has been paid; that the balance of the assets are of doubtful, if any, value, and said old bank is insolvent; that a promissory note for \$25,000, being the amount of the capital stock of the bank, was executed by the officers of the bank as the obligation of the stockholders, and delivered to a representative of the Auditor's office, but was never delivered to complainants; that prior to the execution of the note the officers and stockholders of the bank represented to complainants and the creditors of the bank that they would execute the note, evidencing their stockholders' liability, if the creditors would accept the note and the remaining assets of the bank in full of their claims against the bank; that complainants, representing the creditors, agreed to accept the note on such condition, and thereupon the trust agreement, containing a paragraph to that effect, was presented to a meeting of the stockholders and the creditors' committee, but the stockholders refused to authorize the signing of the agreement on account of the provision concerning said note, and individually represented to complainants that they were ready and willing to pay their individual share of stockholder's liability and would do so, but they objected to the note because it obligated them to pay the principal, even though certain stockholders were unable to pay their share of the same; that the stockholders present unanimously consented to any agreement that should be drawn requiring them to pay the full amount of their individual liability to the creditors, or someone representing them; that thereupon Roy H. Brown, attorney for the stockholders, prepared a resolution providing that all stockholders be requested to pay immediately to the creditors' committee the full amount

[illegible]

of their stock liability and take a receipt showing such payment. The new agreement presented by Brown of which a copy is attached to the bill, substitutes the provision in the resolution in place of the paragraph providing for the note. It appears that no other substantial change was made in the trust agreement as first drawn. As executed, it provides for turning over to the trustee all the assets remaining after those sold to the new bank, prescribes his duties, and for distribution of the proceeds, and contains the following paragraph:-

"It is further understood and agreed by and between said Trustee and the said Depositors' Committee and the creditors and depositors represented by said Depositors' Committee that said creditors and depositors shall and will accept their pro rata distributive share hereafter paid to them by said Trustee in full and complete satisfaction of each, all, and every of their several demands of every kind and nature against the said Winnebago State Bank."

The bill further alleges that a man named Jaeger, representative of the Auditor's office, advised complainants to sign the agreement; that Brown and Jaeger informed them that upon its execution, the stockholders would immediately pay the full amount of their individual stock to complainants; that they are men of no legal ability, four of them farmers, and one a hardware merchant; that they were not familiar with legally phrased documents, and were not aware that the agreement contained no promise on the part of the stockholders to pay their individual stock liability; that they were induced to sign the same upon the representations made by the stockholders and Brown that the stockholders would pay their individual liability, and by the assurance by Jaeger and Brown that said agreement was full protection to said creditors and depositors,

of said bank... in the trust agreement as first drawn. As executed, it provided for turning over to the trustee all the assets remaining after the sale of the bank, including the notes, and for distribution of the proceeds, and...

"It is further understood and agreed by and between

said trustee and the said bank... committee that said creditors and depositors shall and will accept their pro rata distributive share hereafter paid to them by said trustee in full and complete satisfaction of all claims, all, and every of their several demands of every kind and nature against the said Winnipeg State Bank."

The bill further alleges that a man named Jaeger,

representative of the bank's stockholders, entered into an agreement with the bank and the bank's directors that upon the execution of the agreement, the stockholders would be paid the full amount of their individual shares in the bank, and that they were to be paid within a certain time...

with legally passed documents, and were not to be paid... agreement contained no promise on the part of the stockholders to pay their individual shares in full; and that the bank to also the same upon the recommendation of the bank... believe and know that the stockholders would pay their individual shares, and by the agreement by Jaeger and Brown that said agreement was full payment to said creditors and depositors.

fully as good as said note and better protection; that but for said representations, complainants would not have signed said agreement, and it was signed upon the assurance by said stockholders and by Brown and Jaeger that it bound and obligated said stockholders to pay the full amount of their individual stock liability to the creditors' committee.

The bill then proceeds with a statement that by the trust agreement as executed, the creditors and depositors have agreed to accept such sum as shall be paid to them by the trustee in full satisfaction of their several demands against the bank; that the paragraph so providing was in the agreement as originally drawn and was left in the agreement when the promissory note was eliminated; that with the elimination of the note there is no consideration for the promise to accept such sum as shall be paid by the trustee in full of their claims, and that the agreement gives the creditors nothing more than they had previous to its execution, but if it is valid and binding, it is a detriment to them.

The refusal of the defendants to pay their stock liability is then alleged, with a list of the stockholders, the number and amount of their shares, the names of the stockholders who have paid their stock liability, with the amounts thereof, and a statement showing the names of those who have not paid, and the respective amounts of their stock liability.

The bill prays for the cancellation of the trust agreement; that the court take jurisdiction of all liabilities arising under the constitution and the statutes of this state against the stockholders of the bank, ascertain the creditors and depositors of the bank, the liabilities thereof, who are its stockholders, the number of shares held by each and the extent of each stockholder's liability to the

creditors and depositors; that a receiver be appointed to collect the amount so determined by the court to be due from each stockholder and to distribute the same among the creditors and depositors pro rata; that such stockholders who have failed to pay the full amount of their stock liability be ordered to pay the amount so found due, to said receiver without delay; and that Branstetter, trustee, be directed to turn over to such receiver the money paid to him by certain stockholders pursuant to their stock liability or to said trust agreement, and for general relief.

The only question here is whether or not the amended bill states a cause of action. Shorn of verbiage, the bill alleges the insolvency of the bank; that five of complainants are depositors or creditors of the bank; that creditors have received 60% of their claims; that the remaining assets of the bank are of doubtful, if any, value; that defendants are stockholders in the bank; that they recognized and agreed to pay the full amount of their individual stock liability; that certain others of the stockholders have paid the amount of such liability for which they were liable. The bill asks for the appointment of a receiver; that the stock liability of defendants be determined; that they be ordered to pay the amount thereof to such receiver; and that the trustee be directed to turn over to such receiver the amounts paid to him by certain stockholders pursuant to their liability. The bill also asks for the cancellation of the trust agreement and for general relief.

We are of the opinion that there is no showing in the bill which would authorize the cancellation of the agreement. By the allegations of the bill, a new bank has been organized, the live assets of the old bank sold, and by that means and the liquidation of other assets, the depositors and

...and ...
...the court to be the
...and to distribute the same among the
...and depositors who ... that such stockholders who
...to pay the full amount of their stock liability
...to pay the amount as found due, to said receiver
...and that Branstetter, trustee, be directed
...to turn over to such receiver the money paid to him by
...stockholders pursuant to their stock liability or to
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...for the appointment of a receiver; that the stock liability
...be determined; that they be ordered to pay
...to such receiver; and that the trustee
...to turn over to such receiver the amounts paid
...to him by certain stockholders pursuant to their liability.
The bill also asks for compensation of the receiver and
...and for general relief.
As to the question of cause of action, it is clear that
...the bill states the cause of action.
...of the bill, a new bank has been
...organized, and the five complainants are the only ones
...and the liquidation of the bank, the receiver and

creditors have received 60% of their claims. Under such circumstances it would be inequitable and unjust to allow the creditors to have the trust agreement set aside. There is no offer in the bill to place the other parties to it in statu quo, but if there was such an offer, still there is no apparent reason why the agreement should be set aside. However, the absence of such a showing has no bearing upon the question of the liability of the stockholders to the creditors and depositors of the bank. An examination of the trust agreement discloses that it makes no attempt to release the stockholders from such liability, but by its express terms, provides only for a release by the creditors of their claims against the bank.

There is a liability of each stockholder in a state bank which is fixed by the constitution, and the statutes of this state. The Constitution of 1870, Art. IX., Sec. 6, provides that every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he ~~is~~ she remains such stockholder. The statute makes a like provision.

The liability of a stockholder to the creditors of a bank is separate and distinct from the liability of the bank. The liability of the stockholders is to the creditors of the corporation. It is a several and individual liability on the part of each stockholder to each creditor, (Golden v. Cervenka, 278 Ill. 409; Am. Nat. Bank v. Holsen, 331 Ill. 622) and is self executing. (Duppee v. Swigert, 127 Ill. 494 (505); People v. Adams State Bank, 272 Ill. 277 (280); Am. Nat. Bank v. Holsen, supra.) It cannot be satisfied by payment to the bank. A person who becomes a stockholder in a bank assumes

a primary liability to the creditors of the bank to an amount equal to his stock. (Golden v. Cervenka, supra, (441)).

A suit to collect such liability cannot be maintained by the Auditor of Public Accounts or by the receiver appointed for the Bank. They represent the creditors only so far as the assets of the bank are concerned. The creditors alone have a right to pursue and control their own remedies to collect the stock liability from the stockholders. (Golden v. Cervenka, supra.) Such remedies are properly sought by a bill in chancery. (Queenan v. Palmer, 117 Ill. 619)

The trust agreement not only contains no provision for the release of the stockholders, but expressly provides that they shall be requested to immediately pay the amount of their stock liability, and further provides that such stockholders so paying shall be deemed preferred creditors, subject to the payment of depositors and a balance due the new bank upon the transfer of assets. The terms of the agreement as a whole show that in the minds of the contracting parties, the liability of the stockholders was recognized. The provision as to payment and the preference clause would be meaningless, unless the parties contemplated that there was such a liability, and that it was intended that the stockholders should pay the same. The liability is fixed by law, and there being nothing in the agreement which tends to show there was any purpose or attempt to release the stockholders from that liability, the bill states a good cause of action against defendants for the relief prayed, except the cancellation of the trust agreement.

The Court erred in sustaining the demurrers and dismissing the bill. The decree is accordingly reversed and the cause remanded.

Reversed and remanded.

... liability to the creditors of the bank to an
... equal to his stock. (Golden v. Gervoise, supra, (441).)

A suit to collect such liability cannot be maintained

by the bank or its assigns or by the creditors of the bank.

for the bank. They represent the creditors only so far as the

assets of the bank are concerned. The creditors alone have

a right to pursue and control their own remedies to collect

the stock liability from the stockholders. (Golden v. Gervoise,

supra.) Such remedies are properly sought by a bill in equity.

(Quacken v. Palmer, 117 Ill. 419.)

The trust agreement not only contains no provision

for the release of the stockholders, but expressly provides that

they shall be requested to immediately pay the amount of their

stock liability, and further provides that such stockholders

so far as they shall be deemed preferred creditors, subject to the

payment of deposits and a balance due the bank upon the

transfer of assets. The terms of the agreement as a whole

show that in the minds of the contracting parties, the

liability of the stockholders was recognized. The provision

as to payment and the preference clause would be meaningless,

if the parties contemplated that there was such a

liability, and that it was to be paid by the stockholders.

should pay the same. The liability is fixed by law, and

there being nothing in the agreement which tends to show

that any release or payment is to be made by the stockholders

from this liability, the bill states a valid cause of action

against the stockholders for the unpaid liability, and the recovery

of the trust agreement.

The court found in favor of the bank and its assigns.

Assigning the bill. The decree is affirmed with costs.

Costs awarded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~eighty~~ thirty-one

Clerk of the Appellate Court

139
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 663²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

May Term, A. D. 1931.

Pltf. in error

Writ of Error to County
Court of Rock Island County.

An information was filed in the county court of Rock Island county during March, 1930 by the State's attorney of that county charging Cyriel Dumolein, hereafter referred to as defendant, with the violation of the Illinois Prohibition law. The information contained three counts. The first count charged defendant with the unlawful possession of intoxicating liquor on March 17, 1930; the second count charged the unlawful sale of intoxicating liquor by defendant on the same day, and the third count charged him with the unlawful maintenance on that date in a building located at 1108 Fifteenth Avenue in the city of East Moline, Illinois, of a common nuisance as defined in Sec. 21 of the Prohibition Act. Upon petition of defendant a change of venue was granted. He was tried during September, 1930 before a jury and the county judge of Knox county presided at the trial. A nolle pros was entered by the State's attorney as to the second and third counts of the information and the jury returned a verdict finding defendant guilty as charged in the first count of the information. Motions for a new trial and in arrest of judgment were denied by the court and judgment was entered on the verdict sentencing defendant to the Illinois State Farm

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
May Term, A. D. 1931.

Writ of Error to County
Court of Cook Island County.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Def. in error
vs.
CYRIL DUMOLEIN
Plff. in error

Opinion by Jones, J.

An information was filed in the county court of Cook Island county during March, 1930 by the State's attorney of that county charging Cyril Dumolein, hereafter referred to as defendant with the violation of the Illinois Prohibition law. The information contained three counts. The first count charged defendant with the unlawful possession of intoxicating liquor on March 17, 1930; the second count charged the unlawful sale of intoxicating liquor by defendant on the same day, and the third count charged him with the unlawful maintenance on that date in a building located at 1108 Fifteenth Avenue in the city of East Moline, Illinois, of a common nuisance as defined in Sec. 21 of the Prohibition Act. Upon petition of defendant a change of venue was granted. He was tried during September, 1930 before a jury and the county judge of Knox county presided at the trial. A nolle pro was entered by the State's attorney as to the second and third counts of the information and the jury returned a verdict finding defendant guilty as charged in the first count of the information. Motions for a new trial and in arrest of judgment were denied by the court and judgment was entered on the verdict sentencing defendant to the Illinois State Farm

at Vandalia, Illinois for six months and that he pay the costs of prosecution. The record has been brought to this court by writ of error.

The material facts presented by this record are substantially as follows: The defendant owned a two story brick building located on the south side of Fifteenth Avenue in the city of East Moline, Illinois. The ground floor of the building was divided into two store rooms, each having a frontage of about twenty feet on Fifteenth Avenue and having a depth of approximately sixty feet. For five or six years prior to 1929 defendant had conducted a retail boot and shoe store in the west store room. There were ten rooms on the second floor of the building where defendant and his wife had lived for twelve or thirteen years, and after ~~discontin~~ discontinuing the shoe store business he assisted his wife in keeping roomers and boarders on the second floor of his building. The east room on the ground floor, known as 1108 Fifteenth Avenue, had been used and occupied by defendant's son, Julius Dumolien, since about March, 1929 as a soft drink parlor, and the son had secured a license from the city of East Moline to operate such a place of business. He paid defendant \$50 a month rent for the use of the store room. At the time the son opened his place of business he secured the services of Rene Ver Meesch as clerk or bartender, and Ver Meesch has continued to work there in that capacity. Julius Dumolein worked in the day time as a core maker for the John Deere Harvester Company. He finished his work each day at the harvester plant about four-thirty o'clock in the afternoon and after returning home and cleansing himself he would relieve his clerk at the soft drink parlor, and would keep the place of business open until eight or nine o'clock in the evening. The equipment in the soft drink establishment consisted of a bar, a cigar case and a back bar which extended almost across the room from west to east, also an ice box, a stove, cooking utensils and tables, and the merchandise sold there included near beer, soda, soft drinks, candy, tobaccos,

at Vandalia, Illinois for six months and that he pay the costs of prosecution. The record has been brought to the court by writ of error.

The material facts presented by this record are substantially as follows: The defendant owned a two story brick building located on the south side of Fifteenth Avenue in the city of East Moline, Illinois. The ground floor of the building was divided into two parts, each having a depth of about twenty feet on Fifteenth Avenue and having a depth of approximately sixty feet. For five or six years prior to 1923 defendant had conducted a retail boot and shoe store in the west store room. There were ten rooms on the second floor of the building where defendant and his wife had lived for twelve or thirteen years, and after ~~discontinuing~~ discontinuing the shoe store business he assisted his wife in keeping rooms and boarders on the second floor of his building. The east room on the ground floor, known as 1108 Fifteenth Avenue, had been used and occupied by defendant's son, Julius Dumolien, since about March, 1923 as a soft drink parlor, and the son had secured a license from the city of East Moline to operate such a place of business. He paid defendant \$50 a month rent for the use of the store room. At the time the son opened his place of business he secured the services of Rene Ver Mesach as clerk or bartender, and Ver Mesach has continued to work there in that capacity. Julius Dumolien worked in the day time as a core maker for the John Deere Harvester Company. He finished his work each day at the harvester plant about four-thirty o'clock in the afternoon and after returning home and cleaning himself he would relieve his clerk at the soft drink parlor and would keep the place of business open until eight or nine o'clock in the evening. The equipment in the soft drink establishment consisted of a bar, a cigar case and a back bar which extended almost across the room from west to east, also an ice box, a stove, cooking utensils and tables, and the merchandise

sandwiches and soup.

During the afternoon of March 17, 1930, Ver Meesch came out to the back door of the soft drink parlor and shouted to defendant, who was upstairs in the building, and inquired if he would come down stairs and stay at the place of business while Ver Meesch went to a near-by barber shop for a shave. Defendant assented, and came down the back way, entering the rear door of the soft drink place. Charles Sutton, a sewer contractor, entered the rear door of the premises about the same time, and the bartender left the building. Defendant went behind the bar and stood near the west end of it, where he engaged in playing cards with two or three men who were standing in front of the bar and who had been playing cards with Ver Meesch before the latter left. Very soon thereafter two deputy sheriffs named Hasson and Krueger, and Käster the assistant Chief of Police of the city of East Moline, entered the place of business. One of the deputy sheriffs called the defendant to the east side of the bar and inquired if there was a toilet available. Defendant walked over to where the officers were and they immediately seized the defendant. One of the officers held him and under authority of a search warrant which was in their possession the other officers proceeded to search the premises. They found two plain flat bottles in the ice box, one containing about an inch of liquid and the other was less than one-half full. Two small glasses were found on the drain board behind the bar. The bottles with their contents and the glasses were introduced in evidence at the trial and the testimony of the city chemist was that the contents of the bottles contained approximately 49 per cent of alcohol by volume and that it was fit for use for beverage purposes.

During the search of the premises and immediately thereafter the defendant informed the officers that he had no interest in the soft drink parlor; that he did not operate the place of business; that he knew nothing about the bottles found in the

handkerchiefs and soap.

During the afternoon of March 17, 1930, Ver Meesch came out to the back door of the soft drink parlor and shouted to defendant, who was upstairs in the building, and inquired if he would come down stairs and stay at the place of business while Ver Meesch went to a near-by barber shop for a shave. Defendant assented, and came down the back way, entering the rear door of the soft drink place. Charles Sutton, a sewer contractor, entered the rear door of the premises about the same time, and the bartender left the building. Defendant went behind the bar and stood near the west end of it, where he engaged in playing cards with two or three men who were standing in front of the bar and who had been playing cards with Ver Meesch before the latter left. Very soon thereafter two deputy sheriffs named Hanson and Krueger, and Kester the assistant Chief of Police of the city of East Moline, entered the place of business. One of the deputy sheriffs called the defendant to the east side of the bar and inquired if there was a toilet available. Defendant walked over to where the officers were and they immediately seized the defendant. One of the officers held him and under authority of a search warrant which was in their possession the other officers proceeded to search the premises. They found two plain flat bottles in the ice box, one containing about an inch of liquid and the other was less than one-half full. Two small glasses were found on the drain board behind the bar. The bottles with their contents and the glasses were introduced in evidence at the trial and the testimony of the city chemist was that the contents of the bottles contained approximately 48 per cent of alcohol by volume and that it was fit for use for beverage purposes.

During the search of the premises and immediately thereafter the defendant informed the officers that he had no interest in the soft drink parlor; that he did not operate the place of business; that he knew nothing about the bottles found in the

ice box, did not know they were there, or that any intoxicating liquor was kept around the place; and that the soft drink parlor belonged to and was operated by his son. However the officers took defendant into custody, left the building before the bartender, Ver Meesch, returned, and placed defendant in jail.

It is contended by counsel for defendant that the verdict was not warranted by the evidence; that the court erred in admitting in evidence the two bottles with their contents, and the glasses taken by the officers at the time of the search; that the court erred in refusing to give two instructions offered by defendant, and in restricting the cross-examination of one of defendant's witnesses.

In the view we take of the case it will be unnecessary to consider but one of the contentions relied upon by defendant for a reversal of the judgment. It will serve no useful purpose in setting forth in detail the testimony produced on the trial. The evidence presented by the State was that of the three officers who searched the premises where defendant was when arrested, and the city chemist who gave the alcoholic content of the liquid in the bottles seized by the officers at the time of the search. The proof presented on behalf of the defendant was given by himself, his son, and Charles Sutton. There is little conflict in the testimony of any of the witnesses, and none whatever as to the material and important facts. In addition to the statements which the defendant made to the officers that he had no interest in the soft drink parlor and knew nothing about any intoxicating liquor being kept there, the record shows that defendant was never employed by his son in the operation of the business; that on the afternoon when the officers searched the premises he was merely staying at the soft drink parlor as a favor or accommodation to Ver Meesch while the latter went out to obtain a shave; that during the time the defendant was in charge of the place he did not serve or sell any drinks or merchandise of any kind and did not look in the ice box or know what was in it, and that afternoon

ice box, did not know they were there, or that any intoxicating liquor was kept around the place; and that the soft drink parlor belonged to and was operated by his son. However the officers took defendant into custody, left the building before the partner, Ver Meesch, returned, and placed defendant in jail.

It is contended by counsel for defendant that the verdict was not warranted by the evidence; that the court erred in admitting in evidence the two bottles with their contents, and the glasses taken by the officers at the time of the search; that the court erred in refusing to give two instructions offered by defendant, and in restricting the cross-examination of one of defendant's witnesses.

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was the only time during the month of March that defendant was in the place of business. Some of the material statements made by defendant on the trial were corroborated by the testimony of his son, and other such facts recited by defendant were substantiated by Charles Sutton, who was present when the officers searched the place. The officers did not dispute what defendant testified he stated to them when arrested.

In our view of this record the evidence presented by the People does little more than raise a suspicion of the guilt of the defendant and was insufficient to justify a verdict of guilty. Courts of review are committed to the doctrine that the jury are the judges of the facts and the weight of the evidence in all criminal cases, yet if, upon a careful review of the evidence, it appears the conviction is based upon unsatisfactory evidence, or if, upon a consideration of the evidence, there remains such grave and serious doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice or passion and not of that calm and deliberate consideration of the evidence which the law requires, the verdict should be set aside. People vs. Rischio, 262 Ill. 596; Dahlberg vs. People, 225 Ill. 485.

Allowing the jury all the advantage of seeing and hearing the witnesses, a consideration of this record leaves the mind in great uncertainty as to the guilt of defendant.

The judgment of the county court of Rock Island county will therefore be reversed and the cause remanded.

Reversed and remanded.

was the only time during the month of March that defendant was in the place of business. Some of the material statements made by defendant on the trial are corroborated by the testimony of his son, and other such facts recited by defendant were substantiated by Charles Sutton, who was present when the officers searched the place. The officers did not dispute what defendant testified he stated to them when arrested.

In our view of this record the evidence presented by the People does little more than raise a suspicion of the guilt of the defendant and was insufficient to justify a verdict of guilty. Courts of review are committed to the doctrine that the jury are the judges of the facts and the weight of the evidence in all criminal cases, yet if, upon a careful review of the evidence, it appears the conviction is based upon unsatisfactory evidence, or if, upon a consideration of the evidence, there remains such grave and serious doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice or passion and not of that calm and deliberate consideration of the evidence which the law requires, the verdict should be set aside. People vs. Kisch, 282 Ill. 526; Dahlberg vs. People, 285 Ill. 485.

Allowing the jury all the advantage of seeing and hearing the witnesses, a consideration of this record leaves the mind in great uncertainty as to the guilt of defendant. The judgment of the county court of Rock Island county will therefore be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

1407
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 603³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 29 1931 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois,
Second District,
May Term, A. D. 1931.

Oscar Nelson, as Auditor of
Public Accounts of the State
of Illinois,

Complainant,

vs.

Appeal from Circuit Court
of Putnam County.

The First State Bank of Magnolia,
et al,

Defendants.

In the matter of the claim of Mark
E. Kays, Supervisor of the Town of
Magnolia, County of Putnam and State
of Illinois,

Appellant.

Opinion by Jones, J.

During April, 1927, the Auditor of Public Accounts closed the First State Bank of Magnolia in Putnam County, Illinois, and later filed a bill in chancery in the circuit court of that county for the purpose of liquidating the business of the bank. In October, 1927, Mark E. Kays, as supervisor of the town of Magnolia, filed a sworn petition in the cause praying that an order be entered finding him to be a preferred creditor of the bank. An amended claim under oath was later filed by leave of court in the name of the People of the State of Illinois upon the relation of Mark E. Kays, Supervisor of Magnolia township, wherein it was set forth in substance that Kays in his official capacity as supervisor was the legal custodian of \$20,000 derived from the sale of bonds issued under authority of a vote of the

equally as important was the legal question of \$20,000 derived
 therein it was set forth in substance that Kays in his official
 position as Supervisor of Kewanee Township,
 of said in the name of the People of the State of Illinois upon
 the bank. An amended claim under oath was later filed by leave
 that an order be entered finding him to be a preferred creditor
 town of Kewanee, filed a sworn petition in the cause praying
 the bank. In October, 1927, Mark E. Kays, an supervisor of the
 West county for the purpose of liquidating the business of
 Kewanee, and later filed a bill in chancery in the circuit court
 closed the First State Bank of Kewanee in Kewanee County, Ill-
 During April, 1927, the Auditor of Public Accounts
 relation by Jones, J.

Appellant.

of Illinois,
 Kewanee, County of Putnam and State
 E. Kays, Supervisor of the Town of
 in the matter of the claim of Mark
 Defendants.

of al,
 The First State Bank of Kewanee,

Appeal from Circuit Court
 of Putnam County.

Complainant.

of Illinois,
 Public accounts of the State
 Oscar Nelson, an Auditor of

May Term, A. D. 1931.

Second District,
 of Illinois,

In the Appellate Court

Agenda 1A.

people of Magnolia township for the purpose of graveling roads in that township; that he intrusted the sum of \$20,000 to The First State Bank of Magnolia, a corporation, as a special deposit or trust fund to be used for the sole purpose of paying contracts awarded for the doing of said road work; that the fund was to be kept separately and apart from the other funds of the bank and not to be paid out upon any check of any persons or individual except upon the vouchers of the proper officers in the manner provided by law; that the officers of the bank knew the source of the funds, which were the property of the People of the State of Illinois; that at the time the bank was closed there as in its possession under such trust agreement a balance of \$4118.67, which fund was not the property of the bank and which the receiver merely held at trustee. The prayer of the written claim was for an order of court directing the payment of such balance as a preferred claim by the receiver of the bank. Under an order of reference the proof was taken before the master in chancery without any conclusions. A hearing was had before the court and an order was entered denying the claim was a preferred one and allowing it as a general claim. From that order an appeal has been perfected to this court by the ~~Supervisor~~ Supervisor of Magnolia Township.

The evidence presented shows that an election was held in Magnolia township during July, 1925, for the purpose of voting upon the proposition of issuing bonds for the graveling of roads in that township. Bonds in excess of \$40,000 were thereafter issued and sold and the proceeds thereof placed in the Farmers State Bank of McNabb, Illinois. Kays, the Supervisor of Magnolia township, to whom we shall hereafter refer as appellant, withdrew \$20,000 from this fund by depositing a check for that amount in The First State Bank of Magnolia, on September 14, 1925. One half of this amount was placed to his credit in the latter bank in an open or checking account designated upon the bank's books

people of Madison township for the purpose of traveling roads in that township; that he instructed the sum of \$20,000 to the first State Bank of Madison, Illinois, as a trust fund to be used for the sole purpose of paying and awarding for the doing of said road work; that the fund was to be kept separately and apart from the other funds of the bank and not to be paid out upon any check of any persons or individual except upon the vouchers of the proper officers in the manner provided by law; that the officers of the bank knew the source of the funds, which were the property of the People of the State of Illinois; that at the time the bank was closed there as in its possession under such trust agreement a balance of \$118.37, which fund was not the property of the bank and which the receiver held as trustee. The order of the written claim was for an order of court directing the payment of such balance as a preferred claim by the receiver of the bank, under an order of reference the proof was taken before the master in chambers without any conclusions. A hearing was had before the court and an order was entered denying the claim as a preferred one and allowing it as a general claim. From that order an appeal has been perfected to this court by the People of Madison Township. The evidence presented shows that an election was held in Madison township during July, 1925, for the purpose of voting upon the proposition of traveling roads for the traveling of roads in that township. Bonds in excess of \$40,000 were thereafter issued and sold and the proceeds thereof placed in the hands of the State Bank of Madison, Illinois. Kays, the Supervisor of Madison Township, at whom we will hereafter refer as appellant, withdrew \$20,000 from this fund by depositing a check for that amount in the First State Bank of Madison, on September 14, 1925. One half of this amount was placed to his credit in the latter bank

as "Mark Kays, Treas. Hard Road Fund". The other \$10,000 was represented by a time certificate for eight months at five per cent interest issued by the Magnolia bank on the same day and made payable to "Mark L. Kays, Treas. Road & Bridge Fund". When the deposit of \$10,000 was made by appellant he told the Magnolia bank officials, who knew the source of the deposit, that the funds were to be kept as a separate fund and were to be used only for the payment of graveling of the roads. The bank cashier wrote on the top of the deposit ticket "Hard Road Fund" and the account was known and carried thereafter as the hard road or bond issue fund. Withdrawals were made from this fund from time to time by vouchers drawn at the direction of the superintendent of roads and were signed by the town clerk and road commissioner. During July, 1926, the time certificate of \$10,000 and interest thereon in amount of \$333.33, were deposited in the Magnolia bank and credited to the account of the hard road or bond issue fund, ~~with~~ and withdrawals were continued to be made therefrom. During the time of these transactions appellant had two other open accounts in the Magnolia bank, one of which was designated as "Mark Kays, Treasurer of Road and Bridge Fund", and the other as "Mark Kays, Treasurer of Town Fund". When the bank was closed by the State Auditor of Public Accounts in April, 1927, there was on deposit to the credit of the hard road or bond issue fund the sum of \$4118.67.

It is the contention of appellant that he was entitled to preference or priority in payment over other creditors of the bank, first, because the money which he deposited in the Magnolia bank constituted a trust fund, and second, because the title to the money was in a political subdivision of the State and that as agent for, or custodian of the funds of such political subdivision he was entitled thereto.

In support of his first contention appellant says that

as "Mark Kaye, Treas. Hard Road Fund". The other \$10,000 was represented by a time certificate for eight months at five per cent interest issued by the Magnolia bank on the same day and made payable to "Mark E. Kaye, Treas. Road & Bridge Fund". When the deposit of \$10,000 was made by appellant he told the Magnolia bank officials, who knew the source of the deposit, that the funds were to be kept as a separate fund and were to be used only for the payment of traveling of the roads. The bank cashier wrote on the top of the deposit ticket "Hard Road Fund" and the account was known and carried therefor as the hard road or bond issue fund. Withdrawals were made from this fund from time to time by vouchers drawn at the direction of the superintendent of roads and were signed by the town clerk and road commissioner. During July, 1926, the time certificate of \$10,000 and interest thereon in amount of \$882.25, were deposited in the Magnolia bank and credited to the account of the hard road or bond issue fund, which and withdrawals were continued to be made therefrom. During the time of these transactions appellant had two other open accounts in the Magnolia bank, one of which was designated "Mark Kaye, Treasurer of Road and Bridge Fund", and the other as "Mark Kaye, Treasurer of Town Fund". When the bank was closed by the State Auditor of Public Accounts in April, 1927, there was on deposit to the credit of the hard road or bond issue fund the sum of \$1110.27. It is the contention of appellant that he was entitled to preference or priority in payment over other creditors of the bank, first, because the money which he deposited in the Magnolia bank constituted a trust fund, and second, because the title to the money was in a political subdivision of the State and that as a trust or custodian of the funds of such political subdivision he was entitled thereto. In support of his first contention appellant says that

the deposit made by him and known and carried by the bank as the hard road or bond issue fund was to be used for a definite specific purpose, namely the payment of contracts for the graveling of roads in Magnolia township, which purpose was known to the bank officials, and that the bank received this money impressed with that agreement and trust. Bank deposits are classified as general and special. A general deposit is one where the bank merely becomes the debtor of the depositor and may be drawn upon in the usual course of the banking business. A special deposit is a deposit for safe keeping, to be returned intact on demand, or for some specific purpose not contemplating a credit or general account. As a rule when money is deposited in a bank title thereto passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and to that extent the debtor becomes the creditor of the bank. Such deposit then becomes a part of the assets of the bank, and in case of insolvency of the bank that deposit belongs to the creditors of the bank in proportion to the amount of their respective claims. A depositor making a deposit in a fiduciary capacity rather than in an individual capacity does not make the deposit a special one. The depositor may be described in the pass-book, certificate or receipt which evidences his deposit, as a trustee, executor, administrator, guardian, agent, treasurer, manager, or by some other word or words indicating his fiduciary character, but this will not alone render the deposit a special one. The question between the bank and the depositor is not what relation the latter or his fund bears to some third party, but rather whether a trust relation has been created between the bank and the depositor in connection with the fund. In order to make a deposit a special one the bank must be made an agent rather than a debtor, and its agency or trusteeship cannot be created by mere external relationship of the debtor unless the deposit is wrong-

the deposit made by him and known and assumed by the bank as the
bank's own money and used for a definite ap-
propriate purpose, namely the payment of contracts for the traveling
of roads in Hancock township, which purpose was known to the
bank officials, and that the bank received this money impressed
with that agreement and trust. Bank deposits are classified
as general and special. A general deposit is one where the
bank merely becomes the debtor of the depositor and may be drawn
upon in the usual course of the banking business. A special
deposit is a deposit for safe keeping, to be returned intact on
demand, or for some specific purpose not contemplating a credit
or general account. As a rule when money is deposited in a bank
title thereto passes to the bank. The bank becomes the debtor
of the depositor to the extent of the deposit, and so that ex-
tent the debtor becomes the creditor of the bank. Such deposit
then becomes a part of the assets of the bank, and in case of
insolvency of the bank that deposit belongs to the creditors of
the bank in proportion to the amount of their respective claims.
A depositor making a deposit in a fiduciary capacity rather than
in an individual capacity does not make the deposit a special one.
The depositor may be described in the pass-book, certificate or
receipt which evidences his deposit, as a trustee, executor,
administrator, guardian, agent, treasurer, manager, or by some
other word or words indicating his fiduciary character, but this
will not alone render the deposit a special one. The question
between the bank and the depositor is not what relation the
latter to his fund bears to some third party, but rather whether
a trust relation has been created between the bank and the de-
positor in connection with the fund. It seems to me a legal
question and the bank must be made an agent or trustee of the
depositor, and the money or property must be deposited in some

ful or the law forbids the bank becoming a debtor. People vs. Farmers State Bank, 538 Ill. 154; People vs. Home State Bank, 538 Ill. 179. In the latter case it was further stated that a fiduciary may deposit trust funds as a general deposit. The fact that the funds so deposited are trust funds and known by the bank to be so does not make the deposit special. In the absence of evidence making it a special deposit the depositor simply becomes a creditor of the bank, standing upon the same footing as other general creditors and entitled to no preference, the bank simply becoming indebted to him in his representative capacity.

It will be seen from the evidence produced that the bank officials were informed that the deposits made by appellant were composed of money derived from the sale of bonds voted by the electors of the township, and that such funds were to be used only for the payment of graveling of roads in the township. However there was no request or direction on the part of appellant to the bank that it actually keep the particular or specific funds intact or separate from other money in the bank. Neither was there any specific understanding, so far as the record discloses, as to how the funds were to be withdrawn. There could have been no intended restriction placed upon the bank in the use of the money because at least half of the original hard road funds were represented by a time certificate for eight months upon which the bank agreed to, and did, pay interest at the rate of five per cent. The bank had nothing to do with the furtherance of the graveling work on the roads, or in the designation of the payment of the funds for the doing of such work, except to pay out of the hard road or bond issue fund all vouchers or checks drawn thereon. The record discloses no agreement whatever between appellant and the bank whereby any agency or trusteeship was created, and there was no undertaking, obligation or

of the law forbids the bank becoming a debtor. People vs.

Commonwealth State Bank, 358 Ill. 194; People vs. Home State Bank,

358 Ill. 195. In the latter case it was further stated that

the bank may deposit trust funds as a general deposit. The

trust funds so deposited are trust funds and known by

the bank to be so, does not make the deposit special. In the

absence of evidence making it a special deposit the depositor

simply becomes a creditor of the bank, standing upon the same

footing as other general depositors.

The bank simply becoming indebted to him in his way as a creditor.

It will be seen from the evidence produced that the

trust funds were informed that the deposits made by ap of the

were derived from the sale of bonds voted by

the electors of the township, and that such funds were to be

used only for the payment of traveling of roads in the township.

However there was no request or direction on the part of ap of the

to the bank that it actually keep the particular or special

funds intact or separate from other money in the bank. Neither

was there any specific understanding, so far as the record dis-

closed, as to how the funds were to be withdrawn. There could

have been no intended restriction placed upon the bank in the

use of the money because at least half of the original hard road

funds were represented by a time certificate for eight months

upon which the bank was to, and did, pay interest at the

rate of five per cent. The bank had nothing to do with the

furtherance of the traveling work on the roads, or in the con-

struction of the payment of the funds - the doing of such work,

except to pay out of the hard road or bond issue fund all vouchers

or checks drawn thereon. The bank had no agreement with

any other party and the bank was not a party to any of the

acts or omissions of the bank.

responsibility placed upon or assumed by the bank except such as is the case with any bank which becomes a debtor of its depositor. The cashier of the bank stated that the words "Hard road Fund" were written across the top of appellant's original deposit ticket for the benefit and direction of the bookkeeper and so that the fund would be kept separate and would not be confused with any other account of appellant. We think no trust fund was created as between appellant and The First State Bank of Magnolia, and that the relation was one of debtor and creditor.

Appellant relies upon *People vs. Farmers State Bank*, 335 Ill. 617 in support of his second contention that the title to the fund is in a political subdivision of the State and as agent therefor he is entitled to priority over other creditors of the bank. That case was referred to in the case of *People vs. Farmers State Bank*, 338 Ill. 134, where the Supreme Court said, "That case, under the facts stated in the opinion of the court, is authority for the proposition that money paid and collected for taxes is the property of the State until distribution thereof to the various municipalities and political subdivisions. However, we are not disposed to extend that doctrine and make it applicable to tax money or alleged public funds which have been segregated, separated or delivered to the proper representative or custodian of each and every minute political subdivision or unit of the State, county or other municipality." In *People vs. Home State Bank*, *supra*, which is a case similar to the one at bar, it was held that the supervisor of a town who deposited funds in a bank as supervisor and as treasurer of a road and bridge fund was not entitled to preference over other creditors of the bank after its insolvency, where the funds were deposited as a general and not as a special deposit. The court said in that case, "It has been held in many cases that the right which a State has to a preference over creditors of a common insolvent

responsibility placed upon or assumed by the bank except such
as the case with any bank which becomes a debtor of its de-
positor. The cashier of the bank stated that the words "Bank
Fund" were written across the top of appellant's original
deposit ticket for the benefit and direction of the bookkeeper
and that the fund would be kept separate and would not be
mixed with any other account of appellant. We think no fund
was created as between appellant and the First State Bank
of Maryland, and that the relation was one of debtor and creditor.
The bank appellant relies upon People vs. Farmers State Bank,
233 Ill. 617 in support of his second contention that the title
to the fund is in a political subdivision of the State and as
such therefor he is entitled to priority over other creditors
of the bank. That case was referred to in the case of People vs.
Farmers State Bank, 233 Ill. 134, where the Supreme Court said,
"That case, under the facts stated in the opinion in the court,
is authority for the proposition that money paid and collected
for taxes as the property of the State until distribution thereof
to the various municipalities and political subdivisions. How-
ever, we are not disposed to extend that doctrine and make it
applicable to tax money or alleged public funds which have been
segregated, separated or delivered to the proper representative
or creation of each and every minute political subdivision or
unit of the State, county or other municipality." In People vs.
Farmers State Bank, supra, which is a case similar to the one at
bar, it was held that the supervisor of a town who deposited
funds in a bank as a treasurer of a road and
bridge fund was not entitled to preference over other creditors
of the bank after its insolvency, where the funds were deposited
as a general and not as a special deposit. The court said in
that case, "It has been held in many cases that the right which

debtor does not extend to a county, and the principle applies to towns, highway commissioners and other similar organizations." Those cases clearly negative the second contention of appellant.

The circuit court correctly decided that appellant was not entitled to a preference in the payment of his claim, and its order is affirmed.

Order affirmed.

... extend to a county, and the principle applied
to commissioners and other civil
... negative the second contention of appellant.
... decided that appellant
... in the ... of his ... and
... in ...
...
... and the ...
... and that the ...
... upon ...
... in support of his second contention that the ...
... in a political subdivision of the State and as
... to ...
... that case was referred to in the case of ...
... the ...
... in the opinion of the ...
... for the proposition that money said and collected
... of the State until ...
... and political subdivisions ...
... to extend that doctrine and make it
... or alleged while funds have been
... to the proper representative
... and every minute political subdivision of
... "county or other municipality." In people vs
... which is a case similar to the one at
... of a town who deposited
... and as ...
... over other ...
... the funds were deposited
... the court said in
... that the right ...

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

147
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2621A. 653⁴

BE IT REMEMBERED, that afterwards, to-wit: On

1628 193, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Joseph Peterson,

Appellee

vs.

G. N. Carlson and William
A. Barton, doing business as
Barton & Carlson
(William A. Barton,

Appellant)

Appeal from
Circuit Court of
Winnebago County.

Jones, P. J:

Joseph Peterson, plaintiff, instituted his suit against defendants G. N. Carlson and William A. Barton, doing business as Barton & Carlson. The declaration charges that defendants were engaged in the real estate business, and employed plaintiff as a real estate salesman, agreeing to pay him fifteen per cent of the selling price of all lots or real estate offered for sale through defendants and sold by plaintiff, such commission to be paid at the time the sales were completed; and that plaintiff sold certain lots in Rockton Avenue Subdivision, at a total selling price of \$6150. The amount of commission claimed by the declaration is \$922.

Summons was served on defendant Barton on December 12, 1930, for the January term, 1931, which convened on January 12th. No service was had on defendant Carlson. Judgment by default was entered against Barton on January 20th in the sum of \$922. Thereafter, during the same term, he filed a motion to vacate the judgment and for leave to plead. The motion was overruled and this appeal followed.

The only question presented for the decision of this court is whether or not, under the showing made by defendant Barton, he was entitled to have the judgment by default set aside and vacated.

Before a defendant is entitled to have a judgment by default set aside it is necessary for him to show that he has used due diligence in attending to and protecting his rights,

Appeal from
Circuit Court of
Winnebago County.

Joseph Peterson,
Appellee

vs.

G. W. Carlson and William
A. Barton, doing business as
Barton & Carlson
(William A. Barton,

Appellant)

Jones, P. 1.

Joseph Peterson, plaintiff, instituted his suit
against defendants G. W. Carlson and William A. Barton,
doing business as Barton & Carlson. The declaration charges
that defendants were engaged in the real estate business, and
employed plaintiff as a real estate salesman, agreeing to
pay him fifteen per cent of the selling price of all lots or
real estate offered for sale through defendants and sold by
plaintiff, such commission to be paid at the time the sales
were completed; and that plaintiff sold certain lots in
Rockton Avenue Subdivision, at a total selling price of \$6180.
The amount of commission claimed by the declaration is \$928.
Summons was served on defendant Barton on December
12, 1930, for the January term, 1931, which convened on
January 13th. No service was had on defendant Carlson.
Judgment by default was entered against Barton on January
20th in the sum of \$928. Thereafter, during the same term, he
filed a motion to vacate the judgment and for leave to plead.
The motion was overruled and this appeal followed.
The only question presented for the decision of this
court is whether or not, under the showing made by defendant
Barton, he was entitled to have the judgment by default set
aside and vacated.
Before a defendant is entitled to have a judgment by
default set aside it is necessary for him to show that he has

and that he has a meritorious defense to the action. Diligence on his part is as essential to his right to relief by means of his motion as it is that a good defense on its merits shall exist. Chapman v. North American Life Ins. Co. 212 Ill. App. 389.

Defendant filed with his motion his affidavit in support of the same, designed to show diligence and a meritorious defense. That part of the affidavit relating to his alleged diligence sets out that immediately after the summons had been served upon him he handed the same to John H. Page, a practicing lawyer, in Rockford; that Page has handled all of the legal affairs of affiant for more than two years prior to the time the summons was served upon him, and it was the understanding of affiant that Page would act as his lawyer in this suit; that affiant did not learn that a default had been entered against him and that no plea had been filed in the case for him until the judgment was entered January 20, 1931; that he learned of the same by looking at the Commercial Reporter, which reported the entry of such judgment; that immediately after he learned that the judgment had been entered, he communicated with the office of Page and learned that he was in the trial of a liquor conspiracy case at Freeport, Illinois, acting as Assistant United States District Attorney; that Page had been actively engaged in such trial for about two weeks, and was then and had been for a long period of time prior to that, actively engaged in the preparation of the conspiracy case; that at Freeport, Page told affiant he did not understand he was to act as his attorney in the defense of this suit, and that for that reason he had not filed any plea for him; that within two or three days after his conference with Page, he employed the attorneys who now represent him and directed them to proceed to have said judgment set aside; that affiant verily believes there was a misunderstanding on the part of Page that he was to handle this case for affiant, but that it was affiant's understanding that Page would handle the case for him.

and that he has a meritorious defense to the action. Diligence on his part is as essential to his right to relief by means of his motion as it is that a good defense on its merits shall exist. Chapman v. North American Life Ins. Co. 212 Ill. App. 382. Defendant filed with his motion his affidavit in support of the same, designed to show diligence and a meritorious defense. That part of the affidavit relating to his alleged diligence sets out that immediately after the summons had been served upon him he handed the same to John H. Page, a practicing lawyer, in Rockford; that Page has handled all of the legal affairs of affiant for more than two years prior to the time the summons was served upon him, and it was the understanding of affiant that Page would act as his lawyer in this suit; that affiant did not learn that a default had been entered against him and that no plea had been filed in the case for him until the judgment was entered January 20, 1931; that he learned of the same by looking at the Commercial Reporter, which reported the entry of such judgment; that immediately after he learned that the judgment had been entered, he communicated with the office of Page and learned that he was in the trial of a liquor conspiracy case at Freeport, Illinois, acting as Assistant United States District Attorney; that Page had been actively engaged in such trial for about two weeks, and was then and had been for a long period of time prior to that, actively engaged in the preparation of the conspiracy case; that at Freeport, Page told affiant he did not understand he was to act as his attorney in the defense of this suit, and that for that reason he had not filed any plea for him; that within two or three days after his conference with Page, he employed the attorneys who now represent him and directed them to proceed to have said judgment set aside; that affiant verily believes there was a misunderstanding on the part of Page that he was to handle this case for affiant, but that it was affiant's understanding that Page would handle the case for him.

The only allegation in the affidavit pertaining to defendant's claim of diligence, prior to the entry of the judgment, is that he handed the summons to a lawyer who had handled his legal affairs for more than two years. It is not shown that he asked him to represent him in this case, or ~~during~~ that they had any conversation about the matter at that time or thereafter during the month which intervened before the first day of the term of court, or during the term before the judgment was entered. In order to justify an understanding, there must be a basis of facts from which the understanding could reasonably be drawn. The mere statement that affiant's understanding was that Page was employed is of no weight without a showing of facts upon which such understanding could reasonably be based. The only transaction between affiant and Page after the summons was served, was apparently not sufficient to give Page the understanding that he was employed.

An affidavit in support of an application to set aside a judgment by default is to be construed most strongly against the applicant. *Staunton Coal Mine Co. v. Menk*, 197 Ill. 369. It is not to be inferred that anything further was said or done that is set forth in the affidavit. No sufficient showing is made in the affidavit that defendant exercised diligence in employing counsel or otherwise.

Even if the affidavit had been sufficient to show the employment of counsel, the fact that such counsel, through press of business, failed or neglected to attend to the matter, is not sufficient to require the setting aside of a default. *Schulz v. Meiselbar*, 144 Ill. 26. *Lancaster v. Western Stoneware Co.*, 185 Ill. App. 314.

While courts should be liberal in setting aside defaults at the term at which they were rendered, where it appears justice will be promoted thereby, yet what shall be done in a particular case, must be left largely to the legal discretion of the court. *Considine v. Lee*, 105 Ill. App. 246. Motions to set

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aside such judgments are addressed to the sound discretion of the trial court, and its action in that respect will only be reversed for an abuse of discretion. Wright v. Griffey, 146 Ill. 394.

In view of what is disclosed in the record, we hold that the trial court was clearly within the rule and did not abuse his discretion in refusing to vacate the judgment, and the same is accordingly affirmed.

Judgment affirmed.

aside such judgments addressed to the sound discretion of the trial court, and its action in that respect will only be reversed for an abuse of discretion. Wright v. Grifley, 146 Ill. 394.

In view of what is disclosed in the record, we hold that the trial court was clearly within the rule and did not abuse its discretion in refusing to vacate the judgment, and the same is accordingly affirmed.

Judgment affirmed.

Before the first day of the term of court, on which the case before the judgment was entered. In order to justify an affirmance, there must be a basis of facts from which the court could reasonably be shown. The mere statement that the defendant was employed in a certain position is of no weight in itself. Showing of facts upon which such inference is made is necessary. If only transaction between defendant and State is shown, the inference was warranted, was suggested, not sufficient to affirm. The understanding that he was employed.

It is an attempt in support of an application to set aside judgment by default is to be considered most especially against the defendant. Stumton Coal Co. v. Ark. 197 Ill.

It is not to be inferred that anything further was said or done that was set forth in the affidavit. No sufficient showing is made for the affidavit that defendant exercised diligence in the prosecution of the case.

Warrant of arrest

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~xxxix~~ thirty-one

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2621A.664¹

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

25-26-1914
John Haase and William J. Carrow,
~~carpenters~~ doing business as

Haase Bros.,

Appellees

Appeal from County Court

vs.

of Peoria County.

Willis Shearer,

Appellant.

Jones, P.J:

This suit was brought before a justice of the peace by John Haase and William J. Carrow, co-partners doing business as Haase Bros., against Willis Shearer, to recover damages to their Dodge delivery truck, occasioned by a collision with the automobile of defendant. Upon a trial in that court plaintiffs recovered a judgment against defendant in the sum of \$245.65 and costs of suit. The cause was appealed to the County Court, where a jury trial resulted in a verdict and judgment for \$175 in favor of plaintiffs. This appeal followed.

The record discloses that the truck of plaintiffs was being driven by one George Jamick. Defendant was driving his own automobile. The collision occurred at the intersection of Garfield avenue and Russel street in the City of Peoria. Plaintiffs' truck was being driven north on Garfield avenue and defendant's car was proceeding east on Russel street. Both cars were considerably damaged. The testimony is in conflict on practically every material point. The questions of whether or not the driver of plaintiffs' truck was in the exercise of due care and caution immediately before and at the time of the accident, and whether or not defendant was guilty of the negligence charged against him, were questions of fact for the jury to determine. Courts of review uniformly hold that in cases where there is an irreconcilable conflict in the testimony, the verdict will not be laid aside, unless it is

John Hasse and William J. Garrow,

co-partners doing business as

Hasse Bros.,

Appellees

Appeal from County Court

of Peoria County.

vs.

Willis Shearer,

Appellant.

Jones, P.J.:

This suit was brought before a Justice of the peace by John Hasse and William J. Garrow, co-partners doing business as Hasse Bros., against Willis Shearer, to recover damages to their Dodge delivery truck, occasioned by a collision with the automobile of defendant. Upon a trial in that court plaintiff recovered a judgment against defendant in the sum of \$245.65 and costs of suit. The cause was appealed to the County Court, where a jury trial resulted in a verdict and judgment for \$175 in favor of plaintiffs. This appeal followed.

The record discloses that the truck of plaintiffs was being driven by one George Jamick. Defendant was driving his own automobile. The collision occurred at the intersection of Garfield avenue and Russell street in the City of Peoria. Plaintiffs' truck was being driven north on Garfield avenue and defendant's car was proceeding east on Russell street. Both cars were considerably damaged. The testimony is in conflict on practically every material point. The questions of whether or not the driver of plaintiffs' truck was in the exercise of due care and caution immediately before and at the time of the accident, and whether or not defendant was guilty of the negligence charged against him, were questions of fact for the jury to determine. Courts of review uniformly hold that in cases where there is an irreconcilable conflict in the testimony, the verdict will not be laid aside, unless it is

clearly and manifestly against the weight of the evidence.

We have examined the testimony as disclosed by the record, and we are of the opinion that it is sufficient to sustain the verdict. The justice of the peace before whom the cause was tried found in favor of plaintiffs, as did the jury in the County Court. The trial judge approved the verdict and rendered judgment accordingly. They saw and heard the witnesses, and in such a state of conflicting evidence their conclusion will not be disturbed. *Herman v. Wroughton*, 141 Ill. App. 353; *Melton v. Rittenhouse*, 111 Id. 30.

No other question is presented by this appeal. The judgment of the trial court is affirmed.

Judgment affirmed.

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Hearings, and we are of the opinion that it is sufficient to
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question of liability is not material. The question of whether

... not defendant was liable on the
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... there is an unreasonable conflict in the
... will not be held aside, unless it is

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 29th day of
August in the year of our Lord one thousand
nine hundred and ~~xxxix~~ thirty-one

Clerk of the Appellate Court

143 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 654²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 29 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
May Term, A. D., 1931.

CHARLES J. GRAHAM, et al,

Appellees,

vs.

AGNES I. RYAN, et al,

(BECKER ROOFING COMPANY,

a Corporation,

Appellant.

Appeal from

Circuit Court

Will County.

Opinion by Jones, J.

Charles J. Graham and Commercial Trust and Savings Bank of Joliet, Illinois, as trustee, who will be hereafter referred to as appellees, filed their bill in the circuit court of Will county, Illinois, on November 20, 1930, to foreclose a trust deed, describing certain residence property in the city of Joliet and executed by Agnes I. Ryan and James A. Ryan on April 20, 1926, to secure five notes of \$500 each, due five years from that date with interest thereon at the rate of six per cent per annum. The bill alleged default in the payment of interest and non-payment of taxes, by reason of which Charles J. Graham, the owner of said notes had elected to declare the entire sum due. James A. Ryan and his wife and several other persons, including the Becker Roofing Company, a corporation and a lien claimant, were made parties defendant. All were defaulted except the Becker Roofing Company, which filed an answer admitting it had filed a mechanic's lien against the premises and neither admitting nor denying the material allegations in the bill of appellees, but demanding strict proof thereof. On January 19, 1931 Becker

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APPELLATE COURT OF ILLINOIS
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Appeal from
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Roofing Company filed a cross-bill, naming as defendants appellees and all the defendants to the original bill. The cross-bill set forth in substance that on August 21, 1930 the roofing company entered into a written agreement with the owners of the equity of redemption in the premises to place a new roof upon the dwelling house situated thereon for the sum of \$198; that it performed its contract and the new roof was completed; that the roofing work greatly enhanced the value of the premises as a lasting and permanent improvement; that no payments had been made thereon under the roofing contract, and that its lien against the property is paramount and superior to the claim of appellees and all other persons. The prayer of the cross-bill was that the roofing company be decreed to be entitled to a prior lien upon the premises; that Ryan and his wife be required to pay the same within a short day to be fixed by the court, and that in default of such payment its lien be foreclosed and the property ordered sold under the court's direction to satisfy the lien, together with costs of suit. The cause was heard before the chancellor on the original bill and answer, the cross-bill, and a stipulation between the parties appearing of record that a general denial by answer to the cross-bill would be considered as having been filed. Proof was offered by appellees as to the execution of the notes and trust deed, the ownership of the note, and that default had been made under the provisions of the trust deed. The roofing company introduced its proof showing the written agreement with the owners for the placing of the new roof upon the house located on the premises, the cost of the roof, that its bill therefor had not been paid, and that a mechanic's lien had been properly filed as provided by law to protect its claim. It also presented evidence tending to show the increased value of the improvements after the roof was completed, and appellees offered evidence in rebuttal upon that question. On January 27, 1931 the court entered a decree of sale finding that there was due Charles J. Graham under the provisions of the notes and trust deed a total sum of \$2854.01, which was a prior lien on the

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premises and superior to the claim of any other person; that Becker Roofing Company's claim for lien in amount of \$198 was filed within the proper time required by law, but that said roof replacement did not enhance the value of the premises over and above its value prior to the time of the execution of the contract for the installation of said roof and that its claim was inferior to the lien of the trust deed. The court ordered and decreed that unless Ryan and his wife pay to Graham within five days the sum of \$2854.01 and to Becker Roofing Company the sum of \$198, with lawful interest thereon and costs of suit, including solicitor's fees, the premises be sold by the master in chancery in the usual manner provided by law. Disbursement of the proceeds for such sale were provided for in the decree. The record discloses that a sale was had under the decree and that the proceeds therefrom were insufficient to satisfy any part of the Becker Roofing Company's claim. From the decree entered the roofing company, whom we shall hereafter refer to as appellant, prayed an appeal to this court, which was granted and subsequently perfected.

Appellant contends that the chancellor should have found that appellant had a lien superior to the lien of the trust deed as to the enhanced value of the improvements on said premises by reason of the replacement of the roof by it. In support of this contention counsel for appellant asserts that the undisputed evidence shows appellant enhanced the value of the improvements of the premises; that the court should have decreed that the prior mortgagee had a prior claim on the land and whatever was on it at the time the contract for the improvements was made, and that appellant had a prior claim on the improvements which it made, to the extent of the enhanced value which it imparted to the premises; that when the premises did not sell for enough to satisfy the claims of appellees and appellant, the court should have heard further evidence to determine in what proportion each should have shared in the proceeds.

The rule for adjusting the different rights of parties

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Appellant contends that the chancellor should have found that appellant had a lien superior to the lien of the trust deed as to the enhanced value of the improvements on said premises by reason of the replacement of the roof by it. In support of this contention counsel for appellant asserts that the undisputed evidence shows appellant enhanced the value of the improvements of the premises; that the court should have decreed that the prior mortgagee had a prior claim on the land and whatever was on it at the time the contract for the improvements was made, and that appellant had a prior claim on the improvements which it made to the extent of the enhanced value which it imparted to the premises; that when the premises did not sell for enough to satisfy the claims of appellees and appellant, the court should have heard further evidence to determine in what proportion each should have shared in the proceeds.

The rule for adjusting the different rights of parties

holding separate liens upon property, which is sought to be subjected to the payment of a mechanic's lien, is, that an incumbrance anterior to the mechanic's lien takes priority over it to the extent of the value of the property at the time the mechanic's lien attached, and the mechanic's lien takes priority over the mortgage only to the extent of the additional value given to the property by the improvements. *Groskey et al vs. Northwestern Manufacturing Company*, 48 Ill. 481. In the case of *Abbau, et al vs. Grassie, et al* 191 Ill. App. 577, the court stated that under the provisions of section 16 of the Lien Act a prior mortgage lien is entitled to preference to the extent of the value of the land at the time of the making of the contract, and the mechanic's lien creditor should be preferred to the value of the improvements erected on the premises. In *Albrecht, et al, vs. Buelow*, 191 Ill. App. 481, section 16 of the present Mechanic's Lien Act was considered and the views of the Supreme Court as set forth in the early cases upon the subject were recited. The court said, "It thus appears from these cases that, under section 20 of the Act of 1845, where the owner of land improved by a building thereon, which are incumbered by a mortgage, has improvements or repairs made upon the building for which a mechanic's lien is enforced, such lien is paramount to the lien of the mortgage to the extent of the increased value of the premises by reason of the improvements or repairs. And it also appears from these cases that, after it has been determined that the mechanic has a lien, and in what amount, and that his lien is superior to the lien of the mortgage as to a portion of the premises as improved, it is not necessary, though proper, for the court to determine, before entering a decree of sale, what proportion of the proceeds of the sale shall be paid to the lien holder and what to the prior mortgagee. The proper proportion may be ascertained by the taking of evidence after the sale. And the taking of this evidence may be unnecessary, where the property sells for enough to satisfy the lien of the mortgagee and that of the mechanic in full. Inasmuch as section 16 of the present Act does not differ materially from section 20 of the Act of 1845, we think that these rulings

holding separate liens upon property, which is sought to be subjected to the payment of a mechanic's lien, is, that an incumbrance anterior to the mechanic's lien takes priority over it to the extent of the value of the property at the time the mechanic's lien is attached, and the mechanic's lien takes priority over the mortgage only to the extent of the additional value given to the property by the improvements. *Groskey et al vs. Northwestern Manufacturing Company*, 48 Ill. 481. In the case of *Abhan, et al vs. Grassie, et al*, 191 Ill. App. 577, the court stated that under the provisions of section 18 of the Lien Act a prior mortgage lien is entitled to preference to the extent of the value of the land at the time of the making of the contract, and the mechanic's lien creditor should be preferred to the value of the improvements erected on the premises. In *Albrecht, et al, vs. Buelow*, 191 Ill. App. 481, section 18 of the present Mechanic's Lien Act was considered and the views of the Supreme Court as set forth in the early cases upon the subject were recited. The court said, "It thus appears from these cases that, under section 20 of the Act of 1845, where the owner of land improved by a building thereon, which are incumbered by a mortgage, has improvements or repairs made upon the building for which a mechanic's lien is enforced, such lien is paramount to the lien of the mortgage to the extent of the increased value of the premises by reason of the improvements or repairs. And it also appears from these cases that, after it has been determined that the mechanic has a lien, and in what amount, and that his lien is superior to the lien of the mortgage as to a portion of the premises as improved, it is not necessary, though proper, for the court to determine before entering a decree of sale, what proportion of the proceeds of the sale shall be paid to the lien holder and what to the prior mortgagee. The proper proportion may be ascertained by the taking of evidence after the sale. And the taking of this evidence may be unnecessary, where the property sells for enough to satisfy the lien of the mortgage and that of the mechanic in full. Inasmuch as section 18 of the present Act does not differ materially from section 20 of the Act of 1845, we think that these rulings

are applicable to the present act. "

The principles announced are not applicable here unless it appears that the roof replacement enhanced the value of the improvements on the property. Upon that subject the record discloses appellant offered the proof of one witness, who testified in substance that he was the Joliet branch manager of appellant and had been with the company for eighteen years; that he sold the roof to the owners August 20, 1930 for \$198, and the work of installing the roof was completed that month; that the property was worth about \$4000 to \$4500 before the new roof was placed on the building and the roof improvement was probably worth approximately \$400 more to the property, because of the appearance it added to the property and that it made the roof leak proof and fire-resisting. He stated that he did not examine the property in 1926, but that its value was the same over the period of four years prior to the roof installation; that the old roof was wooden shingles and part composition roofing; that he did not know whether the old roof leaked; that he did not examine the old roof before the work was done; that he did not know whether the new roof gave any more protection to the building from the elements or that the new roof was serving the building better than the old roof did. Appellees offered the testimony of one witness, Charles J. Graham, on the question of enhancement of value due to the roof replacement. He testified in substance that he was an appraiser for the Woodruff Securities Company and had been doing such work for that company for three and one half years; that during the year he would make about 350 real estate appraisals in and near the city of Joliet; that he was formerly associated with a real estate firm and did similar appraisal work. He stated he had known the Ryan property since April, 1926, and had seen it from time to time since then; that the house was about forty-five years old; that he observed the roof, which consisted of wooden shingles and a tar paper roofing over it, a short time before August, 1930, and it appeared to be in good condition except where about a square yard of covering

and applicable to the present act. " The principles announced are not applicable here unless it appears that the roof replacement enhanced the value of the improvements on the property. Upon that subject the record discloses appellant offered the proof of one witness, who testified in substance that he was the Joliet branch manager of appellant and had been with the company for eighteen years; that he sold the roof to the owners August 20, 1930 for \$198, and the work of installing the roof was completed that month; that the property was worth about \$4000 to \$4500 before the new roof was placed on the building and the roof improvement was probably worth approximately \$400 more to the property, because of the appearance it added to the property and that it made the roof leak proof and fire-resisting. He stated that he did not examine the property in 1926, but that its value was the same over the period of four years prior to the roof installation; that the old roof was wooden shingles and part composition roofing; that he did not know whether the old roof leaked; that he did not examine the old roof before the work was done; that he did not know whether the new roof gave any more protection to the building from the elements or that the new roof was serving the building better than the old roof did. Appellees offered the testimony of one witness, Charles J. Graham, on the question of enhancement of value due to the roof replacement. He testified in substance that he was an appraiser for the Woodruff Securities Company and had been doing such work for that company for three and one half years; that during the year he would make about 350 real estate appraisals in and near the city of Joliet; that he was formerly associated with a real estate firm and did similar appraisal work. He stated he had known the Ryan property since April, 1926, and had seen it from time to time since then; that the house was about forty-five years old; that he observed the roof, which consisted of wooden shingles and a tar paper roofing over it, a short time before August, 1930, and it appeared to be in good condition except where about a square yard of covering

on the south side of the house had been blown off. He testified that the new roofing was a roll roofing marked off like shingles and was put on over the old shingles; that he was perhaps prejudiced against that particular kind of roofing and felt that it added nothing to the value of the property. He said if all the composition roofing had been taken off and the wood shingles left on the property would sell for more or at least just as much as it would with the new roll roofing. The witness further stated that the property was worth not to exceed \$3000, and he would be willing to turn over the property to appellant for one hundred dollars less than that amount; that from his observation of the property before and after the roof was put on by appellant, there was no appreciation in the value of the property as a result of the addition of the roof.

It will be seen that there is conflict in the proof as to the value of the property as well as in the alleged enhancement thereof by reason of the roof replacement. The chancellor found that the roof improvement did not enhance the value of the premises above its value prior to the time of the making of the contract for the roof, and we are not disposed to disturb the finding upon such a question of fact. Where the chancellor sees and hears the witnesses, his findings upon mere questions of fact, when the testimony is conflicting, will not be disturbed on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. *Delaney vs. Delaney*, 175 Ill. 187; *Gaines vs. Kracke*, 338 Ill. 172; We are unable to say from an examination of this record that the findings and decree of the chancellor are so palpably against the weight of the evidence as to justify a reversal of the decree.

The decree of the circuit court of Will county will therefore be affirmed.

Decree affirmed.

on the south side of the house had been blown off. He testified that the new roofing was a roll roofing marked off like shingles and was put on over the old shingles; that he was perhaps prejudiced against that particular kind of roofing and felt that it added nothing to the value of the property. He said if all the composition roofing had been taken off and the wood shingles left on the property would sell for more or at least just as much as it would with the new roll roofing. The witness further stated that the property was worth not to exceed \$5000, and he would be willing to turn over the property to appellant for one hundred dollars less than that amount; that from his observation of the property before and after the roof was put on by appellant, there was no appreciation in the value of the property as a result of the addition of the roof. It will be seen that there is conflict in the proof as to the value of the property as well as in the alleged enhancement thereof by reason of the roof replacement. The chancellor found that the roof improvement did not enhance the value of the premises above its value prior to the time of the making of the contract for the roof, and we are not disposed to disturb the finding upon such a question of fact. Where the chancellor sees and hears the witnesses, his findings upon mere questions of fact, when the testimony is conflicting, will not be disturbed on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. *Deaney vs. Deaney*, 175 Ill. 187; *Gaines vs. Kroke*, 338 Ill. 173. We are unable to say from an examination of the record that the findings and decree of the chancellor are so palpably against the weight of the evidence as to justify a reversal of the decree. The decree of the circuit court of Will county will therefore be affirmed.

Decree affirmed.

Reversed, which was affirmed in 1908.

over it, a short time before the
the good condition except where the

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

144 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 I.A. 664³

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 10 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IDA J. HENKE,

Appellant

Appeal from the Circuit

vs.

Court of Du Page County

THE ESTATE OF THOMAS J.
CALE, Deceased,

Appellee

Jett, J.

Ida J. Henke, appellant, filed a claim for \$50,000.00, in the County Court of Du Page County on the 13th day of August 1928, against the estate of Thomas J. Cale, deceased, and the basis of said claim is as follows:

"Estate of Thomas J. Cale, Sr.

Debtor to Ida J. Henke

Services rendered by Ida J. Henke to, and for, said Thomas J. Cale, Sr., as his housekeeper and manager of his home, and nursing and care during sickness and health, and services rendered for his comfort and enjoyment during the remainder of his life, all of which was fully performed by Ida J. Henke in accordance with the agreement of said decedent, made on or about March 1, 1915, and for which services said decedent promised and agreed that he would at his death, by last will and testament, will and devise to her the sum of \$50,000.00."

On a hearing in the county court, the said claim was disallowed. The claimant prosecuted an appeal to the Circuit Court. In the Circuit Court a jury was waived, and a trial had by the court without the intervention of a jury, with a finding in favor of the estate.

The claimant, appellant herein, has prosecuted this appeal with a view of having the record of the Circuit Court of Du Page County reviewed.

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On a hearing in the county court, the said claim was

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at his death, by last will and testament, will and devise

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decedent, made on or about March 1, 1915, and for which

by Ida J. Henke in accordance with the agreement of said

the remainder of his life, all of which was fully performed

and services rendered for his comfort and enjoyment during

home, and nursing and care during sickness and health,

Thomas J. Galt, Sr., as his housekeeper and manager of his

Services rendered by Ida J. Henke to, and for, said

Debtor to Ida J. Henke

"Estate of Thomas J. Galt, Sr.

and the basis of said claim is as follows:

August 1928, against the estate of Thomas J. Galt, deceased,

in the County Court of De Page County on the 13th day of

Ida J. Henke, appellant, filed a claim for \$50,000.00,

Ida J.

Appellee

THE ESTATE OF THOMAS J.
GALT, Deceased,

vs.

Court of De Page County
Appeal from the Circuit

Appellant

IDA J. HENKE,

Gen. No. 8261

Page 16

It appears from the record that the appellant's claim is based on an alleged promise of Thomas J. Caie, Sr., Deceased, that if Ida J. Henke, appellant, would leave her home in Cincinnati, where Thomas J. Caie, Sr., formerly resided, and go with him to Chicago and be his housekeeper, he would in his will bequeath to her \$50,000.00.

It appears that Thomas J. Caie, Sr., lived with his wife in Cincinnati, Ohio, for a number of years, and was engaged in the book publishing business; that in June 1914, Mrs. Caie departed this life; that at the time of her death, and for some time prior thereto, two maids had been kept in the home, one of whom was Ida J. Henke, appellant; that Caie had a branch office in Chicago, and in February 1915, he decided to go there; that he leased his home in Cincinnati and went to Chicago, the two maids accompanying him; that the appellant was receiving a wage of \$7.00 per week; that Caie rented an apartment in Chicago and appellant continued in his employ while he was there; later on Caie bought a house in Glen Ellyn, and occupied the same until the time of his death; that appellant continued in his employ and her wages were increased from time to time, and at the time of the death of Caie and for some time prior thereto, he had been paying the appellant \$30.00 per week; that Caie departed this life testate, on or about, the 29th of April, 1928, at Glen Ellyn; that in, and by his last will and testament, he appointed Thomas J. Caie, Jr., Herbert H. Stanley and Ralph B. Treadway, executors of his will; that proof of heirship was made and entered on May 7, 1928, and that on June 4, following, letters testamentary were issued to the executors herein above named.

On the hearing, the inventory that had been filed with the executors was admitted in evidence showing the estate of Thomas J. Caie, Sr., to be of the value of \$204,453.27.

The will of the deceased was offered and received in

It appears from the record that the appellant's claim is based on an alleged promise of Thomas J. Galt, Sr., deceased, that if Ida J. Henke, appellant, would leave her home in Cincinnati, where Thomas J. Galt, Sr., formerly resided, and go with him to Chicago and be his housekeeper, he would in his will bequeath to her \$50,000.00.

It appears that Thomas J. Galt, Sr., lived with his wife in Cincinnati, Ohio, for a number of years, and was engaged in the book publishing business; that in June 1914, Mrs. Galt departed this life; that at the time of her death, and for some time prior thereto, two maids had been kept in the home, one of whom was Ida J. Henke, appellant; that Galt had a branch office in Chicago, and in February 1915, he decided to go there; that he leased his home in Cincinnati and went to Chicago, the two maids accompanying him; that the appellant was receiving a wage of \$7.00 per week; that Galt rented an apartment in Chicago and appellant continued in his employ while he was there; later on Galt bought a house in Glen Ellyn, and occupied the same until the time of his death; that appellant continued in his employ and her wages were increased from time to time, and at the time of the death of Galt and for some time prior thereto, he had been paying the appellant \$50.00 per week; that Galt departed this life testate, on or about, the 23rd of April, 1928, at Glen Ellyn; that in, and by his last will and testament, he appointed Thomas J. Galt, Jr., Herbert H. Stanley and Ralph B. Treadway, executors of his will; that proof of heirship was made and entered on May 7, 1928, and that on June 4, following, letters testamentary were issued to the executors herein above named.

On the hearing, the inventory that had been filed with the executors was admitted in evidence showing the estate of Thomas J. Galt, Sr., to be of the value of \$204,453.27.

The will of the deceased was offered and admitted in

evidence, and the third clause thereof reads as follows:

THIRD. "I hereby give and bequeath to Ida J. Henke, who has been long in my employ as my housekeeper, the sum of \$10,000.00, and also all the furnishings of the room which she has occupied in my residence, all to be hers absolutely in appreciation of her faithful services as my housekeeper. It is further my will that said bequest of \$10,000.00 to said Ida J. Henke shall be the full net sum of \$10,000.00, and that if there be any estate inheritance or other taxes due and payable thereon, my said executors shall pay same as part of the costs of administration ~~off~~ of the remainder of my estate, and not out of said bequest of \$10,000.00. It is also my will that said bequest shall be paid by my said executors, before any of the bequest by me hereinafter made."

The appellant remained at the home where the deceased resided at the request of the executors, until the house was closed.

It appears that the body of the deceased was taken to Ohio for burial; that when the relatives and appellant had returned from the funeral at Cincinnati, Treadway read the will to those assembled at the late residence of the deceased, including appellant; that after the will was read appellant Henke asked whether her services would be needed longer and Treadway replied to her, that he assumed, of course, that she would be wanted; that the relatives would be there until the house was closed; appellant then inquired if she were to be paid, and Treadway said she would, and Thomas J. Gaie, Jr., another executor said: "Yes, we will pay you the same we had, that is, we have been paying or that Mr. Gaie had been paying, and we will pay two weeks extra as vacation money, and we will make allowance for a trip to Cincinnati if you want to go." Appellant then asked if she would be allowed to retain Martha the maid, which she was permitted to do.

Treadway saw appellant after the will was read several times before the house was closed, and communicated with her; that on or about the 11th day of May 1928, Treadway saw the

evidence, and the third clause thereof reads as follows:

THIRD. "I hereby give and bequeath to Ida J. Henke, who has been long in my employ as my housekeeper, the sum of \$10,000.00, and also all the furnishings of the room which she has occupied in my residence, all to be hers absolutely in appreciation of her faithful services as my housekeeper. It is further my will that said bequest of \$10,000.00 to said Ida J. Henke shall be the full net sum of \$10,000.00, and that if there be any estate inheritance or other taxes due and payable thereon, my said executors shall pay same as part of the costs of administration out of the remainder of my estate, and not out of said bequest of \$10,000.00. It is also my will that said bequest shall be paid by my said executors, before any of the bequest by me hereinafter made."

The appellant remained at the home where the deceased resided at the request of the executors, until the house was closed.

It appears that the body of the deceased was taken to Ohio for burial; that when the relatives and appellant had returned from the funeral at Cincinnati, Treasway read the will to those assembled at the late residence of the deceased, including appellant; that after the will was read appellant Henke asked whether her services would be needed longer and Treasway replied to her, that he assumed, of course, that she would be wanted; that the relatives would be there until the house was closed; appellant then inquired if she were to be paid; and Treasway said she would, and Thomas, also, said, "Yes, we will pay you the same we had, that is, we have been paying on that Mr. Gale had been paying, and we will pay two weeks extra as vacation money, and we will make allowance for a trip to Cincinnati if you want to go." Appellant then asked if she would be allowed to remain in the house, which she was permitted to do.

Treasway saw appellant after the will was read several times before the house was closed, and communicated with her; that on or about the fifth day of May 1928, Treasway saw the

appellant at the late residence of the deceased and had a conversation with her, and informed her he was ready to pay her what was due and that he wanted a receipt for it; Treadway read the receipt and in substance stated, "Miss Henke this is a receipt in full, an acknowledgment in full of all payments due you from the estate of Mr. Galt, except the \$10,000.00 legacy, which is provided for you in the will;" that Treadway handed her the paper and asked her to read it; that when the receipt was handed to the appellant to read, she took it, looked at it, and signed it, returned it to Treadway, and he gave her his check for the amount stated in the receipt, and which was afterwards returned to Treadway in due course of banking, as paid; that in June 1928, the appellant called on Treadway at his office and asked when she could get the \$10,000.00, and was told that the executors had decided to pay her the \$10,000.00 shortly after the 1st of July, as they had some stock belonging to the estate that had been called for payment; that shortly after the 1st of July Treadway advised the appellant that the executors were ready to pay the \$10,000.00, and sent a form of receipt to be signed by her, to be sent to a Mr. Bogan of the Du Page Trust Company, or to the Bank to be turned over to him upon the payment of the \$10,000.00; that shortly thereafter, Treadway received a letter from a Mr. Shuey, counsel for appellant, dated July 20, 1928, in which letter among other things the following appeared: "In behalf of my client Miss Ida Henke, will say that I have advised my client to sign the release drawn by you when the amount of the legacy, \$10,000.00, including the interest thereon from the date of the death until legacy is paid is sent to Mr. Harvey Krapf, Secretary & Treasurer of the Fifth Third Bank & Trust Company, 6th and Vine, Cincinnati, Ohio. This release will then be signed at the bank and presented for payment. There should not be any hesitancy in complying with this request immediately, as my client seems to be on the verge of changing her mind on account of the inadequacy of

at the residence of the deceased and had a conversation with her, and informed her he was ready to pay her what was due and that he wanted a receipt for it; Treasway read the receipt and in substance stated, "Miss Henke this is a receipt in full, an acknowledgment in full of all payments due you from the estate of Mr. Dale except the \$10,000.00 legacy, which is provided for you in the will;" that Treasway handed her the receipt and asked her to read it; that when the receipt was handed to the appellant to read, she took it, looked at it, and signed it, returned it to Treasway, and he gave her his check for the amount stated in the receipt, and which was afterwards returned to Treasway in due course of banking, as said; that in June 1928, the appellant called on Treasway at his office and asked when she could get the \$10,000.00, and was told that the executors had decided to pay her the \$10,000.00 shortly after the 1st of July, as they had some stock belonging to the estate that had been called for payment; that shortly after the 1st of July Treasway advised the appellant that the executors were ready to pay the \$10,000.00, and a form of receipt to be signed by her, to be sent to a Mr. Hogan of the Du Page Trust Company, or to the Bank to be turned over to him upon the payment of the \$10,000.00; that shortly thereafter, Treasway received a letter from a Mr. Shaw, counsel for appellant, dated July 30, 1928, in which letter among other things the following appeared: "In behalf of my client Miss Ida Henke, I say that I have advised my client to sign the release drawn by you when the amount of the legacy, \$10,000.00, including the interest thereon from the date of the death until legacy is paid is sent to Mr. Harvey Kripp, Secretary & Treasurer of the Fifth This Bank & Trust Company, 6th and Vine, Cincinnati, Ohio. This release will then be signed at the bank and presented for payment. There should not be any hesitancy in complying with this request immediately, as my client seems to be on the verge of liquidation and will not be able to pay the legacy."

the amount of this legacy."

To the letter of Shuey written in behalf of the appellant, Treadway replied, raising a question as to the right of the executors to pay interest on the legacy unless they withheld payment after proper settlement date, and asked Shuey to cite any authority which would justify the payment of interest. In this letter Treadway also called attention to the fact that the trustees were going ^{out} of their way to pay the legacy promptly so that the appellant could get it as soon as possible, and concluded his letter by saying that if Mr. Shuey agreed with him as to the law, and would so advise him, he would forward the check for \$10,000.00 as directed in the letter of Shuey.

This was the status of this cause when the claim was filed in the County Court of Du Page County, claiming the sum of \$50,000.00.

The claim of appellant is based on an alleged promise of said deceased, that if appellant would leave her home in Cincinnati, where Caie formerly lived, and go with him to Chicago and be his housekeeper, he would in his will bequeath to her \$50,000.00. Appellant had lived in the family of Caie, and was living there at the time of the death of his wife. Upon the death of his wife, Caie having large interests in Chicago contemplated moving there, and it is the contention of appellant that he promised her that ~~if~~ she would go with him to Chicago and be his housekeeper he would leave her \$50,000.00, by way of a bequest.

the
Emma Louisa Henke, sister of the appellant, is/a witness who testified to the alleged promise. She testified to being at the home of Caie frequently; to the going through the house and wandering about the same. This question was asked the witness, "State what he said in regard to anything connected with your sister." A. 'Well, the first time he spoke about wanting to go to Chicago, he asked Ida (appellant) if she would come with him and she didn't give him much satisfaction at that time * * * she didn't say much. The first time he just said he wanted to come to Chicago to live. And the second

the amount of this legacy."

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Cincinnati, where Gate formerly lived, and go with him to
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and was living there at the time of the death of his wife.

Upon the death of his wife, Gate having large interests in
Chicago contemplated moving there, and it is the contention
of appellant that he promised her that if she would go with

him to Chicago and be his housekeeper he would leave her

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The witness Emma Louise Herke, sister of the appellant, testified to being
who testified to the alleged promise. She testified to being

at the home of Gate frequently; to the going through the house
and wandering about the same. This question was asked the

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with your sister." A. "Well, the first time he spoke about
wanting to go to Chicago, he asked me (appellant) if she

would come with him and she didn't give him much satisfaction
at first time * * she didn't say much. The first time he
last said he wanted to come to Chicago to live. And the second

conversation took place, I remember distinctly, in February, I happened to be there * * * the latter part of February 1915." The witness then related how she and her sister, Ida, were in the hall when Mr. Caie came in on this February day; how Mr. Caie said to her, "How do you do," and shook hands and spoke about the weather for a moment or so, and then spoke to her sister Ida, saying: "I have leased my house today. Have you made up your mind to come to Chicago with me?" and my sister said: "Oh Mr. Caie, I don't think I want to leave Cincinnati, I can't leave my home and my friends, I don't think I want to go." "Well, Mr. Caie said, "Ida, I will tell you what I will do. I am an old man. You know my manner of living, and if you come to Chicago with me, and take care of me, keep house for me until I die, I will leave you \$50,000.00 in my will." My sister said, "Well, all right, Mr. Caie, I will go," and he said, "Very well, I will go to Florida. If you will pack my grip, I will go to Florida, and I will leave the packing of the furniture to you. I will call Mr. Todd," who was a neighbor across the street, "to attend to the packing of it, and I will write you just where I will meet you on my return from Florida."

Appellant also called a witness by the name of Lee Farnsworth, who testified that he was an intimate and close friend of Caie, the deceased; that the reputation of Caie had been good, and that he kept his promises; that Caie told him that he was going to leave her, naming claimant, \$50,000.00.

Mrs. Margaret Farnsworth, called by the claimant, testified that the reputation of Caie in Glen Ellyn was good; that Caie told her what Ida Henke had done for him; that he was providing for her very well in his will, and that he was leaving her \$50,000.00; that Caie had practically said the same thing to her in other conversations.

J. W. Young, called by the claimant, testified that the reputation of Caie for honesty and integrity was absolutely the best in the world; that he had talked with Caie about various matters connected with Ida Henke, claimant; that he

conversation took place, I remember distinctly, in February, I happened to be there * * * the latter part of February 1915. The witness then related how she and her sister, Ida, were in the hall when Mr. Galt came in on this February day; how Mr. Galt said to her, "How do you do," and shook hands and spoke about the weather for a moment or so, and then spoke to her sister Ida, saying: "I have leased my house today. Have you made up your mind to come to Chicago with me?" and My sister said: "Oh Mr. Galt, I don't think I want to leave Cincinnati, I can't leave my home and my friends, I don't think I want to go." "Well," Mr. Galt said, "Ida, I will tell you what I will do. I am an old man. You know my manner of living, and if you come to Chicago with me, and take care of a keep house for me until I die, I will leave you \$50,000.00 in my will." My sister said, "Well, all right, Mr. Galt, I will go," and he said, "Very well, I will go to Florida. If you will pack my grip, I will go to Florida, and I will leave the packing of the furniture to you. I will call Mr. Todd, who was a neighbor across the street, to attend to the packing of it, and I will write you just where I will meet you on my return from Florida." There was an end of the conversation. Upon the appellant also called a witness by the name of Lee Barnworth, who testified that he was an intimate and close friend of Galt, the deceased; that the reputation of Galt had been good, and that he kept his promises; that Galt told him that he was going to leave her, naming claimant, \$50,000.00. Mrs. Margaret Barnworth, called by the claimant, testified that the reputation of Galt in Glen Ellyn was good; that Galt told her what Ida Henke had done for him; that he was providing for her very well in his will, and that he was leaving her \$50,000.00; that Galt had previously said the same thing to her in other conversations. J. W. Young, called by the claimant, testified that the reputation of Galt for honesty and integrity was absolutely the best in the world; that he had talked with Galt about various matters connected with the Henke claimant; that Galt

told him how faithful Miss Henke had been, and he was going to leave her \$50,000.00 when he died, because she had given the best part of her life for him.

Mrs. Margaret Drummond was a witness for appellant and testified that she never met Gaie except at the Farnsworth home; that she had been ill, and to get away from housework, was staying at the Farnsworth office in Glen Ellyn, answering the telephone calls and meeting people who called; that Gaie often came in the office and would talk with her about home matters, that it was in the latter part of '26 or in the spring of '27. The witness was unable to fix the date of any conversation with Gaie relating to Ida J. Henke. She testified ~~that~~ on direct examination as follows: "Well, we were speaking of ill-health, mine was very poor. I learned that Miss Henke was quite ill and I said, 'It would be too bad if anything happened to you,' he said, 'Well, she will be well taken care of when I die, I promised her if she would stay with me until I died, I promised to give her \$50,000.00.' I don't know that those were his exact words, that was pretty nearly what he said." When asked by counsel for claimant if Mr. Gaie said when this agreement was ~~made~~ made, the witness answered, "I think he told me he promised her that before he came up from Cincinnati if she would stay with him. I believe he said he promised her that if she would come up from Cincinnati with him."

On the cross-examination of this witness she was interrogated about a question asked her in the County Court as follows: "Mrs. Drummond, did you ever have a conversation with Mr. Gaie to any matter concerning Miss Ida J. Henke? Answer that yes or no and did you answer, yes? A. 'I think I did.' Q. "were you asked this question, 'when was that', and did you make this answer, 'I think that was in the spring about 1925?'" A. "Well I may have had that conversation in '25, but I remember distinctly being in the office in '27, I don't think it was in '25, it may have been in Mr. Farnsworth's home."

Ethel B. Lindh was called as a witness on the part of the

happened to be there

told him how faithful Miss Henke had been, and he was going to leave her \$50,000.00 when he died, because she had given the best part of her life for him.

Mrs. Margaret Hammond was a witness for applicant and testified that she never met Gale except at the Hammond home; that she had been ill, and so got away from housework, was staying at the Hammond office in Glen Ellyn, answering the telephone calls and meeting people who called; that Gale often came in the office and would talk with her about home matters, that it was in the latter part of '86 or in the spring of '87. The witness was unable to fix the date of any conversation with Gale relating to Ida L. Henke. She testified that on direct examination as follows:

"Well, we were speaking of ill-health, mine was very poor. I learned that Miss Henke was quite ill and I said, 'It would be too bad if anything happened to you,' he said, 'Well, she will be well taken care of when I die, I promised her if she would stay with me until I died, I promised to give her \$50,000.00. I don't know that those were his exact words, that was pretty nearly what he said.' When asked by counsel for applicant if Mr. Gale said when this agreement was made, the witness answered, "I think he told me he promised her that before he came up from Cincinnati if she would stay with him. I believe he said he promised her that if she would come up from Cincinnati with him." Q. On the cross-examination of this witness she was interrogated about a question asked her in the County Court as follows: "Mrs. Hammond, did you ever have a conversation with Mr. Gale to any matter concerning Miss Ida L. Henke? Answer that yes or no and did you answer, yes? A. I think I did. Q. Were you asked this question, 'when was that', and did you make this answer, 'I think that was in the spring about 1887'? A. "Well, I may have had that conversation in '85, but I remember distinctly being in the office in '87, I don't think it was in '85. It may have been in Mr. Hammond's home. " Q. When was called as a witness on the part of the

estate and testified that she was a niece of Gais, deceased, and that she knew Ida Henke; that she was at Gais's house in June and July 1918, in Hyde Park, Chicago; that she had a conversation with Ida pertaining to finances; that Ida said she had a talk with Mr. Gais, and he said he would leave her \$1000.00, and she said she should at least get \$10,000.00.

James G. Clark, called on behalf of the estate, testified that he was a Public Accountant, had been employed with Arthur Anderson & Company, public accountants, and went from that company with Thomas J. Gais in 1923, as the office manager; that Gais stated to him he was going to leave \$10,000.00 to Miss Henke, and that he and Gais computed the inheritance tax on that amount.

William J. Morris, a witness on the part of the estate, testified that on the train when Farnsworth and Gais were on their way to Europe, that only Farnsworth, Gais and himself were present in the smoking compartment; that there was a conversation in Farnsworth's presence in which Gais said, "Well, I am taking care of Tom and Herbie, and I am taking care of Ida. I don't think she will have to work very hard, she saved up some money I think, and I am going to leave her \$10,000.00." Mr. Farnsworth heard that, he was standing there."

The record discloses that the claimant was a maid in the household of Gais in Cincinnati receiving \$7.00 a week; that she was retained in his employ for a period of about eleven years, and her wages were advanced from time to time from \$7.00 to \$30.00 a week; that after the death of the deceased, and after the funeral when they had returned and assembled at the residence of the deceased, the will was read, and she remained at the late residence of the deceased for some time afterwards, receiving the same pay she had received at the time of the death of the deceased; that she received from one of the executors of the estate a sum of money due her for her services and receipted for the same, and in which receipt it was stated that it was in

estate and testified that she was a niece of Gail, deceased; and that she knew Ida Hanks; that she was at Gail's house in June and July 1918, in Hyde Park, Chicago; that she had a conversation with Ida pertaining to finances; that Ida said she had a talk with Mr. Gail, and he said he would leave her \$1000.00, and she said she should at least get \$10,000.00.

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full payment, of any and all claims, for services or otherwise, against Thomas J. Gaie, deceased, with the exception only, of a certain legacy of \$10,000.00, provided by the will of said Thomas J. Gaie; that subsequently the claimant went to the executor and inquired when she would get the \$10,000.00 and she was informed that she would get the same shortly after the 1st of July; that after the 1st of July 1928, the executor informed the claimant that they were ready to pay the \$10,000.00, and a few days later the executors received the letter from Mr. Shuey heretofore referred to in this opinion.

In view of what is disclosed by this record, the question is, has the appellant established her claim as the law requires in such cases. In order to establish a claim of this character, the court should be satisfied from the entire record that the claimant had proved her case by the greater weight of the evidence. This case is based upon the recollection of the respective witnesses as to what was said by the deceased, Gaie, on the occasions alluded to by them. The deceased made provision for the claimant. He devised to her \$10,000.00. He was desirous that she should have the full \$10,000.00 without any sum or sums being deducted therefrom by virtue of any law in force or might be in force at the time of his decease.

It is disclosed by the evidence and it is uncontradicted, that he, with his manager, figured up the amount of the inheritance tax on \$10,000.00. The appellant was willing to accept the sum of \$10,000.00 until a short time before the claim was filed. Up to the time of the filing of the claim no objection had been made by the claimant although she saw some of the executors frequently.

It is also in evidence on the part of the claimant that the deceased was a man of his word; that he lived up to his promises. It is in evidence that he had stated that he intended leaving to the appellant \$10,000.00.

full payment, of any and all claims, for services or otherwise, against Thomas J. Galt, deceased, with the exception only, of a certain legacy of \$10,000.00, provided by the will of said Thomas J. Galt; that subsequently the claimant went to the executor and inquired when she would get the \$10,000.00 and she was informed that she would get the same shortly after the 1st of July; that after the 1st of July 1928, the executor informed the claimant that they were ready to pay the \$10,000.00, and a few days later the executor received the letter from Mr. Galt with Thomas J. Galt in it, in which he referred to in this opinion. In view of what is disclosed by this record, the question is, has the appellant established her claim as the law requires in such cases. In order to establish a claim of this character, the court should be satisfied from the entire record that the claimant had proved her case by the greater weight of the evidence. This case is based upon the recollection of the respective witnesses as to what was said by the deceased, Galt, on the occasion alluded to by them. The deceased made provision for the claimant. He devised to her \$10,000.00. He was desirous that she should have the full \$10,000.00 without any sum or sums being deducted therefrom by virtue of any law in force or might be in force at the time of his decease. It is disclosed by the evidence and it is uncontradicted, that he, with his manager, figured up the amount of the inheritance tax on \$10,000.00. The appellant was willing to accept the sum of \$10,000.00 until a short time before the claim was filed. Up to the time of the filing of the claim no objection had been made by the claimant although she saw some of the contents of the document for some time. The appellant frequently stated that she had received at the time of the claim that it is also in evidence on the part of the claimant that the deceased was a man of his word; that he lived up to his word. It is in evidence that he had stated that he intended leaving to the appellant \$10,000.00.

We are not unmindful of the fact that the appellant insists that she has established her claim by a preponderance of the testimony, and it may appear that the evidence offered by appellant is sufficient to make a *prima facie* case for her, but in considering the entire record, and giving to the findings of the trial judge the weight that should be given to such findings, he having seen and heard the witnesses testify, we are not prepared to say that we would be justified in reversing the judgment on the ground that the same was against the manifest weight of the evidence.

Unless we are able to say that the judgment is manifestly against the weight of the evidence, we would not be authorized to reverse the judgment. We conclude therefore, that the judgment of the Circuit Court of Du Page County should be affirmed, which is accordingly done.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

 In Testimony Whereof, I hereunto set my hand and affix the seal of
 said Appellate Court, at Ottawa, this_____day of
 _____in the year of our Lord one thousand
 nine hundred and twenty-_____

158 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

202 I.A. 884⁴

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AXEL A. LUNDQUIST,

Appellee

vs.

CLARENCE H. PALMER,

Appellant

Appeal from the Circuit Court
of De Kalb County.

Jett, P. J.

This is an action of debt brought by Axel A. Lundquist, appellee, against Clarence H. Palmer, appellant, in the Circuit Court of De Kalb County. The declaration consists of three counts. The first and second counts are statutory counts for wilful holding over of the premises after the expiration of the terms of the lease in question. The third count is for use and occupancy of the two story brick building, located at 223 East Lincoln Highway, in the city of DeKalb, there being two separate leases, one for the first floor of the building and one for the basement.

The declaration avers that the lease became effective October 1, 1917, and expired October 1, 1927. The controversy in this proceeding arises over the months of October, November, December and eight days in January, the appellant having vacated the premises on the 8th day of January, 1928. A jury trial was had and the following verdict was returned: "We the jury find the issues joined in favor of plaintiff and assess plaintiff's damages at Eleven Hundred Thirty-eight dollars and No/100 Dollars." Motions were made for new trial and in arrest of judgment, which were overruled and judgment was entered on the verdict, from which appellant appeals to this court to have the record reviewed.

Appellant assigns and argues a number of reasons for reversal of the judgment.

One of the grounds relied upon by the appellant for a reversal of the judgment is that the court erred in allowing

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Test. P. 1.

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One of the grounds relied upon by the appellant for a

reversal of the judgment is that the court erred in allowing

appellee to amend his declaration by increasing the amount of the ad damnum. Under the Practice Act the court was clearly within the rule in allowing the amendment.

It is also urged that it was error to refuse to require appellee to elect as to which count of the declaration he would proceed under. The premises described in each of the three counts of the declaration are identical; the period of time in each count during which the appellant is alleged to have held over, was the same, and each count sought to recover rent for the use of the premises, the only difference being that the first two counts sought to recover double the yearly value of the premises for the period appellee was kept out of possession, and the third sought to recover for the use and occupation of said premises for the same period.

The counts of the declaration are not inconsistent, and under the well established rule of common law pleadings, it was proper to join said counts in the same declaration. This rule applies to an action of debt as well as to other actions.

The long established rule of common law pleadings that actions can be joined in which the same plea can be pleaded and the same judgment rendered, is applicable to the joinder of counts in debt in which action counts on all the various forms of obligations under which it is brought, may be united in one suit. 18 Corpus Juris, page 15.

In *Bright vs Kenefick*, 69 Ill. App. 43, the court held, "In an action of debt brought on a foreign judgment, the declaration contained two counts upon the judgment and two counts upon the draft or bill of exchange, which formed the basis of the action in the foreign state upon which the judgment was obtained, and it was held that the plaintiff was not required to elect as to whether he would base his action on the judgment or on the bill of exchange, but that he might declare upon and offer evidence of both of said supposed causes of action, and recover if he established either of them." As to whether

appellee to amend his declaration by increasing the amount of the ad damnum. Under the Practice Act the court was clearly within the rule in allowing the amendment.

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the court should require an election between counts of a declaration, is a matter within the discretion of the court, and is not subject to review unless the trial court abused its discretion in that regard.

Whenever the counts in a declaration are based on the same state of facts, it is proper to deny a motion to require plaintiff to elect on which count in the declaration he will seek recovery. Price vs. Clover Leaf Coal Mining Co. 188 Ill. App. 27.

The statute pertaining to landlord and tenant provides among other things, that the owner of lands may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by action of debt or assumpsit. Sec. 1, ~~Comp.~~ 80, Smith-Hurt Revised Statutes.

The appellant was not prejudiced by the action of the court in refusing to require appellee to elect on which count of the declaration he would rely for a recovery.

Furthermore, the court in its instructions, fully covered the question of willfulness and the question of the claim of appellant that he held over in good faith and under claim of right.

Appellant insists that the court erred in refusing to allow oral testimony to the effect that at the time the lease in question was entered into, in 1917, that the premises were not ready for the occupancy by appellant at the beginning of said term, and that it was agreed that appellant should have an additional month after the termination of his lease by reason thereof. The lease was a written one, under seal, and was for a definite and fixed period, from October 1, 1917, to October 1, 1927, and the terms of the leasing could be neither enlarged or restricted by showing a parol agreement. A lease under seal cannot be varied by a parol agreement, but if the lease has terminated the right of the lessee to make an independent oral agreement for the use of the premises for a term less than a year cannot be questioned.

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The parol agreement as contended for was void under the Statute of Frauds as it could not be performed within a year from the date it was entered into, which was sometime prior to November 1, 1917. The lease did not expire until October 1, 1927. *Florsheim vs Dullaghan*, 58 Ill. App. 626. Parol evidence tending to vary the terms of a written lease is inadmissible as between the parties thereto. *Slaughter vs Johnson*, 138 Ill. App. 47; *Broughton vs Mitchell*, 147 Ill. App. 281; *Smith vs McEvoy* 98 Ill. App. 330.

Appellant contends that the evidence was not offered with the idea of modifying the terms of the leases, but was offered for the purpose of showing the making of a new agreement which was to become effective upon the termination of the original leases.

The court did not commit any error in refusing to allow the oral testimony to be heard as insisted by appellant.

It is also insisted by appellant that the court erred in refusing to admit testimony with reference to an alleged forcible entry and detainer proceeding, instituted by appellee, after the termination of the lease in question. Appellant offered to prove that on October 1, 1927, appellee in a justice of the peace court brought a suit to obtain possession of the premises involved in this cause; that judgment of restitution was entered for appellee by the justice of the peace, and that an appeal was prosecuted to the county court, and the cause was pending in said court until January 9th, 1928, and on that date a trial was had and a jury returned a verdict finding the defendant not guilty of withholding possession of the premises.

Objection was made to the introduction of such proof by appellee for the reason it was not stated in the offer why the case was not tried on its merits or why the court took the case from the jury. The objection to the offer was sustained. Appellant was then re-called as a witness, and he again offered to prove that he was found not guilty of withholding the possession of the premises on the appeal to the county court. Appellee objected to this offer on the ground that no judgment had been

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the defendant not guilty of withholding possession of the premises. Appellant was made to the introduction of such proof by appellee for the reason it was not stated in the offer why the case was not tried on its merits or why the court took the case from the jury. The objection to the offer was overruled. Appellant was then re-called as a witness, and he again offered to prove that he was found not guilty of withholding the possession of the premises on the appeal to the county court. Appellee

offered and that a motion to vacate the judgment and for a new trial was pending, and further objected because the forcible entry and detainer proceeding was an entirely separate and distinct suit, and the court again sustained the objection.

Appellant insists that the proceedings on appeal in the county court were res adjudicata on the question of withholding over the premises.

In order to constitute res judicata, the former judgment must have been in a suit between the same parties, and there must have been identity of subject matter and of cause of action, and there must have been a judgment upon the merits. Krause vs Nolte, 217, Ill. 298-304; Sawyer vs Nelson, 160 Ill. 629; Smith vs Rountree, 185 Ill. 219.

A judgment for want of jurisdiction, or by reason of a technical defect in the pleadings, or as to the parties, or upon any ground not going to the merits, will not prevent a second action. Krause vs Nolte, Supra; Smith vs Rountree, Supra; Sawyer vs Nelson, Supra.

A judgment in a former proceeding is an estoppel only when it appears from the face of the record or by extrinsic evidence that the precise matter in controversy in the suit at bar was raised and determined in the proceeding which is urged as an estoppel. Smith vs Rountree, Supra; Sawyer vs Nelson, Supra.

Where an estoppel is relied upon, it must be pleaded with particularity and precision; in such a pleading nothing can be supplied by inference or intendment, and where the matter relied on is not thus specifically and precisely alleged, it will be no estoppel. The estoppel must be pleaded fully and sufficiently in all respects and with all necessary incident. In short, an estoppel must be certain to every intent. Vol. 8 Encyc. Pl. & Pr. Pages 9 and 10.

The burden was upon appellant to show that the county court did actually adjudicate the precise question

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of whether he unlawfully withheld possession of the premises after expiration of his lease and on the date set forth in the complaint which was October 1, 1927. The offer made by appellant did not come within the rule. If the alleged judgment in the county court, offered by appellant, and relied upon by him, was not obtained as a result of the trial of the cause, on its merits, then of course the contention of appellant must fail in this respect. If appellant intended to rely upon the fact that the question raised by the offer had been adjudicated, then it was incumbent upon him to have pleaded that fact specially. This he did not do.

~~Max~~ We are of the opinion that the court did not err in refusing to admit the testimony offered by appellant.

Moreover, in view of the state of the record it is clear that the two causes of action, the one for forcible detainer, and the other to recover rent for the occupancy of the premises after the commencement to hold over, are entirely separate and distinct causes of action.

A forcible detainer suit is in the nature of ejectment and its purpose is to recover possession of the premises. It is a summary proceeding and might be brought immediately after the expiration of the written lease, upon the ~~xxx~~ refusal or failure of the defendant to vacate the premises. A suit to recover double rent and for use and occupancy of the premises is by action of debt or assumpsit under the statute and sounds in damages and money judgment instead of judgment for restitution or possession.

It is also urged by the appellant that the demand in writing, upon which this suit is based for wilfully holding over the premises, was served upon him a number of months prior to the termination of the leases; that an action to recover the double value of rent under the ~~statute~~ statute is in the nature of a forfeiture and highly penal, and the landlord to recover, must bring his case clearly within the statute. The two leases in question, under

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which the appellant occupied the premises up to October 1, 1927, both contain express provisions that "Second party covenants with party of the first part, that at the expiration of the term of this lease he will yield up the premises to the party of the first part without further notice in as good condition as when the same were entered upon by the party of the second part."

In *Poppers vs Meagher* 148 Ill. 192, the court said: "Where a lease fixes the time for the expiration of the term and provides that the tenant shall restore possession of the demised premises, the duty of the tenant to yield up the possession will not be dependent on a demand of possession or upon any proceeding to be taken, or thing done by the landlord."

In *Alexander et al vs Loeb et al* 230 Ill. 454, the holding of the court is to the effect that a demand for possession is unnecessary as a condition precedent to the right of recovery in an action of debt for double the rent where the terms of the lease are for a fixed period, and where the lease itself determines the expiration of the term, and further said that it is the duty of the tenant to yield up possession to the landlord at the expiration of the lease, and that that duty was not dependent upon a demand for possession or any proceeding to be taken, or done by the landlord.

A demand for possession would be necessary as a condition precedent to the right of recovery in forcible detainer, and it is necessary to make a demand for possession in case of forfeiture where the landlord seeks to recover possession of the premises before the expiration of the lease.

Under Section 2, Chapter 80, Landlord and Tenant Act, it appears to us that there are two situations provided for in which the landlord may recover the double penalty

1. The purpose of the present investigation is to determine the effect of the use of the word "and" in the title of a document on the number of errors made in the transcription of the document. The results of the investigation are presented in the following table.

"Where a lease fixes the time for the expiration of the lease and provides that the tenant shall restore possession of the leased premises, the lease is held to be a lease for years and the tenant will not be deemed to be a tenant at will." *100*

[illegible]

I have been thinking about you very much lately and wondering how you are getting along. I hope you are well and happy. I am still working hard at my job, but I always find time to think of my friends.

With love,
John Doe

for in which the railroad was running the day it was
lost, it appears to me that there are two things wrong
about the railroad, the first is that it is not
running at all, the second is that it is not

provided for therein. The first is, where the tenant shall wilfully hold over any lands after the expiration of the term or terms of the lease. Second, after demand made in writing for the possession thereof.

The purpose of said section 2, requiring a demand in writing to be given a tenant, is to advise him that the landlord wants possession of his premises at the expiration of his lease, but the statute does not say that the demand must be made after the expiration of the term of the lease. This purpose is as well served by making the demand upon the tenant before the expiration of the lease as it would be after the expiration thereof.

The instant case is not one of terminating a tenancy for a fixed period of years before its expiration, but is one where the leases in question expired by their own terms, and in which, as we have already seen, the appellant agreed to yield up possession, etc. Even though said section 2 does provide that a demand be made in writing for the possession of the premises, still this is a provision which the appellant could waive by contract and he did waive notice in the leases in question. These leases must be read in connection with section 2 of the Landlord and Tenant Act and it has been held in *McKinney vs Mulvey Mfg. Co.*, 157 Ill. App. 338; *Strauss vs. Fornaciari* 147 Ill. App. 18; and *Kenyon vs Manley* 125 Ill. App. 615, that where, by the terms of the lease, notice and demand are waived the landlord may terminate the lease without notice to the tenant and that no notice of the landlord's intention to forfeit is essential to the maintenance of an action in Forcible Entry and Detainer. If a tenant can by the terms of his lease, waive notice and demand so as to permit the landlord to forfeit his lease before the date of its expiration, then it follows that where the leases in question terminated by their own express terms on September 30, 1927, and the tenant agreed to yield up the premises to the landlord without further notice, then no demand for possession was necessary by the landlord. We have examined the authorities relied upon by the appellant in support of his contention

[illegible]

that a demand was necessary in a suit to recover double the rent where a tenant held over after the termination of the lease.

Bells vs Anderson 38 Ill. App. 128, is relied upon by appellant. This case cites Chapman vs Wright 20 Ill. 120, as a basis for its holding, but the decision of the court in that case is not in harmony with the decision of the Supreme Court or later decisions of the Appellate Court. In Bells vs Anderson, there is no statement of facts in the opinion, but the action was apparently brought by the tenant against the landlord to recover damages for being ejected from the landlord's premises, and the landlord filed a cross-account against the plaintiff to recover double the rent under the statute for the time plaintiff held over after the termination of the lease. We conclude that a demand of possession at the termination of the lease is not essential to a recovery of double rent under Section 2, of Chapter 80, of the statute.

It is argued by the appellant that as this was an action in debt, the form of the verdict was not proper. The record discloses that the jury was allowed to sign and seal their verdict and to separate, and that at the time the verdict was returned into court, the jury had been discharged. It was impossible, therefore, to send the verdict back to the jury to have it reformed. Section 77, of the Practice Act provides, "It shall be sufficient for the jury to pronounce their verdict by their foreman in open court, without reducing the same to writing and the clerk shall enter the same in form under direction of the court, * * * nor shall any verdict or judgment be set aside for irregularity only, unless cause be shown for the same during the sitting of the court at the term such judgment or verdict shall be given." It is quite apparent no question as to the form of the verdict was raised in the court below. The only reference to the verdict in the motion for a new trial is that "The verdict of the jury is contrary to the law and the evidence in the case."

that a tenant who occupies a building as a tenant is not a tenant of the land but a tenant of the building only.

It is also stated that the tenant is not a tenant of the land but a tenant of the building only.

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It is quite clear from the pleadings in this case as well as the testimony in the record, that this was a proceeding to recover rent, whether simple rent for use and occupancy, or double rent as a penalty for the occupancy of the store building of appellee by appellant. There was no interest claimed to be due either in the pleadings or in the testimony. The intention of the jury can be ascertained with certainty, even though they used the word "damage" instead of the technical word "debt".

In the case of Rockford, Rock Island & St. L. Railroad Co., vs Steele, 69 Ill. 253, which was an action of debt, and the judgment was for damages only, the court, at page 254 said, "It could make no difference to appellants if the amount found by the jury was due by them to the appellee, whether it should assume the form of debt or damages. They owed the amount to ~~people~~ appellee and ought to pay it. This judgment could be successfully pleaded in bar of another suit brought for the same cause of action. At most, it was a mere irregularity and is cured by Sec. 56 of the Practice Act of 1872." On examination of the ~~statute~~ statute it will be found that Sec. 56 of the Practice Act, at the time the opinion was written in the last above cited case, is now Sec. 77 of the Practice Act. We are of the opinion that the appellant was not prejudiced, in any way, by reason of the form of the verdict return^{ed}~~ing~~ by the jury.

A rehearing was granted in this cause. In his petition for a rehearing, appellant argues at length^{ed} in regard to the \$240.00 check deposited by the appellant in the First National Bank of De Kalb, and later credited to the account of appellee and then concludes "having specifically now directed the courts attention to the particular evidence in regard to this matter, we ask the court that a rehearing be granted because of the error of the trial court in refusing to allow the appellant to make proof of such payment."

The record discloses the fact that evidence on behalf of the appellant, as well as, on behalf of appellee as to the

The record discloses the fact that evidence on behalf of the appellee, as well as, on behalf of the appellant, was introduced at the trial and that the jury was instructed to weigh the evidence and to render a verdict thereon. The record also discloses that the jury returned a verdict in favor of the appellee and that the court entered a judgment in accordance with the verdict. The record further discloses that the appellant has failed to show that the judgment is erroneous and that the case is not one of those in which the court is required to reverse the judgment of the jury.

payment of the \$240.00 check, and the whole transaction was permitted to go to the jury. The entire matter of the payment of the check and the inference that might be drawn therefrom were before the jury.

It was a question of fact as to whether the banker who received the check was the agent of appellee. The jury, by their verdict, have found that the banker was not his agent. From the record we conclude that the bank did not purport to receive said payment as the agent and with the knowledge of appellee and that such alleged payment did not extend the term of the lease for another year. The rule is, that the acceptance by the landlord of rent which accrues after the breach of a condition contained in the lease or after the termination of the lease, must have been with full knowledge on the part of the landlord of the fact of the breach and of all of the circumstances thereof. *Kew vs. Trainor*, 50 Ill. App. 629; Affirmed in 150 Ill. 150; *Tober v. Collins*, 130 Ill. App. 233.

Acceptance of rent by an unauthorized agent does not constitute a waiver of the landlord's right to declare a forfeiture. *Tober v. Collins*, supra. Knowledge to an agent is not knowledge to his principal unless the knowledge was acquired by the agent while acting in the scope of authority, and in reference to the matter over which his authority extends. *Tober v. Collins*, 130 Ill. App. 332-333.

In view of what is disclosed by the evidence relative to the check for \$240.00, and in view of the further fact that the jury has found the banker was not the agent of appellee, there is nothing in the record to sustain the position of appellant by reason of his contention that the court refused to allow appellant to make proof of the alleged payment.

Furthermore, appellant in his original brief and argument did not raise the question that the court refused to

... the \$20.00 check, and the whole transaction was
... to go to the jury. The entire matter of the payment
... the check and the insurance that might be drawn there-
... from were before the jury.

... It was a question of fact as to whether the bank
... who received the check was the agent of appellee. The jury,
... by their verdict, have found that the bank was not its agent.
... from the record we conclude that the bank did not purport to
... representative and agent as we have seen from the evidence.
... appellee and this was all that was in issue.
... by the landlord of rent which accrued after the
... breach of a condition contained in the lease or after the
... termination of the lease, must have been with full knowledge
... on the part of the landlord or the agent of the landlord.
... all of the circumstances thereof. New vs. Tinnon, 50 Ill.
... App. 629; affirmed in 150 Ill. 150; Toben vs. Collins, 150 Ill.
... 150.

... acceptance of rent by an unauthorized agent does
... not constitute a waiver of the landlord's right to recover a
... forfeiture. Toben vs. Collins, supra. Knowledge to an agent
... is not knowledge to his principal unless the knowledge was
... obtained by the agent while acting in the scope of authority,
... and in reliance on the power conferred upon him by the principal.
... Toben vs. Collins, 150 Ill. 150.
... In view of that it is clear that the evidence relative
... to the check is not material to the issue of the forfeiture and that
... the jury has found the facts and the law in relation to the
... there is nothing in the record to require the court to set aside
... least by reason of the evidence that the bank was not its
... agent or that it was not its agent in the payment of the check.
... Testimony, excellent in his original trial and
... against him and raise the question that the court refused to

allow appellant to make proof of the alleged payment by the check for \$240.00.

Appellant then assumed the position that the record showed the payment of \$240.00 and that appellee had accepted the rent for the month of October and that the jury by their verdict had failed to give him credit for one month's rent.

Appellant has not pointed out any serious objection to the instructions given on the part of appellee, although it is suggested that some of them ignore some of the elements of his defense. The instructions given on the part of appellee contains a fair statement of the law arising out of the facts in the case. Appellant does insist that the court erred in the refusing of two instructions offered by him. Each of the instructions has to do with the alleged payment of the rent for the month of October 1927.

The question whether the rent for the month of October 1927, was paid to appellee was a controverted question of fact, as was also the question whether depositing the rent in the bank in DeKalb, where it was placed to the credit of appellee, constituted a payment to appellee himself. The first instruction does not leave it to the jury to determine from the evidence whether the rent for October was paid nor does it embody all the evidence in regard to the authority of the banker to collect the rent as the agent of appellee nor whether the rent was paid after the expiration of the lease or before, and the question of knowledge, nor the question of when appellee became aware of the payment to the bank, and then told the jury that as a matter of law the rent for the month of October could not form a basis in any recovery for the use and occupation of said premises.

This instruction invaded the province of the jury and assumed the existence of facts and was erroneous. The second instruction complained of by the appellant in effect

told the jury that the court believed that the evidence showed the appellant had paid to appellee the amount of the rent for the month of October 1927, as fixed in the lease offered in evidence. The instruction also assumed that appellee had not returned, or offered to return, the rent for said month, and that it had been placed to the credit of appellee in the bank without leaving it to the jury to determine from the evidence whether these facts did exist. The instruction then concludes, as a matter of law, there could be no recovery for double rent or for the amount of rent for the month of October. Each of these instructions were peremptory in character and did not embody all the facts, and the second one, as well as the first, invaded the province of the jury and was erroneous.

After an examination of the record, together with the suggestions of the respective parties in the original briefs as well as in the petition for rehearing and reply thereto, we conclude no reversible error was committed by the trial court in the trial of this case. The judgment therefore, of the Circuit Court of De Kalb county will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

159 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

2021A.684⁵

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Hall Motor Company,

Appellee,

vs.

Appeal from the Circuit Court
of Winnebago County.

T. B. Luhman,

Appellant,

Jett, P. J.

This is an appeal by T. B. Luhman, appellant, to reverse a judgment entered against him in favor of Hall Motor Company, appellee, based on a note executed by appellant as maker and payable to one Emil Kuns and endorsed to appellee in the sum of \$450.00, bearing date August 2, 1928, and due one year after date with interest at the rate of 6%. The case was tried before a jury which found for appellee and assessed its damages at the sum of \$490.00, for which judgment was entered together with costs of suit.

A number of reasons are assigned for a reversal of the judgment.

Appellee filed its declaration declaring on the note in question to which was attached an affidavit of George D. Hall, president of appellee company in which he stated that he was acquainted with the handwriting of the appellant and that the signature "T. B. Luhman", as maker of said note was the genuine signature of said Luhman and that there was due appellee from the appellant, after allowing all off sets and counter claims, the sum of \$481.00.

To the declaration the appellant pleaded the consideration had failed, and a plea denying the endorsement by the payee of the note. Subsequently appellant obtained leave to file an affidavit of meritorious defense which he afterwards amended. It appears that the case was tried on the declaration and on the two pleas filed by the appellant. Certain evidence was offered in support of the affidavit of meritorious defense which was stricken

Appeal from the Circuit Court
of Winnebago County.

This is an appeal by T. B. Lohman, appellant, to

reverse a judgment entered against him in favor of Emil Motor
Company, appellee, based on a note executed by appellant as maker
and payable to one Emil Kuna and endorsed to appellee in the sum
of \$100.00, bearing date August 2, 1928, and due one year after
date with interest at the rate of 6%. The case was tried before
a jury which found for appellee and assessed its damages at the
sum of \$100.00, for which judgment was entered together with costs
of sale.

A number of reasons are assigned for a reversal of the

"Appellee filed its declaration declaring on the note in

question to which was attached an affidavit of George D. Hall,

resident of appellee company in which he stated that he was acquainted

with the handwriting of the appellant and that the signature "T.

B. Lohman", as maker of said note was the genuine signature of said

appellant and that note was the genuine note of appellant.

Appellant filed its declaration denying the above and

to the declaration the appellant presented the same

declaration and Exhibit, and a plea denying the execution of the

note of the note. Subsequently appellant obtained leave to file

an affidavit of past former defense with an affidavit denied.

It appears that the case was tried on the declaration and on the

two pleas filed by the appellant. The jury returned the verdict

in favor of the appellee of past former defense with an affidavit

out and this is urged by the appellant for a reversal of the judgment.

The record discloses that a man by the name of Emil Kuns owned an old car and went to appellant, a dealer in Nash cars, and discussed the purchase of a new advance Nash Six; that Kuns got into trouble in the State of Wisconsin and was sent to jail. It further appears that the appellant had possession of the old car which was owned by Kuns and that he sold the same for \$450.00. Kuns was in no position to then buy a new car and appellant gave him a note for \$450.00. It is the contention of the appellant that Kuns agreed not to transfer the note but to hold it and was to apply it upon the purchase of a new car. Kuns was indebted to a man by the name of Woll and endorsed the note to him. Woll was desirous of buying a used car from appellee company and to that end he decided to have the note applied in payment of the used car. The note was shown to Hall, the president of said appellee company, who called the place of business of appellant Luhman and inquired if Luhman had given the note to Kuns. G. E. Jeanmairet, associated with the appellant in business answered the phone and appellant insists he told Hall that the note was not to be assigned and that it was ultimately to be used in the purchase of an advanced Nash Six from appellant. Hall, for his company, sold a used car to Woll, accepted the note and paid Woll \$150.00 in cash.

It is urged by the appellant for a reversal of the judgment that the court erred in striking out the testimony of the witness Jeanmairet concerning an alleged conversation over the telephone with Hall, president of appellee company, before the latter purchased the note in question in which conversation it is charged Jeanmairet told someone, supposed to be Hall, that the note was payable only as a part of the purchase price on a Nash car. This testimony which was all stricken out is the only evidence in the record showing, or tending to show, ~~any knowledge by appellee~~, any knowledge by appellee that the note was subject to any conditions as to the manner of payment.

and this is what the appellant has a reversal of the judgment.

The appellant has a reversal of the judgment.

owned an old car and went to appellant, a dealer in Wash cars, and

discussed the purchase of a new advance Nash Six; that Kuna got

into trouble in the State of Wisconsin and was sent to jail. It

further appears that the appellant had possession of the old car

which was owned by Kuna and that he sold the same for \$480.00. Kuna

was in no position to then buy a new car and appellant gave him a

note or \$480.00. It is the contention of the appellant that Kuna

refused not to transfer the note but to hold it and was to apply it

toward the purchase of a new car. Kuna was indebted to a man by the

name of Wolf and endorsed the note to him. Wolf was desirous of

buying a used car from appellee company and to that end he decided

to have the note applied in payment of the used car. The note was

given to Hall, the president of said appellee company, who called

the place of business of appellant Lohman and inquired if Lohman

had given the note to Kuna. G. E. Jeannette, associated with the

appellant in business answered the phone and appellant insists he

told Hall that the note was not to be assigned and that it was

ultimately to be used in the purchase of an advanced Nash Six from

appellant. Hall, for his company, sold a used car to Wolf, accepted

the note and Wolf will live in jail.

It is argued by the appellant that a reversal of the judgment

that the court made in reversing the judgment of the appellant

is warranted by the facts of the case.

With Hall, president of appellee company, who is the appellant,

the case is presented to the court for its decision.

Hall, appellant, suggested to Wolf, that he should not assign the

a part of the purchase price on a new car. The appellant insists

all evidence and is the only evidence in the case that the note

had been used, notwithstanding, any knowledge by appellee that the note

was subject to any conditions as to the manner of payment.

The record discloses among other things that the witness Jeanmairret testified as follows:

Q. (By Mr. Thomas, for appellant) On or about December 8th, I will ask you to state whether or not you had a conversation with Mr. Hall?

A. Somebody called up and said they were Mr. Hall. I didn't know Mr. Hall's voice, and asked whether such a note existed.

Mr. Reno: I object to that if he does not know Mr. Hall's voice he should not testify to any conversation.

The Court: It would have to be fixed who it was.

Q. Did you later determine that it was Mr. Hall?

A. No, I did not.

The record discloses that the witness was permitted to go ahead and detail the conversation after which the court, on motion, struck out all of the witness' testimony. In view of what is disclosed by the record we are not prepared to say that the court erred in its ruling in this respect.

It is said by appellant that he understands the law to be that an appropriate plea must be filed with an affidavit of meritorious defense and in that event the facts as set forth in the affidavit must be introduced in the trial and authority is cited in support of his contention. Appellee insists that no such plea was filed to allow appellant to present the defense he claims by reason of his affidavit of meritorious defense. The trial court, we think, was correct in its holding that there were only two pleas on file and they were that the consideration had failed and the payee had endorsed the note as averred.

It is next insisted that the court erred in holding that there was no evidence to support the plea of a failure of consideration. In view of the ruling out of the testimony of the witness who claimed to have had a conversation over the phone there was no

The record discloses among other things that the witness
testified as follows:
"I saw Mr. Thomas, the defendant, at the time of the shooting.
I will not say he was the shooter, but I saw him at the scene."
With Mr. Hall?
"Somebody called up and said they were Mr. Hall. I didn't know
Mr. Hall's voice, and asked whether such a note existed.
Mr. Reno: I object to that if he does not know Mr.
Hall's voice he should not testify to
any conversation.
The Court: It would have to be fixed who it was.
Did you later determine that it was Mr. Hall?
"Yes, I did."
The Court: "The witness said that he saw the defendant at the scene of the shooting, and that he saw him at the scene of the shooting, and that he saw him at the scene of the shooting."
In view of what is dis-
closed by the record we are not prepared to say that the court erred
in its ruling in this respect.
Hall: It is said by appellant that he understands the law to
be that an appropriate plea must be filed with an affidavit of merit-
ious defense and in that event the facts as set forth in the
affidavit must be introduced in the trial and authority is cited
in support of his contention. Appellee insists that no such
plea was filed to allow appellant to present the defense he claims
is reason of his affidavit of meritorious defense. The trial court,
we think, was correct in its holding that there were only two pleas
on this case that were the meritorious defense and the plea
that appellant was not guilty.
It is now insisted that the court erred in ruling that
there was no evidence to support the plea of a failure of con-
science. In view of the ruling out of the testimony of the witness
the claim is now made that the court erred in ruling that

evidence left in the record that tended to show a failure of consideration.

The contention of appellant that Kuns was to hold the note and apply it on a new car is very much weakened in view of the facts as disclosed by the record. The record shows that previous to the telephone conversation relied upon by appellant, Kuns went to appellant's place of business and endeavored to buy a used car. He then stated he could not buy a new Advance Nash Six. No effort was made by appellant to take up or cancel the note or in any way to make a settlement for the car which he had sold and for which he had given the note in question.

The case was fairly submitted to the jury and the question of fact were decided in favor of the appellee and there appears to be no substantial error in the record. Appellant's conduct after Kuns had informed him he was not in a condition to buy a new car refutes the claim of any such agreement as is claimed by him now that the note was not to be assigned. Substantial justice has been done.

The judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty_____

Clerk of the Appellate Court

60
7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

262 L.A. 665'

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HERBERT H. DAVIS CO., INC.,
a Corporation,

Appellant

Appeal from the Circuit

-vs-

Court of Lake County.

RICHARD MACEK, et al.,

Appellees

Jett, P. J.

Herbert H. Davis Company, Incorporated, appellant, filed its bill in the Circuit Court of Lake County praying for a Mechanic's Lien on certain premises owned by Richard Macek and Mary Macek, appellees doing business under the name of the Antioch Palace, growing out of a contract entered into between appellees and appellant for the installation of a National Fan Furnace ~~Ran~~ System of heating and ventilation, at a contract price of \$7000.00.

The bill alleges that the work of installing the system of heating and ventilation was completed on December 14, 1927; that appellees, Richard and Mary Macek, were entitled to a credit of \$2300.00, reducing its claim to \$4800.00, with interest; that on January 27, 1928, being within four months after the last work was completed, it filed with the Clerk of the Circuit Court of Lake County, a claim for lien for the sum of \$4800.00.

It is further alleged in said bill for lien, that the premises on which the plant was installed was subject to a first trust deed given by the appellees, Richard and Mary Macek, to S. Boyer Nelson, to secure a note in the sum of \$20,000.00, and a second trust deed given by said appellees securing notes aggregating \$15,000.00; that the First National Bank of Antioch and one F. L. Siverston, each recovered judgments against appellees, Richard Macek and Mary Macek, his wife. The judgment of the First National Bank of Antioch being for \$2778.20, and the judgment of Siverston being for \$8200.76; that the last mentioned judgment

HERBERT H. DAVIS CO., INC.,
a Corporation,

Appellant from the Circuit
Court of Lake County.

Appellant

-vs-

RICHARD MACEK, et al.,

Appellees

Jeff, p. 1.

Herbert H. Davis Company, Incorporated, appellant, filed its bill in the Circuit Court of Lake County praying for a Mechanic's Lien on certain premises owned by Richard Macek and Mary Macek, appellees doing business under the name of the Antioch Palace, growing out of a contract entered into between appellees and appellant for the installation of a National Ten Furnace Fan System of heating and ventilation, at a contract price of \$7000.00.

The bill alleges that the work of installing the system of heating and ventilation was completed on December 14, 1927; that appellees, Richard and Mary Macek, were entitled to a credit of \$3200.00, reducing its claim to \$4800.00, with interest; that on January 27, 1928, being within four months after the last work was completed, it filed with the Clerk of the Circuit Court of Lake County, a claim for lien for the sum of \$4800.00. It is further alleged in said bill for lien, that the premises on which the plant was installed was subject to a first trust deed given by the appellees, Richard and Mary Macek, to S. Boyer Nelson, to secure a note in the sum of \$20,000.00, and a second trust deed given by said appellees securing notes aggregating \$15,000.00; that the First National Bank of Antioch and one T. L. Silverston, each recovered judgments against appellees, Richard Macek and Mary Macek, his wife. The judgment of the First National Bank of Antioch being for \$2778.20, and the judgment of Silverston being for \$8200.76; that the last mentioned judgment

of Siverston was assigned to C. K. Anderson; that the First National Bank of Antioch, C. K. Anderson and S. Boyer Nelson, trustee in said deed, filed answers to said bill in which they denied any claim for lien was filed by appellant in the office of the Clerk of the Circuit Court of Lake County on January 27, 1928, and denied that appellant was entitled to a lien on said premises.

The record discloses that appellees, Richard Macek and Mary Macek, filed answers admitting the ownership of the premises; admitted the installation of said furnace, etc., and demanded strict proof as to the filing of lien and amount due.

On the hearing, the Master in Chancery, in his report, and the court in its decree, found that the appellant was entitled to a lien on said premises for the amount of its claim, but subject to the lien of each of said trust deeds; namely, the trust deed given to secure the note in the sum of \$20,000.00, and the second trust deed given, securing notes aggregating \$15,000.00, but superior to the lien of the First National Bank of Antioch and to the lien of F. L. Siverston, assigned to C. K. Anderson, and that a sale of said premises should be had to satisfy said lien, subject to the lien of said trust deeds.

To review said decree, this appeal is by the appellant prosecuted.

The principal question involved, arising on this record, is as to whether Herbert H. Davis, Company, Inc., appellant, made sufficient proof that it had filed a claim for its Mechanic's Lien in the office of the Clerk of the Circuit Court of Lake County within four months after the completion of the installation of the plant and the doing of the work as alleged in its bill filed herein.

The record discloses that appellant offered in evidence a purported claim for Mechanic's Lien; made proof that the signatures thereto were the signatures of the officers of appellant company, which said instrument bore a file mark which purported to be the file mark of the Circuit Clerk of Lake County under the date of January 27, 1928, This exhibit, being the purported claim

of Riverston was assigned to G. K. Anderson; that the First National Bank of Antioch, G. K. Anderson and S. Boyer Wilson, trustees in said deed, filed answers to said bill in which they denied any claim for lien was filed by appellant in the office of the Clerk of the Circuit Court of Lake County on January 27, 1928, and denied that appellant was entitled to a lien on said premises.

The record discloses that appellees, Richard Mascek and Mary Mascek, filed answers admitting the ownership of the premises; admitted the installation of said furnace, etc., and demanded strict proof as to the filing of lien and amount due.

On the hearing, the Master in Chancery, in his report, and the court in its decree, found that the appellant was entitled to a lien on said premises for the amount of its claim, but subject to the lien of each of said trust deeds; namely, the trust deed given to secure the note in the sum of \$20,000.00, and the second trust deed given, securing notes aggregating \$15,000.00, but superior to the lien of the First National Bank of Antioch and to the lien of T. L. Riverston, assigned to G. K. Anderson, and that a sale of said premises should be had to satisfy said lien, subject to the lien of said trust deeds.

To review said decree, this appeal is by the appellant prosecuted.

The principal question involved, arising on this record, is as to whether Herbert H. Davis, Company, Inc., appellant, made sufficient proof that it had filed a claim for its Mechanic's Lien in the office of the Clerk of the Circuit Court of Lake County within four months after the completion of the installation of the plant and the doing of the work as alleged in its bill filed herein.

The record discloses that appellant offered in evidence a purported claim for Mechanic's Lien; made proof that the signatures thereto were the signatures of the officers of appellant company, which said instrument bore a file mark which purported to be the file mark of the Circuit Clerk of Lake County under the date of January 27, 1928. This exhibit, being the purported claim

for lien, was objected to on the ground that there was no proper foundation laid for its introduction in evidence, nor had any offer been made on behalf of complainant in offering the exhibit in evidence with the file mark of the Circuit Clerk, nor is there any showing that the claim of lien had been properly indexed and recorded by the clerk of the circuit court as provided by the statute, and no showing that it was a claim filed in the Circuit Court or a true certified copy thereof.

Richard Macek and Mary Macek, appellees, join in the objection. The Master allowed the claim to be admitted and become a part of the record subject to the objection interposed thereto.

It is contended by the appellant that sufficient proof was made of the filing of its claim for Mechanic's Lien with the Circuit Clerk.

Appellees insist, that where a certified copy of such claim as proof of the same, or that if the original, or if it is intended to make proof by the original document, testimony must be offered by the clerk of the court, who would be the proper custodian thereof, that it was one of the files in his office, and that it was filed at the time it was purported to be, or within four months of the completion of the work for which a lien was claimed. An examination of the abstract filed in this cause shows the manner in which the proof was attempted to be made of the statement of claim for lien; no offer to show that the exhibit, being the statement of claim for lien, is a record of any court, or a part of any record; no proof of a certified copy of the claim for lien or of the record of the clerk of the circuit court was made; no proof of any identification by the custodian of the same, the clerk, or by any of his deputies, or by any employee of his office. On the contrary, what proof was offered, none of which is with respect to the identification of the record, was offered by an employee of the complainant and by a statement of counsel for the appellant, which said counsel does not appear either from the abstract of record nor from the record itself to have ^{been} sworn and examined as a witness.

After an examination of the record, we are of the opinion

for lien, was objected to on the ground that there was no proper foundation laid for its introduction in evidence, nor had any offer been made on behalf of complainant in offering the exhibit in evidence with the file mark of the Circuit Clerk, nor is there any showing that the claim of lien had been properly indexed and recorded by the clerk of the circuit court as provided by the statute, and no showing that it was a claim filed in the Circuit Court or a true certified copy thereof.

Richard Mascek and Mary Mascek, appellees, join in the objection. The Master allowed the claim to be admitted and become a part of the record subject to the objection interposed thereto. It is contended by the appellant that sufficient proof was made of the filing of its claim for Mechanic's Lien with the Circuit Clerk.

Appellees insist, that where a certified copy of such claim as proof of the same, or that if the original, or if it is intended to make proof by the original document, testimony must be offered by the clerk of the court, who would be the proper custodian thereof, that it was one of the files in his office, and that it was filed at the time it was purported to be, or within four months of the completion of the work for which a lien was claimed. An examination of the abstract filed in this cause shows the manner in which the proof was attempted to be made of the statement of claim for lien; no offer to show that the exhibit, being the statement of claim for lien, is a record of any court, or a part of any record; no proof of a certified copy of the claim for lien or of the record of the clerk of the circuit court was made; no proof of any identification by the custodian of the same, the clerk, or by any of his deputies, or by any employee of his office. On the contrary, what proof was offered, none of which is with respect to the identification of the record, was offered by an employee of the complainant and by a statement of counsel for the appellant, which said counsel does not appear either from the abstract of record nor from the record itself to have sworn and examined as a witness.

After an examination of the record, we are of the opinion

that the contention of appellees in this cause is well taken; that unless proof was made of the filing of said claim in the manner specified by statute to-wit:- by a certified copy thereof, or that if proof is shown to be made by the original document, it must be shown by the officer having the custody thereof, that the same was filed within four months, and that the document so offered, was in fact, one of the files of his office, and not having made the proof in the manner provided by statute and not having made the proof by the officer who would properly have custody of the claim for lien, we hold that the appellant is not entitled to any priority over the trust deeds in question even as to the amount that the property had been increased in value by reason of said work and improvement.

It is also the contention of the appellant that the decree of the court should have ordered a sale of the premises in question in fee and should not have ordered a distribution of the proceeds of the sale before the court had ascertained whether or not such proceeds would be sufficient to pay the liens of both, complainant and defendant, C. K. Anderson. The Chancellor found, and the decree provides that the lien of the complainant (appellant) is subordinate to the liens of the two trust deeds of encumbrance of appellee, C. K. Anderson. The sale provided for in the decree is not for the purpose of securing the amount due upon the trust deeds but for the amount due to the appellant, the lien complainant, by virtue of its lien against the owner of the premises involved.

The purchaser, under the decree rendered in this case, would buy the land subject to the lien of the trust deeds of the appellee, C. K. Anderson. The rights of the appellant are in no way prejudiced by the provision of the decree providing for sale of the premises or so much thereof as are necessary to satisfy its lien which decree provides for the sale of the premises in fee or so much thereof as are necessary to satisfy the decree subject only to the liens of the trust deeds of encumbrance of appellee, C. K. Anderson.

We cannot agree with the contention of the appellant, as the record fails to disclose that the holders of said trust deeds were

that the contention of appellees in this case is well taken; that unless proof was made of the filing of said claim in the manner specified by statute to-wit: by a certified copy thereof, or that if proof is shown to be made by the original document, it must be shown by the officer having the custody thereof, that the same was filed within four months, and that the document so offered, was in fact, one of the files of his office, and not having made the proof in the manner provided by statute and not having made the proof by the officer who would properly have custody of the claim for lien, we hold that the appellant is not entitled to any priority over the trust deeds in question even as to the amount that the property had increased in value by reason of said work and improvement.

It is also the contention of the appellant that the decree of the court should have ordered a sale of the premises in question in fee and should not have ordered a distribution of the proceeds of the sale before the court had ascertained whether or not such proceeds would be sufficient to pay the liens of both, complainant and defendant, O. K. Anderson. The Chancellor found, and the decree provides that the lien of the complainant (appellant) is subordinate to the liens of the two trust deeds of encumbrance of appellee, O. K. Anderson. The sale provided for in the decree is not for the purpose of securing the amount due upon the trust deeds but for the amount due to the appellant, the lien complainant, by virtue of the lien against the owner of the premises involved.

The purchaser, under the decree rendered in this case, would buy the land subject to the lien of the trust deeds of the appellee, O. K. Anderson. The rights of the appellant are in no way prejudiced by the provision of the decree providing for sale of the premises or so much thereof as are necessary to satisfy its lien which decree provides for the sale of the premises in fee or so much thereof as are necessary to satisfy the decree subject only to the liens of the trust deeds of encumbrance of appellee, O. K. Anderson.

We cannot agree with the contention of the appellant, as the record fails to disclose that the holders of said trust deeds were

seeking a foreclosure of their liens and inasmuch as appellant was not entitled to a priority as to a lien, it is in no position to insist that the sale of said property should be made in fee but was only entitled to have its lien satisfied in the foreclosure thereof, subject to said trust deeds. We hold therefore, that the decree of the Circuit Court of Lake County should be affirmed, which is accordingly done.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty- _____

AT A TERM OF THE APPELLATE COURT,

7

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

262 L.A. 885²

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Floyd Sullivan, a minor by
Roy Sullivan, his father and
guardian,

Appellee

Appeal from the Circuit Court
of Rock Island County.

-vs-

Brady-Waxenberg Company,
a Corporation,

Appellant

Jett, P. J.

Appellee, Floyd Sullivan a minor, by Roy Sullivan his father and guardian, instituted in the Circuit Court of Rock Island County this suit against Brady-Waxenberg Company, a Corporation, appellant, to recover damages for injuries sustained by him on September 12, 1929, by reason of being struck by a motor truck of the appellant company in the city of Rock Island.

A trial by jury was had resulting in a finding in favor of appellee in the sum of \$3000.00.

Motions for a new trial and in arrest of judgment were overruled and judgment was rendered upon the verdict of the jury for the sum of \$3000.00, and this appeal followed.

The declaration consists of two counts, each averring that through the negligence and improper conduct of appellant's servant its motor car ran into and against the plaintiff and greatly injured him.

For convenience, appellee will be referred to as plaintiff and appellant as defendant.

The assignments of error by the defendant are, (1) that the Court erred in refusing to grant defendant's motion to withdraw a juror because of prejudicial testimony, (2) that the court erred in refusing to give instructions tendered by the defendant, (3) that the damages awarded are excessive. We will treat these assignments of

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refusing to give instructions tendered by the defendant, (3) that the

damages awarded are excessive. We will treat these assignments of

error in the order in which they appear.

The record contains an affidavit by one of the attorneys for the defendant company setting forth that two of the prospective jurors, during the examination on their voir d~~are~~^{ore}, were asked the following questions: "Do you own an automobile?" "Do you carry automobile insurance?" "With what company?" "Do you know Mr. Tarpey?" It appears that Mr. Tarpey was one of the attorneys representing the defendant and associated with the attorney that filed the affidavit. The affidavit was filed in support of a motion by the defendant to withdraw a juror and declare a mistrial because of prejudicial testimony. The questions asked above are pointed out as the prejudicial testimony relied upon by the defendant in support of its motion to withdraw a juror and declare a mistrial of the cause.

In the affidavit it was also stated that after 3:00 o'clock P. M. on said day, that is, October 16, 1930, the court was adjourned and the jury released for the day; that the trial of said cause was still in progress, one witness for the plaintiff having been partially examined; that the Rock Island Argus is the only day newspaper published in the city of Rock Island where the court house is situated; that said newspaper is a newspaper of general circulation, having a daily circulation of about 14,000; that several of said jurors reside in Rock Island and others resided in Rural Route districts beyond said city; that said Rock Island Argus is widely read by inhabitants of the said city and of said Rural Route districts; that in the edition of said Rock Island Argus of said evening of October 16, 1930, appeared the following news item pertaining to the trial of said cause; namely,

"Seeks \$15,000 as Damages in Case on Trial

Jurors are Chosen in Suit Resulting From Accident
in Which Truck Struck Men.

Trial of the \$15,000 damage claim of Floyd Sullivan, 507 Eleventh Street, Rock Island, against Brady-Waxenburg, Inc., for injuries in a traffic accident, began this morning in

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the Rock Island county circuit court before Judge C. J. Searle. The selection of a jury was completed at the morning session and taking of evidence began this afternoon.

The plaintiff, who sues by his father, Roy Sullivan, as next friend, was one of four hurt Sept. 12, 1929, when a delivery truck skidded on the slippery pavement, into a group of men waiting for a street car, and Sullivan was crushed against a tree. His shoulder was hurt and his arm broken in three places. The accident occurred at Seventh Avenue, near Forty-fourth street.

Edward L. Eagle of Sweeny & Eagle is appearing as attorney for the plaintiff, and the defense is represented by Franklin P. Searle of Connelly, Weld, Walker and Searle, and L. M. Tarpey of Chicago.

Objections arose in the examination of the jurors, when reference to the liability insurance involved in the case was made by attorneys, and the court sustained objections that raised the point that nothing indicating that the suit is being actually defended by an insurance company was proper in connection with the trial."

The record further discloses that when the question was put to the jurors, "Have you ever carried insurance on an automobile?" objection was made, and the same was very promptly sustained by the court.

It will be seen that the grounds for the motion as set up in said affidavit were that certain questions were put to the jurors in substance as above set forth, and that a newspaper article had appeared in one of the local newspapers pertaining to said cause in which newspaper article a reference was made to objections which arose in the examination of jurors relative to liability insurance, and it appears in the article that the court sustained the objections raised by the defendant. The affidavit fails to state that any of the jurors read said article or knew anything about it.

It appears that no motion was made to withdraw a juror and to declare a mistrial at the time of the examination of the jury, but that it was done on the succeeding day after the trial had been entered

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Seventh Avenue, near Forty-fourth street.

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read said article or knew anything about it.

It appears that no motion was made to withdraw a juror and to

declare a mistrial at the time of the examination of the jury, but

that it was done on the succeeding day after the trial had been entered

upon and the examination of witnesses begun.

It is urged that the questions, in the order in which they were asked and the reference to Mr. Tarpey, were as effective to inform the jury of defendant's insurance as a direct statement that the defendant carried liability insurance would have been, especially when considered in connection with the statement in the newspaper article relating to "liability insurance involved in the case." There is nothing in the record to indicate that the jury or any member thereof saw or read the newspaper article. Waiving the query whether the questions complained of were asked in good faith to determine the right to exercise a peremptory challenge, and waiving also the question whether happenings in the presence of the court can properly be put in the record by an affidavit, we will consider the contention of the defendant.

We have examined the various cases relied upon by the defendant relative to the questions raised by reason of the matters and things set forth in the affidavit heretofore mentioned. We have no fault to find with the conclusion in the respective cases relied upon and to which our attention is called by the defendant. From the authorities cited by the defendant, we deduce the rule that any irrelevant evidence admitted or misconduct of an attorney in trying to get irrelevant facts before a jury, the effect of which, in either case, is or may be, the cause of a jury to require less competent evidence in a damage case to establish either the liability or fix the amount of damages than it would otherwise require, may constitute reversible error, but we are of the opinion the rule cannot be successfully invoked in this case for two reasons, first, the question of liability could not have been effected by what took place because the record discloses that the liability was admitted by the defendant. In the second place, the amount of the verdict shows that the jury were not influenced or in any wise prejudiced by reason of the things complained of by the defendant.

The evidence discloses that the injuries of the plaintiff were quite serious. He had abrasions about the face and head, and a compound fracture of the left humerus, a fracture of the shoulder blade, a lacerated wound in the left thigh, abrasions about the left knee joint, abrasions and deep contusions of the left forearm, wrist

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and hand, and was in a condition of great shock and remained in a dazed condition for a number of days; he was confined to his bed for six weeks and remained in the hospital five weeks longer for treatment; he was not able to return to work until four months and two weeks after he was injured; he was making \$4.00 a day and worked six days a week at the time of the injury; his doctor bill amounted to \$405.00, his hospital bill \$362.50; that massage treatments to his hand and arm were had at the cost of \$94.00; the injuries were painful with permanent results; the cost of treatment and loss of earnings amounted to about one-half the amount of the verdict.

It is not at all likely that a new trial with no error would result in a smaller verdict. A case will not be reversed on the ground of excessive damages unless they are so excessive as to indicate that the verdict must have been the result of prejudice or passion, and this is true even where evidence gets to the jury that might excite passion or prejudice. In other words, the verdict itself must, by its very excessiveness indicate to the court that the improper evidence in the record, or something outside the record, so aroused the passion or prejudice of the jury that the damages assessed are not within the range of the competent evidence before them. We see nothing in this verdict to indicate anything of that sort and we hold the verdict is not excessive.

The remaining assignment of error to be considered is that the court erred in refusing two of the instructions offered by the defendant. These instructions were intended as a guide to the jury in fixing the damages and the principles set out is covered substantially in other instructions which tells the jury it was their duty to assess the damages occasioned by the negligence of the defendant.

The record discloses that the defendant offered seventeen instructions, eleven of which were given. Of the eleven instructions given for the defense, three of them were as to the measures of damages, and of what elements could be included therein. Since the liability was admitted the remaining question was, to what extent the plaintiff had been injured. On that question the jury were fully instructed.

We have made a thorough examination of the instructions and

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or prejudice. In other words, the verdict itself must, by its very
excessiveness indicate to the court that the improper evidence in the
record, or something outside the record, so aroused the passion or
prejudice of the jury that the damages assessed are not within the
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verdict to indicate anything of that sort and we hold the verdict
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was admitted the remaining question was, to what extent the plaintiff
had been injured. On that question the jury were fully instructed.
We have made a thorough examination of the instructions and

it appears to us that no reversible error was committed by the court in the giving or refusing of instructions.

We conclude therefore, that substantial justice has been done and the judgment of the Circuit Court of Rock Island County will be affirmed.

Judgment affirmed.

[illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois
Second District
October Term, A. D. 1930.

A. A. Phelps,

appellee,

vs.

Appeal from Circuit Court of
Ogle County.

Geo. D. Whitcomb Company,
a corporation,

appellant,

Opinion Per Curiam:-

An action on the case was instituted by appellee against appellant in the circuit court of Ogle county to recover the amount claimed to be owing to appellee for unpaid salary as vice-president of said corporation. The declaration consisted of one special count and the common counts, supported by affidavit. To said declaration appellant filed a plea of the general issue with affidavit of merits. A jury was waived and a trial was had, resulting in a finding and judgment in favor of appellee for \$2483.33 and costs. To reverse said judgment, this appeal is prosecuted.

No complaint is made as to the rulings of the court on the evidence, the sole question for our determination being as to whether said finding and judgment is against the manifest weight of the evidence.

Appellee was the owner of 35 shares of the preferred stock and 97 shares of the common stock of appellant corporation. Under agreement with appellant company, appellee was to receive a salary of \$100 per month. In December 1928 appellee held three notes of appellant company for \$1,000 each, one dated December 27, 1926, due in two years, one of same date due in three years, and one dated December 27, 1927, due in three years, all bearing interest at the rate of seven per cent per annum, in payment of back salary. The

In the Appellate Court
of Illinois
Second District
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Geo. D. Whitcomb Company,
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vs.
Appellee,
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Appeal from Circuit Court of
Ogle County.

Opinion Per Curiam:-

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evidence also discloses that there was something over 24 months of unpaid salary owing to appellee in December 1928.

Appellee testified that on December 13, 1928, Carl Heim, a vice president and general manager of appellant, called on appellee and made him an offer of \$14,000 for his preferred and common stock and for the three notes of \$1,000 each; that he placed with the Rochelle Trust and Savings Bank a draft for \$14,000 together with his common and preferred stock and said notes; that thereafter said draft was paid and said stock and notes were taken up; that he had not been paid any salary since the giving of said notes, and that in March 1929 there was some \$2,600 of back salary owing to him. That amount, however, included a time subsequent to his sale of his stock and his ceasing to be a director and officer of said corporation. Appellee further testified in the sale of said stock, etc., nothing was said with reference to his unpaid salary, and that this was not included in said transaction. The record discloses that after appellee had deposited his stock and notes, he withdrew the draft for \$14,000 and substituted a draft for \$15,110. His explanation with reference to why he did this tends to show that he was claiming that he had 125 shares of common stock, and that the trade was based on his having 97 shares, and that he should be paid an additional amount by reason of his having more stock than was originally contemplated. However, he found that he only had 97 shares of common stock and again made a draft for \$14,000, which was paid as above set forth.

On the other hand, Heim testified that when he called on appellee, he made a pencil statement of the amount of preferred and common stock owned by appellee, the dividends that appellee was entitled to on his preferred stock, the interest on the three notes held by appellee, and that these figured some \$7970, and that he said to appellee "You have not been paid your back salary, and we will allow you \$6,000 for your common stock and back salary and all claims which you have against the company"; that these figures were made in appellee's presence. The original statement referred to was certified to this court and is as follows:

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made in appellee's presence. The original statement referred to was claims which you have against the company"; that these figures were all allow you \$6,000 for your common stock and back salary and all aid to appellee "You have not been paid your back salary, and we aid by appellee, and that these figured some \$7970, and that he entitled to on his preferred stock, the interest on the three notes common stock owned by appellee, the dividends that appellee was appellee, he made a pencil statement of the amount of preferred and On the other hand, Heim testified that when he called on gain made a draft for \$14,000, which was paid as above set forth. However, he found that he only had 97 shares of common stock and season of his having more stock than was originally contemplated. saying 97 shares, and that he should be paid an additional amount by ad 125 shares of common stock, and that the trade was based on his reference to why he did this tends to show that he was claiming that he or \$14,000 and substituted a draft for \$15,110. His explanation with appellee had deposited his stock and notes, he withdrew the draft included in said transaction. The record discloses that after as said with reference to his unpaid salary, and that this was not appellee further testified in the sale of said stock, etc., nothing took and his ceasing to be a director and officer of said corporation. hat amount, however, included a time subsequence to his sale of his in March 1932 there was some \$2,600 of back salary owing to him. of been paid any salary since the giving of said notes, and that trait was paid and said stock and notes were taken up; that he had is common and preferred stock and said notes; that thereafter said Michelle Trust and Savings Bank a draft for \$14,000 together with and for the three notes of \$1,000 each; that he placed with the and made him an offer of \$14,000 for his preferred and common stock vice president and general manager of appellant, called on appellee Appellee testified that on December 13, 1932, Carl Heim, unpaid salary owing to appellee in December 1932.

Witness also discloses that there was something over 24 months of

"A. A. Phelps

"35 shares Preferred stock 3500.00

"Accrued Dividends 1260.00

"3 Deferred Notes 3000.00

"Accrued Interest 210.00

7970.00

"Common stock and salary 6030.00
\$14000.00."

E. T. Burscheid, cashier of said bank, testified that, in a conversation with appellee on January 7, 1929, appellee said to him: "Has Carl Heim said anything to you with reference to acting as trustee or escrow agent or third party in cleaning up the Whitcomb Company matters?" That he said, "Yes, I have consented to act." That appellee then said to him: "I have talked with Mr. Heim and agreed to settle all my differences and claims against the Whitcomb Company and I want to leave a draft here." He further testified that appellee drew a draft for \$14,000 on appellant company and deposited it with him, together with the preferred stock and notes above mentioned. This witness also testified that appellee withdrew the \$14,000 draft and substituted a draft for \$15,110, which was later withdrawn and a third draft for \$14,000 was deposited. This witness further testified that when he delivered to appellee the check or draft in payment of the \$14,000, appellee stated: "Ed, I am very glad to get all my differences and claims against the Whitcomb Company settled, and I thank you very much."

In rebuttal, appellee denied having made said statement. As a part of his case in chief, appellee offered in evidence two letters written by appellant company to him, which letters are as follows:

"Rochelle, Ill., December 14, 1928

"My dear Mr. Phelps:

"Confirming our arrangement entered into verbally, yesterday, wish to advise that if you will deposit the three \$1000.00 notes of the Geo. D. Whitcomb Company, the thirty-five shares of preferred stock and the common stock which you hold, with the Rochelle Trust & Savings Bank, with a draft drawn on Mr. Whitcomb

for Rochelle Trust & Savings Bank, with a draft drawn on Mr. Whitcomb and preferred stock and the common stock which you hold, with the notes of the Geo. D. Whitcomb Company, the thirty-five shares of \$1000.00

today, wish to advise that if you will deposit the three \$1000.00 bonds to appeal "Confirming our arrangement entered into verbally, yes- my dear Mr. Phelps:

as follows: "Rochelle, Ill., December 14, 1928" letters written by appellant company to him, which letters are as a part of his case in chief, appellee offered in evidence two

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| | |
|-----------|----------------------------|
| \$1000.00 | "Common stock and salary |
| 8030.00 | |
| 7970.00 | |
| 210.00 | "Accrued interest |
| 3000.00 | "3 Deferred Notes |
| 1260.00 | "Accrued Dividends |
| 3500.00 | "35 shares Preferred stock |
| | "A. A. Phelps |

and myself, for \$14,000.00, payable January 5th, we will arrange to retire the same on that date, it being also understood that our plans contemplate a recapitalization and provision of sufficient funds so that we will pay up all bank loans carrying your guarantee, as these loans mature, and will relieve you of any further endorsements on any further Geo. D. Whitcomb Company loans or borrowings.

"I understand also, that you control Mrs. Josephine Hurd's stock and if you will also have this stock which consists of ten shares of preferred stock and eight shares of common stock deposited, we will arrange to pick up these additional shares belonging to your relative, for an additional sum of \$1900.00.

"Will you kindly keep this arrangement in confidence until such time as we have all of our plans consummated, in order that we can complete them in all of the details without interference from any outsiders. Mr. Berscheid of the Rochelle Trust, knows something of the proposed plan and you can deposit the collateral with him without fear of any of the details getting around.

"We are in hopes of getting everything knitted together by the Christmas holidays

"Yours very truly,

"Geo. D. Whitcomb Company

"Carl Heim, Vice President."

"Rocelle, Ill. January 16, 1929,

"My dear Mr. Phelps:

"With reference to our deal for the purchase of your preferred stock, common stock, and deferred notes of the Geo. D. Whitcomb Co., our purchase price of this was \$14,000 for your own holdings and \$2,020.00 for those of Mrs. Hurd.

"I understand that you have all of the certificates deposited with Mr. Berscheid at the Rochelle Trust & Savings Bank but that while your draft up until today was in the amount of \$14,000.00, you have changed it to \$15,100.00.

"Our deal was on the basis of \$14,000 and this is the amount that we are willing to pay, and is all that we have arranged for. We cannot at this time, alter the amount.

"Yours very truly,
"Carl Heim"

and myself, for \$14,000.00, payable January 5th, we will arrange to retire the same on that date, it being also understood that our plans contemplate a recapitalization and provision of sufficient funds so that we will pay up all bank loans carrying your guarantee, as these loans mature, and will relieve you of any further endorsements on any further Geo. D. Whitcomb Company loans or borrowings.

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The testimony on behalf of appellee and of appellant as to what transpired at the time of the sale of said stock, etc., is diametrically opposed. The testimony of Burscheid tends to corroborate Heim that there was a settlement of all claims which appellee held against appellant company, though the matter of salary was not mentioned specifically. On the other hand, the two letters tend strongly to corroborate appellee, to the effect that the transaction did not purport to cover said back salary.

There is no controversy but that the amount found by the court was correct, provided appellee's salary was not taken into consideration in said settlement. No propositions of law were submitted by either party, and there being no error assigned on the rulings of the court on the evidence, the sole and only question for our determination is as to whether the finding and judgment of the court is against the manifest weight of the evidence.

Counsel for appellant contends that, in view of the corroboration of Heim by Burscheid, and the pencil memorandum which Heim testified he made in the presence of appellee, the evidence on behalf of appellant is sufficient to warrant the court in reversing said finding and judgment

In answer thereto, appellee insists that the letter dated December 14, 1928, purports to cover the entire contract between appellee and appellant, and is not to be explained or varied by oral testimony. This point is not well taken, as it is not contended by either of said parties that any contract was entered into in writing between them or that such was contemplated. However, so far as appellant is concerned, it is not in a favorable position to insist that said letter does not cover said entire transaction. It purports so to do, and to have been written for that express purpose, and it was admitted in evidence without objection.

Great stress is laid by counsel for appellant on the pencil memorandum, Defendant's Exhibit 1. Appellee testified "that Heim did not show him any figures or get out any paper and that he did not show him Defendant's Exhibit 1, nor had he ever seen it prior to the trial. That his salary for the last two years was not mentioned,

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nor did Heim produce any figures showing how the \$14,000 offer was arrived at." Heim testified that he "took out a piece of paper and I figured out, computed the value of his 35 shares of preferred at 100 cents on the dollar and figured interest on the preferred stock, and I said, 'you have three One Thousand Dollar notes, have you not?' And he said, 'I am still carrying those deferred notes.' I computed them at their face value and interest to the end of the year, and then I asked him if he had 97 shares of common stock. I asked if that was correct, and he said, 'I haven't the certificates here but it is something like that.' Then I said to him, 'Well, you fellows haven't been credited with any salary for two years. I am making the same arrangement with the other inactive Vice Presidents and Directors, and I will pay you \$6,000.00 for your common stock and whatever accounts you have against the Company.' I then put this \$6,000 down, and that didn't figure quite an even fourteen thousand and so I changed it to \$6,020, if my memory is accurate. I made a pencil memorandum of that in the presence of Mr. Phelps of just how I arrived at that \$14,000." He further testified "that the figures (on Defendant's Exhibit 1) were made in the store of the plaintiff in Rochelle, Illinois, on December 13, 1928, and that plaintiff was present at that time and the figures thereon made in his presence."

It will be observed that, while Heim testified that he made the figures on the memorandum in appellee's presence, he does not testify that appellee saw or examined the same, and his testimony does not contradict the statement of appellee that he did not see the figures and items that Heim claims made up the \$14,000.

Where a jury is waived and a trial is had before the court, its findings on the evidence are not to be set aside unless against the manifest weight thereof. *Lane v. Lesser*, 135 Ill. 567-573; *Burgett v. Osborn*, 172 Ill. 227-238; *Delaney v. Delaney*, 175 Ill. 187-199; *Haug v. Haug*, 193 Ill. 645-650; *Hess v. Killebrew*, 209 Ill. 193-200; *Murrah v. Russell*, 194 App. 85-86; *Katzoff v. Goodman*, 197 App. 488; *Lidgerwood Co. v. Robinson & Son*, 198 App. 604-606.

A review of the evidence does not warrant us in holding that said finding and judgment is against the manifest weight of the evidence.

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A review of the evidence does not warrant us in holding that said finding and judgment is against the manifest weight of the evidence.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

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It is so affirmed.

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at 17 face value and interest to the end of the year, and then I

and him if he had 87 shares of common stock. I asked if that was

correct, and he said, 'I haven't the certificates here but it is

some like that.' Then I said to him, 'Well, you believe that?

been credited with any money for two years. In making the

arrangement with the President.

will be

you have against the company. When this was done

and that didn't figure quite as even then, but I thought

changed it to \$4,000. If my memory is correct, I

memorandum of that in the presence of Mr. Phelps of New York

arrived at that \$4,000. He further testified that the figures

Defendant's Exhibit 1 were made in the course of the plaintiff's

Rochelle, Illinois, on September 13, 1928, and that plaintiff was

present at that time and the figures thereon made in his presence.

It will be observed that, while defendant testified that he made

the figures on the memorandum in appellee's presence, he does not

testify that appellee saw or examined the same, and his testimony

contradicts the statement of appellee that he did not see

and items that defendant made up the \$4,000.

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Rest v. Gabor, 178 Ill. 327-338; Delaney v. Cal. Rev., 178 Ill. 157-

Hans v. Hans, 193 Ill. 643-650; Hans v. Andrew, 202 Ill. 133-

Maselli, 194 Ill. 65-8; Katsoff v. Goodman, 197 Ill.

Go. X. Robin

warrant us in holding that

which is evidence

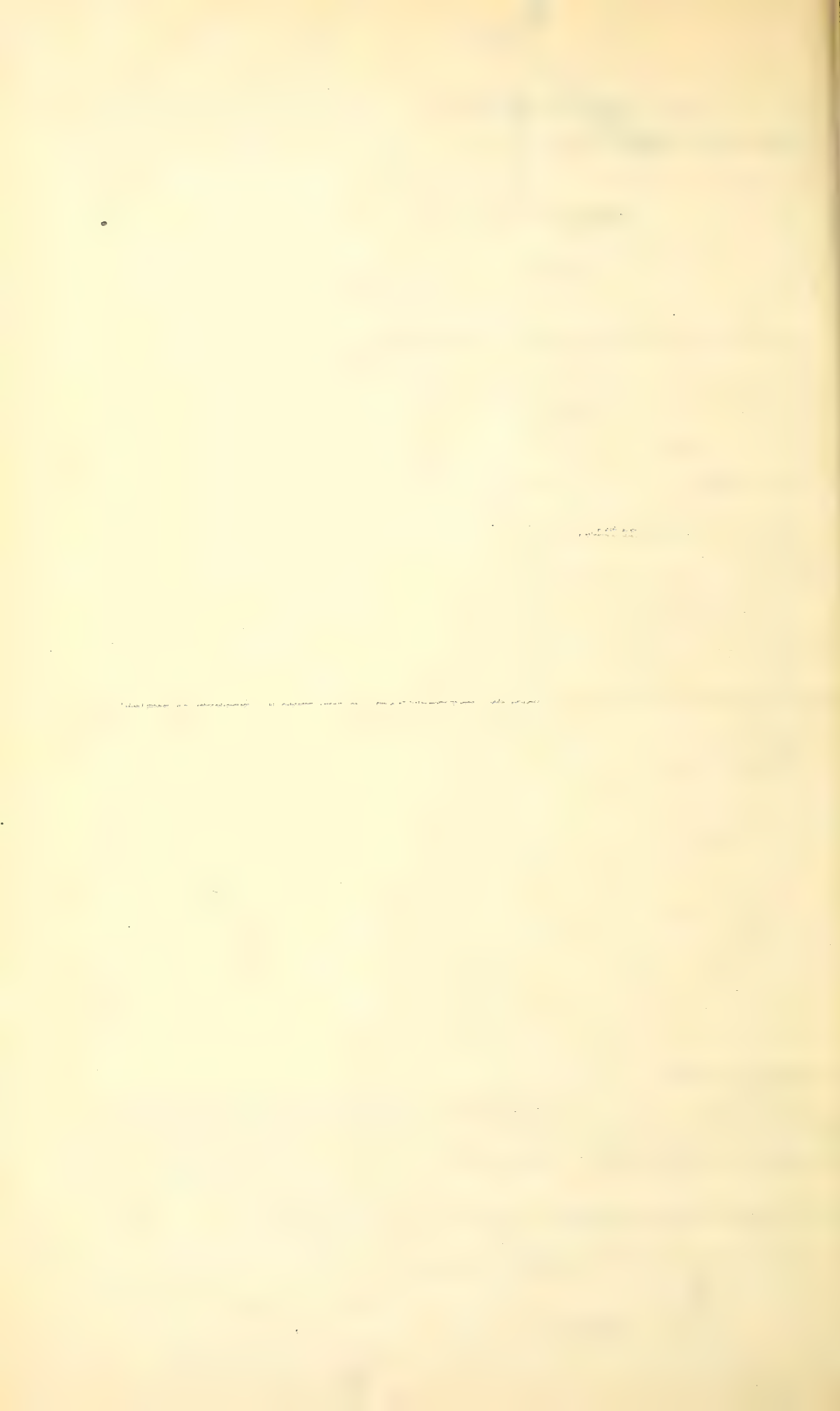
STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



IN THE
APPELLATE COURT OF ILLINOIS.

October Term, A. D., 1930.

262 T.A. 665#

| | | |
|--------------------------------|------------|----------------------------|
| In the Matter of the Estate of |) | |
| HENRY CARSTENS, Deceased., |) | |
| | Appellant, |) |
| vs. |) | Appeal from the |
| |) | Circuit Court of |
| |) | Madison, County, Illinois. |
| MAY COOL, | Appellee. |) |

The appellant, as administrator of the estate of Henry Carstens, deceased, filed in the probate court of Madison county, his verified petition as provided by Section 81 of the Administration Act (Cahill Rev. Ill. St., Chap 3), alleging inter alia that May Cool, the appellee, had in her possession, or embezzled, or concealed, certificates of deposit issued by the Granite City National Bank and the Granite City Trust and Savings Bank. This property it was alleged belonged to the decedent during his life time. The judgment of the probate court being adverse to the appellee, she appealed the cause to the circuit court of Madison county, where a jury was waived by both parties and the hearing had before the judge. At the close of the appellant's evidence the appellee made a verbal motion requesting the court to dismiss the petition and find that the certificates in question, or the proceeds thereof, are the property of the appellee. Thereupon the court entered a written order sustaining the motion and found that the certificates of deposit, and the proceeds therefrom, are the property of the appellee by gift inter vivos from the decedent. The court dismissed the petition.

The proceedings to this stage are thus briefly summarized for the reason that the appellant contends in this court that the lower court erred in sustaining the motion, and in

effect, found the issues in favor of the appellee on the merits. the objections of the appellant to the court's action was directed against the mode of procedure followed by the court in disposing of the motion.

It is first urged by the appellant that the trial court erred in sustaining the motion, because it (the motion being made at the close of the appellant's evidence), presented only a question of law as to the legal sufficiency of the evidence to sustain a judgment, against the party making the motion, and the evidence being tested by this rule, the motion should have been overruled.

The judgment, or order, is next attacked on ~~on~~ the ground that while the judgment in favor of the appellee necessarily followed the sustaining of the motion, the allowance of the motion did not settle the issues of fact. The appellant contended that after the court had determined that the evidence of the appellant was legally insufficient, the motion should have been denied, and there being no evidence introduced by the appellee, the court should have decided the question of the preponderance of the evidence, and rendered judgment, the motion being in the nature of a demurrer to the evidence. In support of his position the appellant cites several decision of our Supreme Court, in actions at law, and as particularly decisive the cases of Hem vs. Commercial Men's Ass'n., 2 79 Ill., 570, and Wolf vs. Chicago Sign Printing Co., 233 Ill. 501.

If this proceeding, under Section 81, were an action at law, the authorities cited by the appellant would be controlling and the case could be shortly disposed of. For this court to hold that this suit is an action at law, we must further decide that the case should have been appealed from the probate court directly to this court, instead of to the circuit court, and therefore the circuit court was without jurisdiction and its order a nullity. (Sebree v. Sebree, 273 (2-93)

Ill., 228; Williams vs Runyan, 230 Ill., App., 199) The courts of this State have uniformly held that a proceeding under the above Section is a statutory proceeding and not an action at law. It is sui generis. (Brown vs. Hamm Smith, 247, Ill., App., 247; In re Estate of Chalifoux 220 Ill., App., 199; People vs. Benson, 99 Ill., App., 325)

It cannot be successfully maintained that the amendments of 1925 to Section 81 and 82 of the Administration Act granting the right of trial by jury at the request of either party and giving the probate court power to try the right of title to property, have the effect of converting the proceedings under those sections into an action or proceeding at law. (Grier v. Cable, 159 Ill., 29; Sebree v. Sebree 293 Ill., 525) We are not warranted in holding that this statutory proceeding is unqualifiedly analogous to proceedings conducted according to the forms of the common law. (Sebree v. Sebree, supra.) The forms of pleading and the methods of procedure in the respective forms of action at law being peculiar and specialized, in many instances it would be difficult to select any action at law as an unfailing guide.

Investigation of the authorities shows that our courts have held that this proceeding should be governed by equitable principles (In re Estate of Wood, 256 Ill., App., 401; Hicks vs. Monahan 209 Ill., App., 516; Martin vs. Martin, 170 Ill., 18; Williams vs. Runyan 230 Ill., App., 199)

In the case of Adams, 31 Ill., App. 637, it was held the proceeding should be governed by the principles and practice prevailing in equity. In Sebree v. Sebree, supra, it is held that although county and probate courts are without chancery or general law jurisdiction, yet, in probate matters they have jurisdiction of an equitable character and may accept forms of equitable proceedings. Although it must be conceded that not all of the provisions of our chancery practice Act apply

111. Williams v. Ruyman, 230 Ill. App. 199, 199.

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at law. It is an action. (Brown v. Hammett, 247 Ill. App. 199.)

247. In re Estate of Chalfoux 230 Ill. App. 199; People

v. Benson, 29 Ill. App. 325.

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property, have the effect of converting the proceedings under

these sections into an action or proceeding at law. (Grier v.

Carle, 159 Ill. 29; Grier v. Carle, 233 Ill. 325.)

We are not warranted in holding that this statutory proceeding

is analogized to proceedings conducted according

to the forms of the common law. (Grier v. Carle, supra.)

The forms of pleading and the methods of procedure in the

various forms of action at law being peculiar and separate

in many instances it would be difficult to select any action

at law as an analogizing guide.

Investigation of the authorities shows that our

courts have held that this proceeding should be governed by

equitable principles (In re Estate of Wood, 236 Ill. App. 199.)

401; Wicks v. Monahan 209 Ill. App. 518; Martin v. Martin,

170 Ill. 12; Williams v. Ruyman 230 Ill. App. 199.)

In the case of Adams, 21 Ill. App. 231 it was held

the proceeding should be governed by the principles and practice

usually in equity. In Grier v. Carle, supra, it is held

that although county and probate courts are without chancery

jurisdiction, yet, in probate matters they have

equity jurisdiction and may accept forms

of procedure usually in equity. Although it must be conceded that

our equity practice has been largely

to a statutory proceeding. (Therens v. Therens, 207, Ill., 59) Our Supreme Court has never held that a statutory proceeding is either an action at law or a suit in equity, still on an appeal to a court of review such court will consider the proceeding as a chancery proceeding, if the probate court must have exercised equitable powers in deciding the cause. Thus, in the case of Henry V. Caruthers, 196 Ill., 136, and Starrett v. Brossleau, 208 Ill., 408, the point presented is whether the Supreme Court would review the facts in the case, upon appeal from this court. In a statutory proceeding, the question was held to turn on the fact whether the probate court exercised its equitable powers in determining the matters in issue.

Appellant urges that the lower court erred in its order finding a gift inter vivos from the decedent to the appellee as a fiduciary relation existing between the parties and therefore the gift is prima facie void according to the rule in equity and the conclusion that must be drawn therefrom, We deem it incumbent upon this court to decide that this proceeding on review should be controlled by the rules in force in chancery governing equitable proceedings.

A demurrer to the evidence is unknown in equity proceedings. The court say in Hiss v. Hiss, 228 Ill., 414: "A motion to dismiss a bill in equity at the close of the plaintiff's evidence is not good practice. The Law in Illinois being: At the close of plaintiffs in error's case, defendants in error moved to dismiss the bill for want of equity. While this is not considered proper practice, if such a motion is made it amounts to nothing but a submission of the case on the merits to the Chancellor." (Thorworth v. Sheets, 269 Ill., 567. And in the case of Koebel v. Dyle, 256 Ill., p. 614, the court says, "We do not recognize a practice of making a motion in a case on final hearing before the Chancellor to dismiss the bill on the evidence submitted at any stage of the case. This

[illegible]

cause was on hearing before the Chancellor for a final decision on the merits, as they had to establish a right to the relief prayed for or to show good defense. To permit such a motion would result in hearing a case piece-meal, the sustaining such a motion would result in an appeal and on a reversal another hearing of more evidence, followed perhaps by another appeal. The party has a right to submit his cause to the Chancellor upon the evidence adduced if he sees fit, and the motion, if made, was neither more nor less than a submission of the cause to the Chancellor."

At the close of the petitioner's evidence, the court, at the suggestion of the attorney for the petitioner, called the defendant, May Cool, as a witness. Attorneys for the appellant and appellee cross-examined Mrs. Cool at considerable length. From an examination of all of the evidence in the case it is our conclusion that there was no fiduciary relation existing between the parties. Mrs. Cool was given those certificates in question by Henry Carstens for the many acts of kindness and services that she rendered to him while he was making his home with her and her husband. We are of the opinion that the evidence sustains the contention of the defendant that there was a gift of the certificates of deposit in question from Henry Carstens to May Cool, and that they were rightfully the property of the said May Cool, and the court did not err in so finding, and properly dismissed the petition of the administrator. The judgment of the circuit court of Madison County is hereby affirmed.

Not to be reported in full

was on hearing before the Chancellor for a final decision on the merits, as they had to establish a right to the relief prayed for or to show good cause. To permit such a motion would result in hearing a case piece-meal, the sustaining motion would result in an appeal and on a reversal another hearing of more evidence, followed perhaps by another appeal. The party has a right to submit his cause to the Chancellor upon the evidence adduced if he sees fit, and the motion, if made, was not more than a submission of the cause to the Chancellor."

At the close of the petitioner's evidence, the court, at the suggestion of the attorney for the petitioner, called the defendant, May Cool, as a witness. Attorney for the appellant and appellee cross-examined Mrs. Cool at considerable length. From an examination of all of the evidence in the case it is our conclusion that there was no fiduciary relation existing between the parties. Mrs. Cool was given these certificates in question by Henry Garstene for the many acts of kindness and services that she rendered to him while he was making his home with her and her husband. We are of the opinion that the evidence sustains the contention of the defendant that there was a gift of the certificates of deposit in question from Henry Garstene to May Cool, and that they were rightfully the property of the said May Cool, and the court did not err in so finding, and properly dismissed the petition of the administrator. The judgment of the circuit court of Madison County is hereby affirmed.

Not to be reported in full

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AG. NO. 1.

262 T.A. 865

V.

When the time for final settlement arrived, it was claimed by appellee that the wagon scale weights exceeded the railroad weights and that by reason thereof it had paid appellants \$1082.57 more than was due them. Appellee sued to recover that amount and appellants filed the general issue and a plea of set-

U. S. DISTRICT COURT
 JUN 4 1931
 1931

STATE OF ILLINOIS
 APPELLATE COURT
 FOURTH DISTRICT

FEBRUARY TERM, A. D. 1931.

AG. NO. 1.

1931 A. 665

APPEAL FROM
 HARDIN CIRCUIT
 COURT

BAR MINING COMPANY,
 Appellee,
 V.
 JESON QUARTER, et al,
 Appellants.

... By a written contract appellees agreed to sell and
 ... agreed to pay \$700 some of flour. The space, as de-
 ... was weighed over appellee's wagon scale and according to
 the terms of the contract payments were to be made, monthly, in
 accordance with the wagon scale weights. The contract also con-
 tained the following provision: "Railroad weights as registered on
 buyer's standard railroad scales shall be finally determinative of
 the tonnage of gravel delivered. However, preliminary payments to
 the seller shall be made on the basis of wagon scale weights, but
 any difference in weights between wagon scale weights and railroad
 weights after gravel has been loaded on board railroad freight cars
 the weight shall be adjusted so that final payment shall be based
 on the railroad scale weights."
 When the time for final settlement arrived, it was
 stated by appellee that the wagon scale weights exceeded the rail-
 road weights and that by reason thereof it had paid appellees
 more than was due them. Appellee sued to recover that
 amount and appellees filed the general issue and a plea of self-

off, claiming that appellee was indebted to them for more than \$8,000.00 because they had delivered 496 tons of spar over and above the number of tons shown by the wagon scale weights. Appellee recovered a verdict and judgment for the amount claimed.

Appellee was also engaged in mining spar from its own mine. About 50% of the spar purchased from appellants was mixed with appellee's spar and shipped to customers. The remainder was shipped without mixing. When a car of mixed spar was to be shipped the empty car was weighed on appellee's standard railroad scales, the car was then partly filled with spar received from appellants and again weighed on the same scales. From that weight, the weight of the empty car was deducted in order to ascertain the weight of the spar then in the car and the difference was supposed to represent the weight of the spar received from appellants that was placed in the particular car. Frequently appellee's spar was first put in the car and a similar method was used to determine how much of appellants spar went into the particular car.

Appellants spar was not all shipped in railroad cars. A large amount thereof was shipped in barges. The evidence is that up to June 15, fifty cars and eight barges were shipped but the shipping continued until December 1. The capacity of the barges varied from 200 to 500 tons. There is no showing as to the total number of ~~p~~ barges that were shipped, nor does it appear whether the spar shipped in that way was mixed. When shipped in barges appellants spar was weighed in dump cars on appellee's standard railroad scales. When the spar was in the dump cars it was not loaded on board railroad freight cars for shipment. The dump cars were never shipped but were unloaded into barges. There is no showing as to what portion of appellants spar was shipped in that way. The railroad weights, of the portion so shipped, were never ascertained after the spar was loaded on railroad freight cars for shipment as required by the terms of the contract in case appellee insisted upon a settlement otherwise than according to the wagon scale weights.

Appellee claims to have made monthly payments for the spar delivered on the basis of the wagon scale weights in accordance

...that appellee was indebted to them for more than
...because they had delivered 400 tons of spar over and
...number of tons shown by the wagon scale weights.

...recovered a verdict and judgment for the amount claimed.
Appellee was also engaged in mining spar from the

mine. About 50% of the spar purchased from appellants was
mixed with appellee's spar and shipped to customers. The remainder
was shipped without mixing. When a car of mixed spar was to be

shipped the empty car was weighed on appellee's standard railroad
scales, the car was then partly filled with spar received from

appellants and again weighed on the same scales. From that weight
the weight of the empty car was deducted in order to ascertain the

weight of the spar then in the car and the difference was supposed
to represent the weight of the spar received from appellants that

was placed in the particular car. Presently appellee's spar was
first put in the car and a similar method was used to determine how

much of appellants' spar went into the particular car.

Appellants' spar was not all shipped in railroad cars.
A large amount thereof was shipped in barges. The evidence is that

...to June 11, 1917, the ...
...continued until December 1. The capacity of the barges

varied from 200 to 500 tons. There is no showing as to the total
number of barges that were shipped, nor does it appear whether the

spar shipped in that way was mixed. When shipped in barges appellants
spar was weighed in dump cars on appellee's standard railroad scales.

When the spar was in the dump cars it was not loaded on board rail-
road freight cars for shipment. The dump cars were never shipped but

were released into barges. There is no showing as to what portion of
appellants' spar was shipped in that way. The railroad weights, of

the portion so shipped, were never ascertained after the spar was
loaded on railroad freight cars for shipment as required by the terms

of the contract in that appellee furnished a railroad wagon
also was intended to be used as a scale.

Appellee failed to show that weights were used for the
spar delivered on the basis of the wagon scale weights in accordance

with the terms of the contract and that in so doing it has over-paid appellants. After stipulating that payments should be made upon that basis the parties further agreed:- "But any difference in weights between wagon scale weights and railroad weights after gravel has been loaded on board railroad freight cars for shipment, shall be adjusted so that final payment shall be based on the railroad scale weights." Appellee's cause of action is based upon that provision, but, as we have shown, a large portion of appellants spar was never loaded on railroad freight cars for shipment, and appellee was unable to show what the railroad weights were "after the gravel had been loaded on board railroad freight cars for shipment." Neither appellee nor the jury was authorized to adopt any other method of ascertaining the difference, if any, in the weights. The parties must abide by their contract. Courts and juries are not at liberty to make a new contract for them.

It seems to us that appellee recognizes the weakness of its position by arguing to this Court that appellants waived that provision of the contract and that the difference in weights is readily accounted for by the difference in moisture of the spar when delivered and at the time it was shipped. The question of waiver was not raised by the declaration and was not an issue in the case. *Feder v. Midland Casualty Co.*, 316 Ill. 552. The instructions given to the jury at the request of appellee show that the case was not tried on those theories. Appellee failed to prove a cause of action and was not entitled to recover.

Appellants claimed a set-off on the theory that they delivered more spar than was shown by appellee's wagon scale weights. The basis of that claim is that appellee's scale did not weigh correctly. From a careful consideration of all the evidence bearing upon that question we are of the opinion that it is insufficient to entitle appellants to recover. Appellee's wagon scale may not have weighed correctly at times, but in the state of the proof it would be a mere conjecture as to the extent of the inaccuracy. Appellee's superintendent conceded, however, that on the basis of the wagon scale weights there would be still due appellants the sum of \$428.51. In our view of the evidence appellants were entitled to recover that sum from appellee. The judg-

the weights between wagon scale weights and railroad weights after
travel has been loaded on board railroad freight cars for shipment,
shall be adjusted so that final payment shall be based on the rail-
road scale weights." Appellee's cause of action is based upon that
deviation, but, as we have shown, a large portion of appellee's spar
was never loaded on railroad freight cars for shipment, and appellee
was unable to show what the railroad weights were "after the gravel
had been loaded on board railroad freight cars for shipment." Neither
appellee nor the jury was authorized to adopt any other method of
ascertaining the difference, if any, in the weights. The parties
were bound by their contract. Courts and juries are not at liberty
to make a new contract for them.

It seems to us that appellee's position is untenable. It is
its position by arguing to this Court that appellee waived that
provision of the contract and that the difference in weights is readily
ascertained for by the difference in moisture of the spar when delivered
at the time it was shipped. The question of waiver was not raised
by the declaration and was not an issue in the case. *Feder v. Highland*
Granite Co., 316 Ill. 522. The instructions given to the jury at the
request of appellee showed that the case was not tried on those theories.
Appellee failed to prove a cause of action and was not entitled to

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delivered more spar than was shown by appellee's wagon scale weights.
The basis of that claim is that appellee's scale did not weigh correctly.
A careful consideration of all the evidence bearing upon that ques-
tion we are of the opinion that it is insufficient to entitle appellee
to recover. Appellee's wagon scale may not have weighed correctly at
times, but in the state of the proof it would be a mere conjecture as
to the extent of the inaccuracy. Appellee's superintendent conceded
that on the basis of the wagon scale weights there would be
still an appellee the sum of \$488.51. In our view of the evidence
appellee were entitled to recover that sum from appellee. The judg-

ment in favor of appellee is reversed and judgment will be entered in this Court for \$428.51 in favor of appellants and against appellee. Appellee will pay the costs in this court and in the trial court.

JUDGMENT REVERSED AND

JUDGMENT ENTERED HERE.

The clerk will insert in the judgment the following:-
"The Court finds that appellee failed to prove a cause of action and that appellee is indebted to appellants in the sum of \$428.51."

Not to be reported in full

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Bill.

QMA DESIGNS INTERNATIONAL

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STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1931.

TERM NO. 29.

AG. NO. 22.

2621.1.666'

GRACE BAKER,
Appellee,

V.

EAST ST. LOUIS RAILWAY
COMPANY,
Appellant.

APPEAL FROM

EAST ST. LOUIS

CITY COURT.

BARRY, P. J. - Appellee sued to recover for injuries alleged to have been caused by the negligence of appellant while she was a passenger on one of its cars. She charged that the car in which she was riding was carelessly and negligently operated by appellant's servant and that by reason thereof the car collided with an engine of the Southern Railway Company at a point where the street car tracks crossed the tracks of that company. She recovered a verdict for \$12,500.00 and on a motion for a new trial the Court required a remittitur of \$7500.00 and rendered judgment for \$5,000.00.

Appellee testified that the street car collided with the engine and that by reason thereof she was injured. Three witnesses testified on behalf of appellant that they were present at the time in question and that there was no collision. The principal injury claimed to have been received by appellee was the falling of the womb. At the time of the alleged injury she made no complaint to anyone on the car of having been injured and did not consult a doctor for more than a month after the alleged occurrence. Her doctor testified that there are many things that cause the falling of the womb. In the state of the proof it was highly essential that the jury should be

STATE OF ILLINOIS.

FOURTH DISTRICT.

TERMINAL TRUNK, A. D. 1931.

APPEAL FROM

EAST ST. LOUIS

CITY COURT.

ST. LOUIS RAILWAY

Appellant.

... P. J. - Appellee used to recover for injuries alleged to have
been caused by the negligence of appellant while she was a passenger
one of its cars. She charged that the car in which she was riding
was carelessly and negligently operated by appellant's servant and that
reason thereof the car collided with an engine of the Southern Rail-
way Company at a point where the street car tracks crossed the tracks
of that company. She recovered a verdict for \$12,500.00 and on a
motion for a new trial the Court rendered a remittitur of \$7500.00
and rendered judgment for \$5,000.00.

Appellee testified that the street car collided with

the engine and that by reason thereof she was injured. Three

witnesses testified on behalf of appellant that they were present at

the time in question and that there was no collision. The principal

injury claimed to have been received by appellee was the falling of

the wheel. At the time of the alleged injury she made no complaint

to anyone on the car of having been injured and did not consult a

doctor for more than a month after the alleged occurrence. Her doctor

testified that there are many things that cause the falling of the wheel.

In the state of the mind of the jury it was their duty to find in

accurately instructed.

The Court instructed the jury on behalf of appellee that it was the duty of appellant to use the highest degree of care and caution consistent with the practical operation of the road to provide for the safety and security of passengers while being transported; that if the jury believed that appellee was a passenger on the car in question and that appellant failed to use the highest degree of care and caution aforesaid and that appellee was in the exercise of due care and caution for her own safety at and immediately prior to the time of receiving the alleged injury, then she was entitled to a verdict against appellant. The instruction directed a verdict in favor of appellee without requiring the jury to find that appellee was injured by reason of appellant's negligence. It also assumes that appellee was injured while a passenger on appellant's car. Those are questions of fact for the jury and which the jury should determine from the evidence before appellee was entitled to a verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full

The Court instructed the jury on behalf of appellee that it was the duty of appellant to use the highest degree of care and caution consistent with the practical operation of the road to maintain for the safety and security of passengers while being transported; that if the jury believed that appellee was a passenger on the bus in question and that appellant failed to use the highest degree of care and caution aforesaid and that appellee was in the bus prior to the time of receiving the alleged injury, then the jury was entitled to a verdict against appellant. The instruction requested a verdict in favor of appellee without requiring the jury to find that appellee was injured by appellant's negligence. It also assumed that appellee was injured while a passenger on appellant's bus. There was no finding of fact that the bus was carrying the City of Dallas employees from the Dallas City Hall and that it was a city bus. The instruction is correct and the jury was entitled to a verdict in favor of appellee.

Very truly yours,
The District Court of Dallas County, Texas

Not to be separated in files

NOTED FOR THE RECORD
FILED IN CASE NO. 10-10-10
JAN 10 1910
CLERK OF DISTRICT COURT
DALLAS COUNTY, TEXAS

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1931.

TERM NO. 30.

AG. NO. 25.

A. J. WEBB,
Appellee,

v.

GREAT NORTHERN MUTUAL
UNION, et al,
(Chicago National Life
Insurance Company)
Appellant.

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:
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:
:
:
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APPEAL FROM
MASSAC CIRCUIT
COURT.

262 I.A. 666

Barry, P. J. - A. J. Webb recovered a judgment against the Great Northern Mutual Union and thereafter filed a bill in the nature of a creditor's bill in which he also averred that appellant had entered into an agreement with the Great Northern Mutual Union whereby appellant assumed and agreed to pay all of the liabilities of the said Great Northern Mutual Union. The Court found that there was such an agreement entered into and entered a decree that appellant should pay Webb the amount of his judgment.

Webb recovered on the theory that there was a parol contract as averred in his bill but the only evidence he offered consisted of proof of alleged admissions and declarations by J. O. Laugman. There was no evidence as to the extent of Laugman's authority. He was shown to be an agent of appellant with the title "Special Home Office Representative." The alleged admissions and declarations were wholly insufficient to show that Laugman had authority to bind appellant to pay the debts of the Great Northern Mutual Union. There is no competent evidence in the record to support the decree and for that reason it is reversed.

REVERSED.

Note to be reported in full

AG. NO. 25.

200 A. 888

APPEAL FROM
KASSAC CIRCUIT
COURT.

... recovered a judgment against the Great
Northern Mutual Union and thereafter filed a bill in the nature
of a writ of habeas corpus to set aside the judgment and
enjoin the enforcement thereof with the Great Northern Mutual Union
and agreed to pay all of the liabilities
of the said Great Northern Mutual Union. The Court found that
there was an agreement entered into and entered a decree
that appellant should pay the same to the said
... recovered on the theory that there was a parcel
... to the bill but the only evidence he offered
... of proof of his indebtedness to the said
... as the basis of his claim. The Court found that
... was not a bill in the nature of a writ of habeas corpus
... to set aside the judgment and enjoin the enforcement thereof
... to pay the same to the said ...

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FEBRUARY TERM A.D. 1931.

Term No. 3.

Ag. No. 3.

Fae Fierstine and
Rosie Koplovitz,
Appellees

vs

John L. Keeley and
Viola Keeley, Doing business
as Keestone Contracting
Company,
Appellants.

Appeal from
City Court of
East St. Louis,
Illinois.

262 I.A. 666³

Fulton, William J.

This is an appeal by the Defendant, John L. Keeley, from a decree of the City Court of East St. Louis, entered on June 25, 1930, containing the findings of the Court and stating an account between the parties.

April 15, 1929, Appellees filed their Bill of Complaint asking for an accounting, settlement and injunction against the Appellant, John L. Keeley and his partners engaged in a building contract with Appellees. All sub contractors were made parties defendant to the bill. On April 20, 1929 the Appellees applied for a temporary restraining order and Appellants appeared to resist the application.

An order was entered on that same date purporting to be based upon stipulation and consent of the parties, which provided for a temporary injunction and other relief.

All sub contractors were settled with and dismissed from the case and later a hearing was had before the Court on the bill of Complaint, the answer of Appellants and replication thereto, resulting in the decree complained of.

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Counsel for Appellant argues the question of damages sustained because of the improper issuance of a temporary injunction, but the stipulation and consent recited in the order of the Court on April 20, 1929 forecloses the Appellant from raising that question on this appeal.

The only remaining question is that of an accounting. The facts show that Appellant under the name of Keystone Contracting Company, on October 9, 1926 agreed in writing to construct a building for Appellees, and to furnish all labor and material therefor, for the sum of \$17,000.00, and to build the same according to plans and specifications attached to the contract. After the work was started it became necessary to make certain changes to conform to the building code of the City of East St. Louis, and to the wishes of the Appellees.

On October 11, 1926, and again on November 27, 1926, subsequent agreements were entered into between the parties changing the terms of payment, but they do not materially effect the questions involved.

Appellees were not satisfied with the progress being made by Appellant and filed their bill of complaint which brought about the hearing and the temporary order of April 20, 1927. In that decree Appellant was ordered to complete the construction of the building within twenty days from that date, at his own expense, and restrained from incurring any bills for labor or material which might become a lien against the premises. He was further ordered to deliver the completed building over to Appellees on May 10, 1927, and to furnish a complete statement of all amounts due for labor and materials already incurred by Appellant in the construction of the building.

Counsel for Appellant complains in his brief that immediately after the above order was entered by the Court, Appellees proceeded to oust the Appellant from the premises by padlocking the doors, seizing all tools and equipment, and generally preventing him from completing the contract. However, Appellants have not introduced any evidence supporting such argument, except that at some

time, the tools of appellant were stolen by someone.

On May 25rd, 1927 Appellees undertook the completion of the building, made contracts and did hire men to finish the construction.

The case was later heard on the merits and October 17, 1929 , the City Court made certain findings and stated an account, which was all incorporated in the final decree under date of June 25, 1930.

In stating the account the Court allowed to the Appellant items as follows:-

| | |
|---|-----------------|
| Contract price | 17,000.00 |
| Extra work done by contractor..... | 248.00 |
| Extra work and materials furnished
by subcontractors, including fee
of ten per cent for contractor on
changes and extras | <u>4,042.66</u> |
| Total | \$21,290.66 |

And charged him with the following:-

| | |
|--|--------------------|
| Deductions agreed upon..... | \$312.40 |
| Cash received | 1,152.00 |
| Claims paid for labor
and materials | 17,995.17 |
| Difference in furnace
put in | <u>1,600.00</u> |
| Total | <u>\$21,059.57</u> |

The balance of \$23/09 the Court found due to Appellant and decreed that he be given a lien against the real estate for that amount.

Appellant complains because Appellees expended excessive amounts in finishing the contract, but offers only bare testimony of Appellant that the construction of the building could have been completed for \$400.0 instead of proving by competent testimony wherein the expenditures were excessive. He further complains because the Court allowed only ten per cent as contractors' fees in having taken care of changes and extras ordered, instead of twenty per cent claimed by Appellant. While it is hard for us to determine from the proof just what is the usual and customary charge for contractor's fee in supervising changes and extras, we hesitate to set aside the definite finding of the Chancellor without further proof than the statement of Appellant.

Appellant exerts to the item of \$1600.00 charged against him in the account for the difference in heating plant installed for Appellees and the one he had planned to install. The proof concerning this item is far from satisfactory, but both Appellees testify that Appellant told them he had arranged to put in a steam plant, costing \$2,800.00, while Appellant testified that he had estimated the sum of \$1,600.00 for such plant. When Appellees tookk over the contract they changed the plan for heating and installed a "blower" system at a cost of \$900.00. The Chancellor had the opportunity of seeing the witnesses and hearing them testify and we are not disposed to disturb his finding, unless convinced that his judgment was in error.

Appellees assigned cross errors and contend that they should be allowed a money decree for the amount expended by them in excess of the contract price of \$17,000.00. We think the evidence clearly shows that Appellees, through their agent, Victor Fierstine, ordered the extras and changes, and should pay for them. We find no reversible error in the record and therefore the decree of the City Court will be affirmed.

Not to be reported in full ^{AFFIRMED.}

S T A T E O F I L L I N O I S

A P P E L L A T E C O U R T

F O U R T H D I S T R I C T

FEBRUARY TERM A.D. 1931.

Term. No.28

Ag.No. 21.

R.J. PERRY and HARRIET E.
PERRY,

Plaintiffs in Error

-vs-

MATTHEW VALERIUS, JR.,

Defendant in Error.

Error to the
County Court of
Madison County.

2621.4.666

Fulton, William J.,

On August 26, 1929, Defendant in Error

recovered judgment by confession in the County Court of Madison County against Plaintiffs in Error and one Isaac Waggoner, on a judgment note for \$277.00 and costs. Plaintiffs in error presented a petition to the Court asking to have the judgment set aside and for leave to plead and defend the suit. The motion was granted and the affidavit of the plaintiff in error, R.J.Perry, permitted to stand as a plea to the declaration. In the affidavit Plaintiffs in Error set up that they were sureties on the note; that neither of them received anything of value for signing the note; that they understood that the note had been paid by the principal maker several years ago and that the delay on the part of the creditor in proceeding to collect against the principal maker, after notice from plaintiff in error, released them as sureties on the note. At the February term 1930 the case was submitted to a jury and at the conclusion of all the evidence the Court directed the jury to find the issues in favor of the Plaintiff, now defendant in error. Judgment was rendered by the Court on the verdict for \$277.00 and costs and Plaintiffs in error have sued out this writ of error to reverse such judgment.

The constitutional questions argued in the briefs having been swept aside by the Supreme Court, the only question now remaining appears to be whether plaintiffs in error by writing, notified the creditor to sue the principal maker upon the note forthwith, and that the delay of the defendant in error in proceeding against the principal, discharged the responsibility of the sureties. The only manner in which sureties can be relieved of payment on promissory notes where their names appear as joint makers, is to proceed under Par. 1, Chapt.132, Smith-Hurd Revised Statutes, which reads as follows:

" That, when any person bound as surety for another for the payment of money or the performance of any other contract in writing, apprehends that his principal is likely to become insolvent or to remove from the state, without discharging the contract, if a right of action has accrued on the contract, he may, BY WRITING, require the creditor forthwith to sue upon the same, and unless such creditor shall, within a reasonable time and with due diligence, commence suit thereon and prosecute the same to final judgment and execution, the surety shall be discharged; but no such discharge shall, in any case, affect the rights of the creditor against the principal debtor."

The note in question was for the sum of \$650.00 and was dated July 17, 1922, and was due and payable two years after date. During the first two years \$500.00 was paid on the principal of the note and interest was paid to July 17, 1924. No further payment of either principal or interest has been paid upon the note.

The only evidence to sustain the contention of Plaintiffs in Error is contained in three letters offered in evidence by them as Defendants' Exhibits Nos.1, 2 and 3. Objection was made to the introduction of the exhibits in evidence and sustained by the Court. A perusal of the letters, however, does not disclose any such notice as complies with the above statute. They were all written by Plaintiff in Error, R.J.Perry, to Defendant in Error. No. 1 was dated only four months prior to the date the note was entered in judgment and contains no notice that the principal is likely to become insolvent or to remove from the state without discharging the contract.

It tells of receiving a letter from a lawyer threatening suit on the note ; states that he had before notified defendant in error to collect the note from principal maker; relates how hard up the writer is and about previous offers made by him in settlement. No. 2 was written November 20, 1928, and states that if defendant in error had notified writer when note was due, it would have been paid , and makes another conditional offer of settlement. No. 3 was dated March 19, 1926 and simply tells what he, plaintiff in error, was doing to urge payment of note by the principal debtor.

In the absence of more convincing evidence that the defendant in error received some notice which would compel him to take action against Waggoner, there is nothing in this record that would release the sureties from liability for payment on this note. Mere delay on the part of the creditor to proceed against the principal does not discharge the responsibility of the surety, Villars v Palmer 67 Ill. 205. Field v Brokaw, 148 Ill. 655.

The Trial Court was warranted in directing a verdict for defendant in error at the close of the evidence, and his action in so doing and the judgment of the County Court of Madison County will be affirmed.

AFFIRMED.

Not to be reported in full

IN THE
APPELLATE COURT ILLINOIS.

FOURTH DISTRICT.

February Term, A. D., 1931.

EDWARD SCHIWITZ,

vs.

J. W. BOBBITT,

Appellant,

Appellee.

262 I.A. 686
Appeal from
City Court of
East St. Louis,
Illinois.

Opinion by Fred G. Wolfe, Justice,

On September 20, 1926, the plaintiff and defendant entered into a written contract whereby the defendant was to wreck a certain building of the plaintiff's in the City of St. Louis, Missouri. The consideration mentioned in the contract was \$844.00. The plaintiff contends that the original contract provided that the defendant was to do the work, and the salvage was to belong to the plaintiff; that the brick and material in the building was to be cleaned and stored upon the premises; that after the defendant had done a part of the work under the contract that he, the defendant, purchased the building and material from the plaintiff and thereafter was working for himself in wrecking the building and selling the material; that the defendant gave his promissory note for \$731.75, payable to the plaintiff for the purchase price of the building. The defendant admits the signing of the contract for the wrecking of the building and claims that he fulfilled and completed his part of the work, and has never been paid for the same. He denies that he ever executed a promissory note to the plaintiff, but claims he thought the same was a contract. receipt or some

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February Term, A. D., 1931.

2221 A. 666

Appeal from
City Court of
East St. Louis,
Illinois.

Opinion by Fred G. Wolfe, Justice.

On September 20, 1928, the plaintiff and defendant entered into a written contract whereby the defendant was to wreck a certain building of the plaintiff in the city of St. Louis, Missouri. The consideration mentioned in the contract was \$244.00. The plaintiff contends that the original contract provided that the defendant was to do the work, and the salvage was to belong to the plaintiff; that the brick and material in the building was to be cleaned and stored upon the premises; that after the defendant had done a part of the work the contract that he, the defendant, purchased the building and material from the plaintiff and thereafter was working for himself in wrecking the building and selling the material; that the defendant gave his promissory note for \$244.00, payable to the plaintiff for the purchase price of the building and material; that the defendant was to be paid for the work, and has been paid for the same. The defendant contends that the contract was for the wrecking of the building and the material was to be sold to the plaintiff; that the defendant was to be paid for the work, and has been paid for the same. The defendant also contends that the contract was for the wrecking of the building and the material was to be sold to the plaintiff; that the defendant was to be paid for the work, and has been paid for the same.

other paper, and that it was procured from the defendant by fraud and circumvention of the plaintiff, and that there was no consideration for the same.

The plaintiff brought suit in a Justice of the Peace court in East St. Louis for the balance he claimed was due on the promissory note. The case was tried before a jury and judgment rendered in favor of the plaintiff for the sum of \$500.00. The defendant perfected an appeal to the City Court of East St. Louis. The defendant filed a plea of setoff in the City Court of East St. Louis, alleging that there was no consideration for the note and that it was procured through fraud and circumvention, and that the plaintiff was indebted to the defendant for the balance due on the original contract for wrecking the building. On the trial in the City Court of East St. Louis before a jury a verdict was rendered for the defendant on his plea of setoff for \$457.00. The appellant, the original plaintiff, brings this suit to this court on appeal.

The evidence in the case is very conflicting. It is difficult to say where the preponderance lies. In a case of this kind where there is such a sharp conflict in the evidence it is imperative that the instructions given by the court to the jury informing them of the law relative to such cases must be accurate, and in this case, if the instructions were correct this court would not feel inclined to disturb the verdict as being against the weight of the evidence.

Instruction No. 4, given on behalf of the defendant is erroneous in stating that "The jury may allow the defendant Bobbitt any amount they think just and proper under his counterclaim." Such instruction has been criticised and the case reversed in *L. C. R.R. v. Johnson*, 221 Ill. 49; *Murin Coal and Ice Co., v. Howell*, 204 Ill., 515. In the *Murin* case (*supra*) many cases are cited and reviewed, all holding that this part of the instruction is erroneous. The latter part of the instruction ignores the fact that the amount of the verdict must be

any way, and that it was the intention of the plaintiff, and that there was no consideration for the same.

The plaintiff brought suit in a Justice of the Peace Court in East St. Louis for the balance he claimed was due on the promissory note. The case was tried before a jury and judgment rendered in favor of the plaintiff for the sum of \$500.00. The defendant perfected an appeal to the City Court of East St. Louis. The defendant filed a plea of setoff in the City Court of East St. Louis, alleging that there was no consideration for the note and that it was procured through fraud and circumvention, and that the plaintiff was indebted to the defendant for the balance due on the original contract for washing the building. On the trial in the City Court of East St. Louis before a jury a verdict was rendered for the defendant on his plea of setoff for \$457.00. The appellant, the original plaintiff, brings this suit to this court on appeal.

The evidence in the case is very conflicting. It is difficult to say where the preponderance lies. In a case of this kind where there is such a sharp conflict in the evidence it is imperative that the instructions given by the court to the jury informing them of the law relative to such cases must be accurate, and in this case, if the instructions were correct this court would not feel inclined to disturb the verdict as being against the weight of the evidence.

Instruction No. 4, given on behalf of the defendant is erroneous in stating that "The jury may allow the defendant to set off any amount which he may claim against the plaintiff's claim." Such instruction has been criticized and the case reversed in *J. C. R. v. Johnson*, 231 Ill. 49; *Martin Coal and* *Ice Co. v. Central Ice Co.* In the *Martin* case (supra) the court said:

based upon the evidence in the case.

Instruction No. 5, contains matter that is not in evidence in the case. There is no contention that anybody has ever owned the note in question except the plaintiff. The instruction is also vague and indefinite in not telling the jury what fraud practiced upon the defendant might vitiate the instrument, or what effect negligence on the part of the defendant might have on his right to recover.

Instruction No. 6, is erroneous as it ignores the defense of fraud in the execution of the note. It is a general rule of law that whoever charges fraud must prove it--(The Commercial Bank v. Volgerts, 200 App. 385; Denning v. Greenburg, 183 App. 2 08; Mortimer v. McMullen, 102 App. 593; Sawyer v. Nelson, 160 Ill., 629; Gillespie v. Fulton Oil Co., 236 Ill., 188; The burden of proving fraud in this case is upon the defendant. The defendant claims that there was no consideration for the note. The burden of proof is upon him to establish that fact.-- Higgins v. Chicago Title and Trust Co., 312 Ill., 11.---- The instruction ignores these two rules of law.

Instruction No. 7, is erroneous under the evidence in this case as it points out facts that the jury might reasonably construe to mean that the court indicated that such facts existed, or had been proven in this case. For the reasons above stated we are of the opinion that the case should be reversed and remanded to the City Court of East St. Louis.

Reversed and remanded.

Not to be reported in full

Instruction No. 5, contains matter that is not in

evidence in the case. There is no contention that anybody has
ever owned the note in question except the plaintiff. The in-
struction is also vague and indefinite in not telling the jury
what fraud practiced upon the defendant might vitiate the

instrument, or what effect negligence on the part of the defendant
might have on his right to recover.

Instruction No. 6, is erroneous as it ignores the

defense of fraud in the execution of the note. It is a general

rule of law that whoever charges fraud must prove it--(The

Commercial Bank v. Volger's, 200 App. 388; Denning v. Greenburg,

188 App. 2 98; Mortimer v. McMullen, 102 App. 593; Sawyer v.

Nelson, 160 Ill., 629; Wallis v. Wilson Oil Co., 236 Ill., 138;

The burden of proving fraud in this case is upon the defendant.

The defendant claims that there was no consideration for the

note. The burden of proof is upon him to establish that fact--

Higgins v. Chicago Title and Trust Co., 312 Ill., 11.---

The instruction ignores these two rules of law.

Instruction No. 7, is erroneous under the evidence

in this case as it points out facts that the jury might

reasonably construe to mean that the court indicated that such

facts existed, or had been proven in this case. For the reasons

above stated we are of the opinion that the case should be re-

versed.

Not to be reported in

IN THE
APPELLATE COURT OF ILLINOIS.
IN
FOURTH DISTRICT.

February Term, A. D., 1931.

W. H. WEBB,

Appellant,

vs.

A. M. LUNCAN, W. R. BROWNING,
N. S. HELM, EARL SIEBER,
H. G. DAVIS, and W. A. MCKEE,
Apellees.

262 I.A. 667¹

Opinion of Fred G. Wolfe, Judge.

On March 1st, 1930, W. H. Webb, appellant, brought suit before a Justice of the Peace in Franklin County, Illinois, to recover from the appellees the amount of a certain deposit that appellant had in the Mercantile Bank & Trust Company of Benton, Illinois. On September 30, 1927, the said bank was closed and placed in the control of the Auditor of Public Accounts of the State of Illinois. The appellees were directors of said bank. This suit was brought against them on the theory that the appellant's loss of his deposit was occasioned by fraud and negligence of the defendants in failing to properly supervise and manage the affairs of said bank.

At the trial of said cause in the Justice of the Peace's court, a judgment was entered in favor of the appellant and against the appellees for the sum of \$179.11. From that judgment an appeal was prayed and perfected to the Circuit Court of Franklin County. In the Circuit Court a trial de novo was had. At the conclusion of the evidence offered on behalf of the plaintiff, the defendants entered their motion for dismissal of the case, for the reason that the Circuit Court did not have jurisdiction

IN THE
 SUPREME COURT OF ILLINOIS
 IN
 COURT DISTRICT
 February Term, A. D. 1931.

2221 A. 667

Opinion of Fred G. Wolfe, Judge.

On March 1st, 1930, W. H. Webb, appellant, brought
 a writ of habeas corpus in Franklin County, Illinois,
 to set aside a judgment of the Justice of the Peace in
 favor of the appellees for the amount of a certain deposit
 made by the appellant in the Mercantile Bank & Trust Company of
 Illinois. On September 30, 1927, the said bank was
 closed and placed in the control of the Auditor of Public
 Accounts of the State of Illinois. The appellees were directors
 of said bank. This suit was brought against them on the theory
 that the appellant's loss of his deposit was occasioned by
 fraud and negligence of the defendants in failing to properly
 supervise and manage the affairs of said bank.
 At the trial of said cause in the Justice of the
 Peace's court, a judgment was entered in favor of the appellant
 and against the appellees for the sum of \$178.11. From that
 judgment an appeal was prayed and perfected to the Circuit Court
 of Franklin County. In the Circuit Court a trial de novo was had.

of the subject matter in said case. The court sustained the motion and dismissed the case and entered judgment against the appellant for the costs of said suit. From the judgment of the Circuit Court of Franklin County the appellant prayed and perfected an appeal to this court.

The only question to be determined by this court is: Did the Circuit Court err in dismissing the suit on the ground that it did not have jurisdiction of the subject matter of the suit. In order to determine this matter it is necessary to inquire whether the Justice of the Peace had jurisdiction to try this class of cases. If the Justice did not have jurisdiction it is conceded that the motion to dismiss was properly sustained.

In the appellant's statement of the case he uses this language: "The suit at bar was an action commenced before a Justice of the Peace by the plaintiff against the defendants to recover the amount of his deposit in the bank on the theory that the defendants tortuously held the bank out to him and the public generally as solvent, when in truth and in fact it was insolvent; and that the defendants tortuously received his money as such directors after the bank actually became insolvent." It will be thus noticed that both the appellant and appellees treated this case as an action of tort, and before the plaintiff could recover in his action he must establish by the evidence the fraud and deceit of the defendants. It is conceded by both parties to the suit that the Justice of the Peace has only such jurisdiction as the statute of the State confers upon a Justice of the Peace. (Rice v. Travis, 216 Ill., 249; White v. Pagen 185 Ill., 195) The evidence shows that there was no contractual relation, either expressed or implied, existing between the parties. ~~Our court has frequently held that a Justice of the Peace does not have jurisdiction to try an action in tort, or case. (Western Union Co., v. DeBois, 128 Ill., 254; Griffith v. Penning, 158 Ill., 314)~~

We are of the opinion that the Justice of the Peace *in a case of this kind* did not have jurisdiction ~~to try this case~~ and the trial court

the subject matter in said case. The court sustained the motion and dismissed the case and entered judgment against the appellant for the costs of said suit. From the judgment of the Circuit Court of Franklin County the appellant prayed and presented an appeal to this court.

The only question to be determined by this court is: Did the Circuit Court err in dismissing the suit on the ground that it did not have jurisdiction of the subject matter of the suit. In order to determine this matter it is necessary to inquire whether the Justice of the Peace had jurisdiction try this class of cases. If the Justice did not have jurisdiction it is conceded that the motion to dismiss was properly sustained. In the appellant's statement of the case he uses this

language: "The suit at bar was an action commenced before a Justice of the Peace by the plaintiff against the defendants to recover the amount of his deposit in the bank on the theory that the defendants tortiously paid the bank out to him and the public generally as solvent, when in truth and in fact it was insolvent; and that the defendants tortiously received his money as such directors after the bank actually became insolvent."

It will be thus noticed that both the appellant and appellee treated this case as an action of tort, and before the Justice of the Peace. In his action he must establish by the evidence the fraud and deceit of the defendants. It is conceded by both parties to the suit that the Justice of the Peace has only such jurisdiction as the statute of the State confers upon a Justice of the Peace. *Price v. Travis*, 218 Ill., 249; *White v. Logan*, 185 Ill., 195. The evidence shows that there was no con-

tractual relation, either express or implied, existing between the parties.

White v. Logan, 185 Ill., 195. The evidence shows that there was no contractual relation, either express or implied, existing between the parties. The Justice of the Peace has only such jurisdiction as the statute of the State confers upon a Justice of the Peace.

properly sustained the motion to dismiss. The judgment of the Franklin County Circuit Court is hereby affirmed.

Not to be reported in full

IN THE
APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

February Term, A. D., 1931.

262 L.A. 667

BERNADINE M. POST,
Plaintiff ~~vs.~~ Defendant, Appellee.
vs.

ANDREW J. GULBRETTAZ, as Conservator
of the Estate of MARY AGNES FRAME,
~~Defendant Below~~, Appellant.

Appeal from the
Circuit Court
of Perry County,
Illinois.

Opinion by Fred G. Wolfe, Justice.

For a number of years Mary Agnes Frame had been a resident of the City of Duquoin in Perry County, Illinois. For some time she had been suffering from some form of eye trouble. In the latter part of October, 1929, she went to the City of St. Louis, Missouri, to consult Dr. J. W. Keller. Dr. Keller directed her to be taken to St. Anthony' Hospital in St. Louis, and she was taken to the hospital and underwent an operation on her eyes. She entered the hospital October 8th, 1929, and remained there a patient until March 27th, 1930. Immediately after the operation at the direction of the authorities of the hospital Bernadine M. Post and Kate Stuart, two registered nurses of the City of St. Louis, were put in charge of the patient, one as day nurse and the other as night nurse, and they continued to care for and nurse Mrs. Frame until March 27, 1930, when Mrs. Frame left the hospital.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

February Term, A. D., 1931.

Appeal from the
Circuit Court
of Perry County,
Illinois.

Appellee,

ANDREW J. GUERRETTAS, as Conservator
of the Estate of MARY AGNES FRAM
Appellant.

For a number of years Mary Agnes Fram had been
a resident of the City of Paducah in Perry County, Illinois.
For some time she had been suffering from some form of eye trouble.
In the latter part of October, 1929, she went to the City of
St. Louis, Missouri, to consult Dr. J. V. Keller. Dr. Keller
directed her to be taken to St. Anthony's Hospital in St. Louis,
and she was taken to the hospital and underwent an operation
on her eyes. She entered the hospital October 8th, 1929, and
remained there a patient until March 27th, 1930. Immediately
after the operation at the direction of the authorities of the
Hospital Bernardino J. Post and Kate Stuart, two registered nurses
of the City of St. Louis, took her to the City of Paducah, Illinois,
and she was taken to the home of her mother, Mrs. Mary Agnes Fram,
where she remained until she died on March 27th, 1930.

The operation for the eye trouble was successful and Mrs. Frame appeared to be fully recovered from the effects of the operation. Shortly after Mrs. Frame was taken to the hospital she became mentally deranged and was in that condition at the time the nurses were called in to care for her, and she remained in that condition all of the time she was in the hospital. The hospital bills and nurses hire at the rate of \$8.50 per day for each nurse was paid by Andrew J. Guerrettaz up to and including December 19, 1929. Mr. Guerrettaz is cashier of the Duquoin State Bank. Mrs. Frame has an account in this bank and it appears from the evidence that Mr. Guerrettaz acted as Mrs. Frame's agent in paying these bills.

Neither Miss Post nor Miss Stuart received any pay for their services from December 19, 1929 to March 27, 1930. On February 3, 1930, Mr. Andrew J. Guerrettaz was appointed conservator of said Mary Agnes Frame by the Judge of the County Court of Perry County. On February 5, 1930, he, as such conservator, caused notice to be served on the hospital authorities, Bernadine M. Post, Kate Stuart, and the doctors who had been treating Mrs. Frame while she was at the hospital. The notice stated that he had been appointed such conservator and that any services rendered Mrs. Frame after that date would be at the person's risk rendering such service, and that he would contest any claim for such service in excess of what it would cost to care for the patient in some institution in the State of Illinois, qualified to care for insane patients.

On April 7, 1930, Bernadine M. Post and Kate Stuart each filed their verified claims in the County Court of Perry County for services rendered the said Mary Agnes Frame while she was a patient in the hospital at St. Louis. A hearing was had in the County Court on each of the claims, and judgment was rendered in favor of the claimants for the full amount of their claims. The conservator appealed each of the cases to the Circuit

hospital she became mentally deranged and was in that condition at the time the nurses were called in to care for her, and she remained in that condition all of the time she was in the hospital. The hospital bills and nurses hire at the rate of \$2.50 per day for each nurse was paid by Andrew J. Guertler up to and including December 19, 1930. Mr. Guertler is cashier of the hospital in St. Louis. Mrs. Frame has an account in this bank.

Mrs. Frame's agent is paying these bills. Neither Miss Post nor Miss Stuart received any pay for their services from December 19, 1930 to March 27, 1930.

On February 19, 1930, the Judge of the County Court of Perry County, on February 19, 1930, he, as such court

has been treating Mrs. Frame while she was at the hospital. The notice stated that he had been appointed such conservator and that any services rendered Mrs. Frame after that date would be at the person's risk rendering such service, and that he would contest any claim for such service in excess of what it would cost to care for the patient in some institution in the State of Illinois, entitled to care for insane patients.

On April 7, 1930, Bernadine M. Post and Kate Stuart filed their verified claims in the County Court of Perry County for services rendered the said Mary Agnes Frame while patient in the hospital at St. Louis. A hearing was

Court of Perry County. A hearing of the same was had before a jury and they found for each of the claimants the full amount of their claims. Judgment was rendered for each of the claimants in said court. The conservator has appealed each of the cases to this court, and by leave of court the cases are consolidated in this court.

It is contended by the appellees that the services they rendered were rendered in good faith, and the care and nursing given Mrs. Frame was in accord with her condition and station in life and was such as any insane patient should have been given under like circumstances. That the nurses rendered the services as set forth in their claims is not disputed. The only question for this Court to decide is whether they were such services as were proper and should have been rendered to Mrs. Frame under the circumstances in the case, and, if so, what was a reasonable amount which they should be paid for such services.

Mrs. Frame went to St. Louis and voluntarily entered the hospital and submitted to an operation. While in the hospital and under the care of a doctor and hospital authorities she became insane, and it was necessary that she be given proper care and attention. The testimony in the case shows that the care and attention given by these two nurses was necessary and suitable for the proper care and protection of Mrs. Frame. The defendant offers no evidence whatsoever to dispute the claim that the care and attention given Mrs. Frame while she was in the hospital was not necessary. It is a well known fact that an insane person requires special attention, and it seems to this court that the hospital authorities did only what was right and proper in calling persons who were skilled in the care of sick people to care for Mrs. Frame. There is no hard and fast rule under which the court can say what are classed as 'necessities', but, surely caring for a sick person and doing all that is humanely possible to keep the patient from self-destruction and harm, and to keep them comfortable,

a jury and they found for each of the claimants the full amount of their claims. Judgment was rendered for each of the claimants in said court. The conservator has appealed each of the cases to this court, and by leave of court the cases are consolidated in this court.

It is contended by the appellees that the services rendered by the nurses were of such a character as to constitute a part of the medical treatment of the patient, and that the nurses rendered the same under the direction of the physician. The only question for this Court to decide is whether they were such services as were proper and should have been rendered to Mrs. Frame under the circumstances in the case, and if so, what was a reasonable amount which they should be paid for such services.

Mrs. Frame went to St. Louis and voluntarily entered the hospital and submitted to an operation. She became ill and under the care of a doctor and hospital authorities she became a patient, and it was necessary that she be given proper care and attention. The testimony in the case shows that the care and attention given by these two nurses was necessary and suitable for the proper care and protection of Mrs. Frame. The defendant offers no evidence to dispute the claim that the care and attention given by these two nurses was necessary and suitable for the proper care and protection of Mrs. Frame.

This court that the hospital authorities did only what was right and proper in calling persons skilled in the care of sick people to care for Mrs. Frame. It is no hard and fast rule under which the court can say what services are "necessary," but, surely caring for a sick person is humanely possible to keep the patient comfortable, and to keep them comfortable,

should be considered as necessary for the care of an insane person.

It is strenuously urged by the appellant that the court erred in not admitting in evidence the notice that he caused to be served upon the appellees and hospital authorities. We are of the opinion that the court did not err in sustaining the objection to the admission of this notice. The notice states that the appellant has been appointed conservator of Mrs. Frame, and recites a great many facts that are not in dispute in this case, and would not in any way aid the jury to decide whether the services of the nurses were necessary to be rendered, or what is the reasonable value of such services.

When a conservator is appointed the law casts upon him certain burdens. One is to see that his ward has the proper care and attention, and we think, in this case, that if the conservator has, in good faith, wanted his ward removed from the hospital in St. Louis to the State of Illinois, he could have done so very easily. He makes no demand in his notice, nor at any other time so far as the evidence shows, for the removal of his ward to the State of Illinois. It seems to us it was his place, if he wanted her removed, to go to St. Louis and bring her back to the State of Illinois, and we find no evidence nor circumstances in the case that tend to show "this poor woman was being held for a ransom," as the appellant states in his argument. The appellant had knowledge of what each of these nurses was charging for her services, as the evidence shows that he paid each of them at the rate of \$8.50 per day up to and including December 19, 1930. The notice that he caused to be served upon the appellees shows that he knew it was costing at the rate of \$25.00 per day to keep Mrs. Frame in the hospital at St. Louis, Missouri. There was no error in refusing to admit this notice in evidence.

The written claims filed by the appellees were ad-

It is strenuously urged by the appellant that the court erred in not admitting in evidence the notice that he intended to be served upon the appellees and hospital authorities. We are of the opinion that the court did not err in sustaining the objection to the admission of this notice. The notice states that the appellant has been appointed conservator of Mrs. Frame, and recites a great many facts that are not in dispute in this case, and would not in any way aid the jury to decide whether the services of the nurses were necessary to be rendered, or as to the reasonable value of such services.

When a conservator is appointed the law casts upon him certain burdens. One is to see that his ward has the proper care and attention, and we think, in this case, that if the conservator has, in good faith, wanted his ward removed from the hospital in St. Louis to the State of Illinois, he could have done so very easily. He makes no demand in his notice, nor at any other time so far as the evidence shows, for the removal of his ward to the State of Illinois. It seems to us it was his place, if he wanted her removed, to go to St. Louis and bring her back to the State of Illinois, and we find no evidence nor circumstances in the case that tend to show "this poor woman was being held for a ransom," as the appellant states in his argument. The appellant had knowledge of what each of these nurses was charging for her services, as the evidence shows that he paid each of them at the rate of \$8.50 per day up to and including December 19, 1930. The fact that he wanted to be served upon the appellees shows that he knew it was costing at the rate of \$26.00 per day to keep Mrs. Frame in the hospital in St. Louis, Missouri. There was no error in refusing to admit this notice in evidence.

mitted in evidence without objections from the appellant.

Mr. Kimmel, who was attorney for the conservator at the time of the trial now insists that it is reversible error for the trial judge to admit written claims in evidence in the case. It was error to admit these claims in evidence when the conservator was defending, but not every error is reversible error. There is nothing in these written claims that has not been testified to by other witnesses in the case.

Complaint is made to the given instructions of the plaintiff. We think they clearly set forth the law relative to such cases. The appellant contends that his instruction that the court marked "refused" should have been given to the jury. Instructions Nos. 1 and 2 of the defendant, that were marked 'refused' by the court, contains statements of facts of which there is no proof in the record. The defendant's instructions Nos. 3, 4, and 5 were properly refused as stating propositions of law that would not in any manner aid the jury in determining the facts in this case.

Clara Larson, a registered nurse of St. Louis, Missouri, testified that she had knowledge of the services rendered by each of the appellees; that she frequently saw them and knew of the work that they were performing; that she knew the reasonable charge in the State of Missouri for such services that these nurses rendered Mrs. Frame, and that the same was reasonably worth \$8.50 per day. Dr. Devitt Jennings, a physician of St. Louis, Missouri, testified relative to the condition of Mrs. Frame while she was in the hospital, and the services that he saw each of these nurses render Mrs. Frame; that he personally saw Mrs. Frame for fifty-two days during the time that she was at the hospital; that in his opinion the services each of these nurses rendered was necessary; that the usual fee or charge for the same would be \$8.50 per day. Dr. William Sullivan, a physician of St. Louis, Missouri, told of seeing Mrs. Frame frequently at the hospital

...witnesses at the trial from the appellant.

...who was attorney for the conservator at the time of the trial now insists that it is reversible error for the trial judge to admit written claims in evidence in the case. It was error to admit these claims in evidence when the conservator was defending, but not every error is reversible error. There is nothing in these written claims that has not been

testified to by other witnesses in the case.

Complaint is made to the instructions of the plaintiff. We think they clearly set forth the law relative to

such cases. The appellant contends that his instructions to the jury should have been given to the jury.

Instructions Nos. 1 and 2 of the defendant, that were denied the court, contain statements of facts of which

there is no proof in the record. The defendant's instructions Nos. 3, 4 and 5 were properly refused as stating propositions

of law that would not in any manner aid the jury in determining the facts in this case.

Elmer Larson, a registered nurse of St. Louis, Missouri, testified that she had knowledge of the services rendered by each

of the appellees; that she frequently saw them and knew of their work that they were performing; that she knew the reasonable

charge in the State of Missouri for such services that these nurses rendered Mrs. Frame, and that the same was reasonably

worth \$8.50 per day. Dr. Dewitt Jennings, a physician of St. Louis, Missouri, testified relative to the condition of Mrs. Frame while

she was in the hospital, and the services that he saw each of these nurses render Mrs. Frame; that he personally saw Mrs. Frame for fifty-two days during the time that she was at the hospital;

that in his opinion the services each of these nurses rendered was reasonable; that the usual fee or charge for the same would

be \$8.50 per day. Dr. William Sullivan, a physician of St. Louis, Missouri, testified relative to the condition of Mrs. Frame while

with one or the other of the nurses always in attendance, and that he knew the reasonable charge for such services as these nurses rendered Mrs. Frame in St. Louis, Missouri; that the reasonable and customary fee for such services was \$8.50 per day. The only evidence the defendant offered to rebut this testimony was a paper marked 'Fees', endorsed by the Third District of the State Association, St. Louis, Missouri, purporting to be a schedule of fees for nurses in said city in which mental cases are listed at \$8.00 per day. We think that the evidence clearly establishes the fact that the usual charge for such services as each of these nurses rendered in the city of St. Louis, Mo., to Mrs. Frame from December 19, 1929 to March 27, 1930, is \$8.50 per day, and so far as this case is concerned, it is immaterial whether the proof shows they were registered nurses in the City of St. Louis, Missouri, or not. We are of the opinion that the evidence in each of the cases was sufficient for the jury to find in favor of the claimants, and there is no error in the judgment of the Circuit Court of Perry County, and the judgment is hereby affirmed.

Not to be reported in full

that the law is reasonable charge for such services as these

was rendered Mrs. Trane in St. Louis, Missouri; that the

The only evidence the defendant offered to rebut this testimony

was a paper marked 'Fee', endorsed by the Third District of the

establishes the fact that the usual charge for such services

as each of these nurses rendered in the city of St. Louis, Mo.,

is Mrs. Trane from December 19, 1929 to March 27, 1930, is

\$8.00 per day, and so far as this case is concerned, it is im-

material whether the proof shows they were registered nurses

in the City of St. Louis, Missouri, or not. We are of the

opinion that the evidence in each of the cases was sufficient

for the jury to find in favor of the claimants, and there is

no error in the judgment of the Circuit Court of Perry County,

and the judgment is hereby affirmed.

111-11-12 reported in full

111-11-12

111-11-12

111-11-12

IN THE
APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.

February Term, A. D., 1931.

262 T.A. 667³

KATE STUART,

Appellee,

vs.

ANDREW J. GUERRETTAZ,
Conservator of the Estate of
MARY AGNES FRAME,
Appellant.

Appeal from the
Circuit Court of
Perry County,
Illinois.

Opinion by Fred G. Wolfe, Justice.

This is an appeal from the Circuit Court of Perry County, and has been combined with the case of Post vs. Andrew J. Guerrettaz, conservator, etc., Term No. 17, Agenda No. 23,

The facts and points of law are fully set forth in said case and are applicable to this case. The judgment of the Circuit Court of Perry County, Illinois, is hereby affirmed.

Not to be reported in full

APPELLATE COURT OF ILLINOIS

1892

IN RE

THE ESTATE OF

2311332

Appeal from the
Circuit Court of
Perry County,
Illinois.

ANDREW J. GUNRETTAL,
Comptroller of the Estate of
MARY AGNES GUNRETTAL,
Appellant.

Report by Trial Court.

THIS IS AN APPEAL FROM THE CIRCUIT COURT OF PERRY

COUNTY, ILLINOIS, IN A CASE WHEREIN THE ESTATE OF MARY AGNES GUNRETTAL

WAS THE PLAINTIFF AND ANDREW J. GUNRETTAL WAS THE DEFENDANT.

THE PLAINTIFF'S PETITION SET FORTH THAT SHE WAS THE WIFE OF

ANDREW J. GUNRETTAL, WHO WAS DECEASED. THE JUDGMENT OF THE CIRCUIT

COURT OF PERRY COUNTY, ILLINOIS, IS HEREBY AFFIRMED.

Wm. H. Beatty, Jr. Clerk

145

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.
MAY TERM, A. D. 1931.

7

TERM NO. 2.

AG. NO. 1.

262 I.A. 667⁴

LETTIE ANGEL, :
Defendant in Error, : ERROR TO
V. :
THOMAS McCONKEY, Admr. etc., : EFFINGHAM CIRCUIT
Plaintiff in Error. : COURT.

BARRY, P. J. - Defendant in error filed a claim against the estate of J. M. McConkey, deceased, for board, room, etc., from April 19, 1922 to March 17, 1926 in the sum of \$2121.00; and for cash alleged to have been advanced to the deceased for clothing, spending money, etc., \$550.00, making a total of \$2671.00, and on which she gave credit for \$416.00 on account of groceries furnished her by the deceased. During the time in question claimant was a widow living with her two children. She was not related to the deceased by blood or marriage. He died in July 1929 and the Court held that the Statute of Limitations was a bar to that part of the claim that accrued prior to July 1924. There was a verdict for \$1400.00 but the Court required claimant to remit \$120.00 and entered judgment for \$1280.

During the entire time covered by the claim the deceased had but little money and no property. The undisputed evidence is that he was too busy drinking and loafing to have any time or inclination to work. The only work he did in six or seven years prior to his death was to work on the section for about three weeks and to do a little work in the garden. Claimant was also in straitened circumstances and received county aid in 1925 - 1926

STATE OF ILLINOIS
 APPELLATE COURT
 FOURTH DISTRICT
 MAY TERM, A. D. 1931.

662 L.A. 687

THE ANGRY
 Defendant in Error,
 vs.
 McCONKEY, Adam, etc.,
 Plaintiff in Error.
 PITTSBURGH CIRCUIT COURT

BARRY, P. J. - Defendant in error filed a claim against the estate of J. M. McConkey, deceased, for board, room, etc., from April 19, 1922 to March 17, 1923 in the sum of \$2121.00; and for cash alleged to have been advanced to the deceased for clothing, spending money, etc., \$350.00, making a total of \$2471.00, and on which she gave credit for \$411.00 on account of groceries furnished her by the deceased. During the time in question claimant was a widow living with her two children. She was not related to the deceased by blood or marriage. He died in July 1923 and the Court held that the estate of J. M. McConkey was a bar to that part of the claim that accrued prior to July 1924. There was a verdict for \$1400.00 but the Court required claimant to remit \$120.00 and entered judgment for \$1280.00.

During the entire time covered by the claim the deceased was in the United States Army. The undisputed evidence is that he was too busy to be able to do any work at home or in the garden. The only work he did in six or seven years prior to his death was to work on the station for about three weeks and to do a little work in the garden. Claimant was also in attendance and received county aid in 1925 - 1928.

and 1927. If she furnished deceased board, etc., expecting him to pay her therefor and if he expected to pay her, such expectations necessarily rested upon a very unsubstantial foundation. In June 1925 the deceased was struck by a train upon a railroad crossing as a result of which he lost an arm and was otherwise injured. He sued the railroad company and recovered a verdict and judgment for \$25,000.00 which was affirmed. *McConkey v. Pa. R.R.Co.*, 251 App. 299. The verdict was obtained about the time he ceased to live at claimant's home, to-wit: March 17, 1928. After he was injured his attorney procured credit for him at a grocery store and by means thereof provided claimant with groceries. He had no money or property until the judgment was collected in 1929.

Claimant contends that she proved an express contract for compensation; that her son testified that just after the deceased recovered the verdict he heard the deceased tell the claimant that he would pay her good for what she had done for him. The son so testified in chief but on cross examination said he did not hear such a conversation. A Mrs. Johnson testified that in 1926 and 1927 claimant told her that the deceased did not owe her anything and that the day after the deceased died claimant told her "this was where she was going to get her's." That testimony is undisputed.

Both parties agreed that the time not barred by the Statute would be 1334 days and the undisputed evidence is that one dollar a day would be the usual and customary charge for board, room etc. There is no evidence on the part of claimant that the deceased was at her home during all of the time in question. While her son testified that deceased made his home at his mother's house from July 1924 to March 17, 1928 he did not say that the deceased was there continuously. He stated that when deceased lost his arm in a railroad accident he was in the hospital for two months and that he was in Chicago for a week when his case was tried. An uncle of the deceased testified that the deceased lived at his home one-fifth of the time covered by the claim, and a brother of the deceased says deceased lived at the uncle's home about a third of the time.

... if the deceased was injured, and if he expected to pay her, even
... upon a very unsubstantial foundation. In June 1925 the
... was struck by a train upon a railroad crossing as a result
... which he lost an arm and was otherwise injured. He sued the rail-
... company and recovered a verdict and judgment for \$85,000.00 which
... was affirmed. *McGonkey v. Pa. R.R.Co.*, 251 App. 292. The verdict
... was obtained about the time he ceased to live at claimant's home, to-
... wit: March 14, 1928. After he was injured his attorney presented
... credit for him at a grocery store and by means thereof provided claim-
... and with groceries. He had no money or property until the judgment
... was collected in 1929.
... Claimant contends that she proved an express contract
... for compensation; that her son testified that just after the de-
... ceased was injured he said to her, "I want to see you," and she
... said he would pay her good for what she had done for him. The son so
... testified in chief but a cross examination said he did not hear such
... conversation. A Mrs. Johnson testified that in 1926 and 1927 claim-
... and told her that the deceased did not owe her anything and that the
... day after the deceased died claimant told her "this was where she
... was going to get her a." That testimony is undisputed.
... Both parties agreed that the time not barred by the
... statute would be 1924 days and the undisputed evidence is that one
... deliver a day would be the usual and customary charge for board,
... room etc. There is no evidence on the part of claimant that the
... deceased was at her home during all of the time in question.
... While her son testified that deceased made his home at his mother's
... house from July 1924 to March 14, 1928 he did not say that the de-
... ceased was there continuously. He stated that when deceased lost
... his arm in a railroad accident he was in the hospital for two months
... and that he was in Chicago for a week when his case was tried. An
... uncle of the deceased testified that the deceased lived at his home
... one-third of the time covered by the claim, and a brother of the
... deceased says deceased lived at the uncle's home about a third of

Claimant offered no evidence that would warrant the allowance of any sum for cash advanced for clothing, spending money, etc. Her son says that deceased furnished groceries to claimant to the amount of about \$800.00 during the time in question. The grocer says that claimant would order groceries and have them charged to deceased; that the groceries were delivered to claimant; that the whole amount of the bill, including \$45.00 in cash given to the deceased, was \$787.00. Claimant recognized that deceased was entitled to a credit for the groceries furnished by him and entered a credit on her claim for \$416.00.

If deceased roomed and boarded with claimant every day of the period in question and no groceries were furnished by him, her claim would amount to \$1,344.00, that is, one dollar a day for 1334 days. Her son says that deceased was away 67 days and does not say that he was not away at other times. Other witnesses say that deceased spent one-fifth or one-third of the time in question at the home of his uncle. The deceased was clearly entitled to credit on account of those matters and also to a credit of \$742.00 for groceries furnished the claimant. The verdict is manifestly against the weight of the evidence.

If defendant in error will file a remittitur of \$1022.00 within fifteen days from the filing of this opinion, the judgment will be affirmed for \$258.00, otherwise the judgment will be reversed and the cause remanded at the cost of defendant in error. In case a remittitur is filed defendant in error will pay two-thirds of the costs in this Court and plaintiff in error will pay the balance thereof and also the costs in the trial court.

AFFIRMED ON FILING REMITTITUR,
OTHERWISE REVERSED AND REMANDED.

not to

To be reported in full

claimant offered no evidence that would warrant the

award of any part of the cash advanced for clothing, regarding

claimant, she has not said that deceased furnished groceries to

the court says that claimant would order groceries and have them

delivered to deceased; that the groceries were delivered to claimant;

that the whole amount of the bill, including \$45.00 in cash given to

deceased, was \$787.00. Claimant recognized that deceased was

entitled to a credit for the groceries furnished by him and entered

a credit on her claim for \$45.00.

If deceased roomed and boarded with claimant every day

of the period in question and no groceries were furnished by him, her

claim would amount to \$1,344.00, that is, one dollar a day for 1344

days. Her son says that deceased was away 37 days and does not say

that he was not away at other times. Other witnesses say that de-

ceased spent one-fifth or one-third of the time in question at the

home of his uncle. The deceased was clearly entitled to credit on

account of those matters and also to a credit of \$742.00 for groceries

furnished the claimant. The verdict is manifestly against the weight

of the evidence.

If defendant in error will file a remittitur of \$1022.00

within fifteen days from the filing of this opinion, the judgment will

be affirmed for \$222.00, otherwise the judgment will be reversed and

the case remanded at the cost of defendant in error. In case a re-

mittitur is filed, the court will pay the balance thereof and

in this Court and plaintiff in error will pay the balance thereof and

also the costs in the trial court.

APPROVED ON FILING REMITTITUR,
OTHERWISE REVERSED AND REMANDED.

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7
To be reported as follows

146

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

7

MAY TERM, A. D. 1931.

TERM NO. 8.

AG. NO. 4.

262 LA. 687⁵

| | | |
|----------------|---|----------------|
| HAROLD WAGNER, | : | |
| Appellee, | : | APPEAL FROM |
| | : | |
| V. | : | CLINTON COUNTY |
| | : | |
| JULIUS COERS, | : | COURT. |
| Appellant. | : | |

BARRY, P. J.- The parties were driving in opposite directions on a foggy night at about two o'clock A.M., and the cars side-swiped. Appellee recovered a verdict and judgment for \$94.25, the amount paid for the repairs to his car. Each testified that it was the other who was on the wrong side of the road. Appellee was corroborated by Mr. Becherer who says he was just behind appellant for two and a half miles before the accident; that he wanted to pass but was afraid to do so because for all of that distance appellant was zig-zagging across the black line; that at the time of the collision appellee was to the right of the center of the road. Appellant had four boy friends in the car he was driving. Three of them were in the back seat and did not observe the position of the cars until after the impact. The other says that appellant was to the right of the black line at all times before the accident. Mr. Becherer had occasion to observe appellant's car while it was going two and a half miles and was in a much better position to see the manner in which appellant was driving. The jury could not properly have found otherwise than that appellant was guilty of negligence and that appellee was in the exercise of due care and caution.

1901 A. J. MEYER

AC 101

APPEAL FROM
CLINTON COUNTY
COURT.

BARRY, P. J. - The parties were driving in opposite directions on a foggy night at about two o'clock A.M., and the cars side-swiped. Appellee recovered a verdict and judgment for \$94.25, the amount paid for the repairs to his car. Each testified that it was the other who was on the wrong side of the road. Appellee was corroborated by Mr. Becherer who says he was just behind appellant for two and a half miles before the accident; that he wanted to pass but was afraid to do so because for all of that distance appellee was right between the black line; that at the time of the collision appellant had three or four boys friends in the car he was driving. Three of them were in the front seat and did not observe the position of the cars until after the impact. He then says that he saw the car of appellant at the black line at all times before the accident. Mr. Becherer had occasion to observe appellant's car while it was going two and a half miles and was in a similar position to the one before him when appellant was stopped. The jury could not determine from the testimony that appellant was guilty of negligence and that

Appellant argues that his rights were prejudiced because appellee was permitted to show that his mother was injured by the collision and that appellee was caring for her. We find no evidence in the record to the effect that appellee's mother was injured. Appellee was asked what he was doing after the collision during the rest of the time he was at the scene of the collision. The question was proper and an objection was overruled. Appellee answered that he was looking over the situation was all and taking care of his mother. He did not say she was injured. If appellant thought the latter part of the answer was improper he should have moved to exclude it.

Appellant argues that the Court erred in allowing Mr. Becherer to testify that when appellant was two and a half miles from the point of collision he was zig-zagging across the black line. The objection would be well taken were it not for the fact that the witness further stated that appellant continued to zig-zag until the impact. Appellee testified, without objection, as to the nature and extent of the damages to his car and that he paid \$94.25 for the repairs. Later he offered the repair bill in evidence and appellant objected on the ground that there was no showing that the charges were usual and customary. Appellee having testified as above stated without objection, the admission of the repair bill in evidence cannot be said to be reversible error.

At the time of the collision appellant was driving his sister's car and the Court permitted him to claim a set-off for the damages thereto. For that reason the Court gave the jury three forms of verdict, but neglected to mark them given. It was not necessary that they should be so marked. They were not instructions as to the law applicable to the case. The record shows that they were actually given and appellant was in no way prejudiced thereby. It is argued that appellee's first instruction was erroneous in allowing him to recover for depreciation in the value of ~~z~~ his car because no evidence was offered in that regard. Appellant was not injured thereby as the jury only allowed appellee for the repairs to his car.

Appellant argues that the Court erred in allowing the admission of evidence that appellant was driving at a speed of 30 miles per hour at the time of the collision. The question was proper and an objection was overruled. Appellee answered that he was looking over the situation as all and taking care of his mother. He did not say she was injured. It is argued that the latter part of the answer was improper he should have been to exclude it.

Appellant argues that the Court erred in allowing Mr. Beesley to testify that when appellant was two and a half miles from the point of collision he was zig-zagging across the black line. The objection would be well taken were it not for the fact that the witness further stated that appellant continued to zig-zag until the impact. Appellee testified, without objection, as to the nature and extent of the damages to his car and that he paid \$94.25 for the repairs. Later he offered the repair bill in evidence and appellant objected on the ground that there was no showing that the charges were usual and customary. Appellee having testified as above stated without objection, the admission of the repair bill in evidence cannot be said to be reversible error.

At the time of the collision appellant was driving his sister's car and the Court permitted him to claim a set-off for the damages thereto. For that reason the Court gave the jury three forms of verdict, but neglected to mark them given. It was not necessary that they should be so marked. They were not instructions as to the law applicable to the case. The record shows that they were actually given and appellant was in no way prejudiced thereby. It is argued that appellee's first instruction was erroneous in allowing him to recover for depreciation in the value of his car because no witness was offered in that regard. Appellant was not injured. The jury only allowed appellee for the repairs to his car.

Appellee's fourth instruction is not subject to the criticism urged against it. It did not assume that appellant was guilty of negligence. The jury was required to find that appellant was guilty of negligence which caused the collision before they could find in favor of appellee. The fifth instruction is not similar to those criticized in the cases cited by appellant but is substantially the same as the instruction approved in St. L. & O'F. Ry. Co. 209 Ill. 457. We think it better that such an instruction should not be given in any case, but we cannot say it was reversible error. Appellee did not call his mother as a witness and offered no explanation regarding her absence. She was in his car at the time of the collision. Appellant insists that the failure of appellee to call her as a witness raises a presumption that her testimony would be unfavorable to appellee. Appellee made out a strong case by satisfactory evidence and for that reason the rule contended for does not apply. 10 R.C.L. 887. The judgment is affirmed.

AFFIRMED.

Not to be reported in full

existence of a contract. It did not assume that appellant
 was guilty of negligence. The jury was required to find that
 appellant was guilty of negligence which caused the collision
 before they could find in favor of appellee. The fifth in-
 struction is not similar to those criticized in the cases cited
 by appellant but is substantially the same as the instruction
 approved in *St. L. & O.R. Ry. Co. v. Ry. Co.*, 209 Ill. 457. We think it
 better that such an instruction should not be given in any case,
 but we cannot say it was reversible error. Appellee did not call
 his mother as a witness and offered no explanation regarding her
 absence. She was in his car at the time of the collision.
 Appellant insists that the failure of appellee to call her as a
 witness raises a presumption that her testimony would be unfavorable
 to appellee. Appellee made out a strong case by satisfactory
 evidence and for that reason the rule contended for does not apply.
 10 R.C.L. 887. The judgment is affirmed.

NOT TO BE REPRODUCED IN FULL
 AND DATED

REPRODUCED FROM THE
 OFFICIAL RECORDS OF THE
 COURT
 BY THE
 CLERK OF THE COURT
 AT THE
 CITY OF CHICAGO
 JANUARY 1, 1911

147 STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

MAY TERM, A. D. 1931.

TERM NO. 21.

AG. NO. 19.

2621A. 658'

D. W. PUGH,
Appellee,

V.

SOUTHERN RAILWAY COMPANY,
Appellant.

:
: APPEAL FROM

:
: EAST ST. LOUIS

:
: CITY COURT.

SEP 1 1931

BARRY, P. J. - Appellee testified that appellant's section foreman told him to go to work mowing weeds along the railroad right of way and that there would be a month's work for him at \$6.00 per day. He worked parts of four days and broke his mower and told the foreman he would have to go to town and have it fixed. When he returned the foreman discharged him.

The foreman says he told appellee he would pay him seventy-five cents an hour to cut the weeds; that he did not tell him he would give him a month's work; that he said there might be two or three weeks work for him if he could go along and cut the weeds; that appellee went to work but his mower broke several times; that appellee said nothing about getting it repaired but did say he would try and get a good machine, although he never came back to work.

Appellant admitted that appellee had earned \$16.50 and tendered a check for that amount after this suit was begun before the Justice of the Peace. The tender was insufficient because it did not include the costs already accrued. The tender was renewed upon the trial in the City Court. The jury returned a verdict for

AG. NO. 19.

2631A 688

APPEAL FROM

EAST ST. LOUIS

CITY COURT.

WARRANT, P. 1. - Appellee testified that appellant's motion for a writ of habeas corpus was granted and that there would be a month's work for him at \$6.00 per day. He worked parts of four days and broke his mower and told the foreman he would have to go to town and have it fixed. When he returned the foreman discharged him.

The foreman says he told appellee he would pay him twenty-five cents an hour to cut the weeds; that he did not tell him he would give him a month's work; that he said there might be two or three weeks work for him if he could go along and cut the weeds; that appellee went to work but his mower broke several times; that appellee said nothing about getting it repaired but did say he would try and get a good machine, although he never came back to work. Appellant admitted that appellee had earned \$16.50 and tendered a check for that amount after this suit was begun before the Justice of the Peace. The tender was insufficient because it did not include the costs already accrued. The tender was renewed at the trial in the City Court. The jury returned a verdict for

\$60.00, which is utterly inconsistent with the evidence on any theory of the case, and the judgment rendered thereon cannot stand. Selamakos v. Victory Ice and Ice Cream Co., 246 App. 178.

If appellee will file a remittitur of \$43.50 with the clerk of this Court within 15 days from the date this opinion is filed, the judgment will be affirmed for \$16.50, in which case appellee will pay the costs in this Court and appellant will pay the costs in the City Court and before the Justice of the Peace. If no remittitur is filed the judgment will be reversed and the cause remanded at the costs of appellee.

AFFIRMED ON FILING REMITTITUR,
OTHERWISE REVERSED AND REMANDED.

*at to
To be reported in full*

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, 1931.

Agenda No. 12.

TERM NO. 5.

Pauline Branhorst,)
Appellant,)
vs.)
Harry W. Stamper et al.)
Appellees.)

Appeal from the Circuit Court
of Franklin County.

262 I.A. 668²

EDWARDS, J.

This is an action for fraud and deceit instituted by appellant against appellees in the Circuit Court of Franklin County. The declaration consisted of two counts, to both of which general and special demurrers were filed, and sustained by the court. Appellant electing to stand by her declaration, judgment was entered for appellees and against appellant for costs of suit; from which judgment she appeals.

The first count charges that appellees, on March 21, 1930, conspired to obtain from appellant her property by false pretenses; did thereby obtain from her the sum of \$2,800, and, for the purpose of inducing her to buy shares of stock in the Illinois Bank and Trust Company, which was then being promoted and formed by appellees, did falsely and fraudulently make certain representations as to the financial stability of such bank; and that she, relying upon such statements, did buy stock in the same to the value of \$4,500, and did deposit in said bank the sum of \$3,300; that all of said representations were false, and with one exception, to be hereinafter discussed, were known by appellees to be such. That the bank, on September 24, 1930, was closed by the Auditor of Public Accounts, and a receiver appointed therefor. That the reason for closing the institution was the failure to collect on certain assets, the unlaw-

ful, unsafe and fraudulent conduct of the bank and its officers, and of appellees in particular, and its unsafe and insolvent condition.

The second count charges generally that appellees did, by conspiring, for the purpose, obtain such amount of property of appellant, by means and by use of the confidence game.

Considering the first count, it is claimed by appellees that its averments are repugnant, and that it is thereby vitiated. The specific objection being that in its first part it charges appellees did obtain such property, and then alleges that they, by false pretenses, induced appellant to buy stock in said bank, and to make deposit therein; that these statements are inconsistent and repugnant to each other.

"To be inconsistent, allegations must be such that if one is true, the other must be necessarily untrue. In passing upon repugnancy, the pleading must be considered as a whole." 49 Corpus Juris, 100-101.

"If terms used in a declaration, signify, in the abstract, something different from what they mean, when read with the context or taken as a part of the whole instrument, they are to be taken in the latter sense. To vitiate a pleading on the ground of repugnancy, the conflict or inconsistency must be irreconcilable. If the intent is clear, nice exceptions are ignored." Town of Cameron v. Wicks, 65 W. Va. 484. 17 Amer. and Eng. Annotated Cases, 926.

From a careful reading of this count, and by application of the rule as thus stated, it seems clear that appellant was intending to charge that appellees, by their misrepresentations, induced her to invest in the bank they were promoting, and not that the property was obtained by them personally.

We conclude that the allegation in the first portion of the count, - "did obtain said money, etc., from the plaintiff," was a formal defect or an inadvertence, and may be regarded as surplus-

age; hence we do not think the objection of repugnancy is well taken.

It is next argued that the averment that the said bank was grossly insolvent, and known by appellees to be so, or "by the exercise of any diligence would have been known by them to be so," renders the count bad, as not being a sufficient statement of scienter.

This allegation is wholly insufficient, and if it were the only representation pleaded, would of course defeat the count. It will be noted, that numerous false representations are charged, and all, with the exception of the one now being considered, are averred to have been known to appellees to be such. Most of these averments were similar and alike in effect, and when severally united to the general allegations of the count, would constitute separate causes of action. "Under such circumstances, such allegations may be regarded as divisible, and plaintiff may succeed, if he can prove one of them, which of itself makes a cause of action." *Endsley v. Johns*, 120 Ill. 477. *Kehl v. Abram*, 112 Ill. App. 77.

The averment, so questioned, may be disregarded, and the count still state a cause of action against the objection urged.

Appellees further contend the counts fail to aver any such connection or participation on their part, as would render them liable for the bank's unsafe or insolvent condition. The allegation in this regard is that "by reason of said failure to collect said notes and said unlawful, unsafe and fraudulent conduct of said bank and its officers, and of the defendants in particular," together with its insolvent condition, the bank was closed by the Auditor. The averment here is direct, that the conduct "of the defendants in particular," was one of the causes for the failure of the institution, and in our opinion is sufficient.

It is said, the suit is shown, by the count, to have been prematurely brought, for the reason that the receivership is still pending, and the loss, if any, to a depositor or stockholder cannot be presently known. "A cause of action in deceit accrues immediately upon the successful consummation of the fraud." 27 Corpus Juris, 20. Wahl v. Brooks, 213 Ill. 134.

The action was not prematurely brought. Our conclusion is that the first count of the declaration is sufficient, in law, and the court erred in sustaining the demurrer to it.

The second count is a general charge that appellees, in conspiracy, obtained from appellant, her property, by means and by use of the confidence game. That such statement of a cause of action does not conform to the rules of common law pleading, requires neither argument nor citation of authorities. The court rightly sustained the demurrer to this count.

For the error of the Circuit Court in sustaining the demurrer to the first count of the declaration, the judgment is reversed, and the cause remanded.

Reversed and remanded.

Not to be reported in full

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STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

MAY TERM, A. D. 1931.

TERM NO. 6.

AGENDA No. 3.

Herman W. Bender et al.)
vs.) Writ of Error to the Circuit Court of
Benjamin Bender et al.) Madison County, Illinois.

EDWARDS, J.

262 I.A. 668³

Herman Bender, a resident of Madison County, died in 1901, leaving a last will, which was duly proven and admitted to probate.

By the terms of said will, all of his property, real and personal, was given to his wife, Mary Bender, she to be put in possession of same at testator's death, to have exclusive control of same, and at her death the property to be divided equally among their surviving children. The division was directed in the following words: "This distribution to be made by will of my wife appointing two of our surviving sons executors of her will, to carry into effect her wishes."

This will was later construed by the Supreme Court, *Bender v. Bender*, 292 Ill. 358, in which the court held that Mary Bender took a life estate in the real and personal property of Herman Bender, and that at her death the same should go to the children of Herman Bender and Mary Bender, who survived the latter, and that the will conferred power upon her to make the division of the property among such surviving children, by her will.

A decree was afterwards entered in the Circuit Court of Madison County, in certain proceedings there pending, that Mary Bender held the sum of \$14,009.75, consisting of the proceeds of

the personality of Herman Bender at the time of his death, together with certain money paid by a railroad company for damages in a condemnation suit for a right-of-way over certain lands of Herman Bender, as life tenant, with right to the income thereof; that at her death it should be distributed, as provided by the will of Herman Bender, and requiring Mary Bender, in order to secure such distribution, to execute a bond for \$15,000, which was done.

Mary Bender died on March 1, 1929, leaving her last will, which was duly probated. The first clause directed the payment of her debts and funeral expenses; the second clause made division of the real estate owned by Herman Bender at the time of his death, with the exception of the small part taken for a railroad right-of-way, equally among the nine children of Herman and Mary Bender living at the time of her death, reciting the terms of the last will of Herman Bender, the decision of the Supreme Court, and the decree of the Circuit Court of Madison County, above mentioned.

In the third clause, which is the subject of this litigation, it is provided that said sum of \$14,009.75 be given and bequeathed to the nine children of Mary Bender and her deceased husband in equal parts, who were living at her death; again reciting the terms of said Circuit Court decree and the provisions of the last will of Herman Bender, and concluding in these words: "Now, therefore, in conformity with said final decree and the last will and testament of my said husband, Herman Bender, and in lieu of all personal and chattel property owned by my said husband, Herman Bender, at the time of his death, and also in lieu of all moneys on hand and on deposit in banks belonging to my said husband, Herman Bender, at the time of his death, and all moneys received by me as the proceeds of the condemnation proceedings as aforesaid, all of which said property and moneys have been appropriated by me as aforesaid, and in full satisfaction and discharge of my said bond filed with the Clerk of said Circuit Court as aforesaid, I give and

bequeath to those of my following children: Benjamin Bender, William Bender, Frank Bender, Frederick J. Bender, Charles Bender, Elizabeth Bender, Edward Bender, Herman Bender and Josephine Bender Uhl, who shall be living at the time of my death, the sum of fourteen thousand nine and 75/100 (\$14,009.75) dollars, the said sum to be divided by my executors equally, share and share alike, among those of my said above-named children who shall be living at the time of my death."

By the fourth clause, all the rest of her estate is given to her sons Benjamin Bender and William Bender, as trustees, with power to sell and convert into money and divide the proceeds equally among her children therein named, to-wit: Frederick Bender, Elizabeth Bender, Frank Bender, Benjamin Bender, William Bender and Charles Bender.

By clause six it is provided: "For reasons entirely sufficient to myself I make no devise or bequest in favor of my children Josephine Bender Uhl, Herman W. Bender and Edward J. Bender, other than the devises and bequests made to them in clauses two and three of this my will."

Clause seven appointed her sons Benjamin Bender and William Bender as executors and trustees, and requested that they be permitted to serve in such capacity without bond.

Plaintiffs in error, Herman W. Bender, Edward J. Bender and Josephine Uhl, filed their bill in the Circuit Court of Madison County, alleging that Mary Bender at the time of her death was seized of real and personal property of the value of more than \$50,000; that said will was vague and uncertain in its terms, undertook to dispose of property of which she was not the owner; that she did not intend to disinherit them; that by a proper construction of said clause three, each of them should take a one-ninth interest in said sum of \$14,009.75 as a part of the testatrix' own estate, and not as property of said Herman Bender, deceased; prayed

that the court would so construe said will, and that a fair and reasonable solicitor's fee be allowed to their solicitor for procuring a construction thereof. Solicitor for plaintiffs in error filed a motion for the allowance of such fee.

Defendants in error filed a general and special demurrer to the bill, which was sustained, and the complainants below electing to stand by their bill, same was dismissed for want of equity. Motion for solicitor's fees was overruled and a decree entered in conformity with such orders; to reverse which, this writ of error is prosecuted.

The question in controversy is whether the bequest to the children named in clause three of Mary Bender's will, of the sum of \$14,009.75, was to be paid out of her own estate, or whether it was a division of her deceased husband's property, which she had held as life tenant, and was, by her, being distributed according to the provisions of his will. Her intention must, of course, be determined from the language used, and such intention, when expressed in or fairly drawn from the language of the will, must control. *Davenport v. Kirkland*, 156 Ill. 159.

It will be observed that clause three begins by reciting the Circuit Court decree which declared her life tenant of this \$14,009.75 of the funds of her deceased husband, and required her to give a bond to insure its distribution according to the terms of her said husband's will. That said clause further declares in conformity with such decree, and the last will of her husband, Herman Bender, deceased, and in discharge of her bond so given as aforesaid such sum is given and bequeathed to the nine children of herself and Herman Bender who should be living at the time of her death, in equal shares.

This language is positive, direct and certain, and can leave no doubt that she, by clause three, was dividing the fund, which came to her as life tenant, among the remaindermen who were

entitled thereto, pursuant to the power conferred upon her, and by the directions given her, by the terms of the last will of Herman Vander. We think it clear that she was not, by said clause three, bequeathing any funds of her own, and that the chancellor correctly sustained the demurrer to the bill of complaint.

Plaintiffs in error contend that there should have been allowed to their solicitor a fee for obtaining a construction of the will, and that error was committed in the trial court by refusal to so order.

The rule of law governing in this class of cases is that such fees can only be allowed where the testator has expressed his intentions so ambiguously, that it becomes necessary to prosecute a suit in chancery, to obtain a construction of the will, and that they should not be charged, in the case of a bill to construe a will, where its terms are so clearly stated that its meaning is obvious or apparent. *Waight v. Royce*, 274 Ill. 172.

In our opinion the terms of the will in question were plainly and clearly set forth, and so understandable, that no necessity existed for seeking a construction of same. We conclude the decree was right, and it will be affirmed.

Decree affirmed.

Not to be reported in full

150 7

STATE OF ILLINOIS,
APPELLATE COURT.
FOURTH DISTRICT.

APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

MAY TERM, 1931.

TERM NO. 17.

AGENDA 21.

R. H. Sullivan, doing business as)

Sullivan Auto Sales Company,)

Appellee,)

vs.)

Mrs. E. C. Brown,)

Appellant.)

Appeal from the Circuit
Court of Madison County.

262 I.A. 668⁴

EDWARDS, J.

Appellee instituted an action of replevin in the Circuit Court of Madison County for the recovery of a yellow Buick coupe. By agreement of the parties, trial by jury was waived, and the cause heard by the Court, who entered judgment for appellee; from which this appeal has been perfected.

It appears that in the early part of 1930, appellant was the owner of the car in question; that she was a married woman, and was living with one D. W. Hickman, a traveling salesman, as his wife, and going by the name of Mrs. Hickman.

In the spring of that year she and Hickman visited appellee at his garage in Quincy; was introduced by Hickman as his wife; that in June thereafter, she and Hickman again called upon appellee, at his place of business, when appellee and Hickman both testify that the latter then stated, in the presence of appellant, that she and Hickman were going into some business, and might wish to secure a loan on the yellow Buick coupe. Appellant denies that her car was mentioned in the conversation, though she admits she

was present when it occurred.

It further appears that during the early part of August, Hickman went to appellee, made a bill of sale to him of the car in controversy, and then re-purchased it under a conditional sales contract, which was assigned by appellee to a finance company. \$650.00 was there paid by appellee to Hickman, who sent \$600.00 that day to appellant by telegraph, and claims he subsequently paid her the remaining \$50.00. She admits receiving the \$600.00, but denies that she ever received from Hickman the other \$50.00.

Hickman made two payments on the conditional sales contract, then defaulted, and appellee was forced to take it back from the finance company, and this suit followed as a consequence.

The case turns on the question whether Hickman was authorized by appellant to deal with her car, as above stated.

The evidence bearing upon this question is almost wholly that of appellant and Hickman, and upon its vital parts, is sharply conflicting. Hickman testifies that he and appellant had talked several times of going into the restaurant and beauty parlor business; that on August 10, 1930, he called appellee by phone, from appellant's home, and in her hearing talked with appellee about making a loan; that he then went to Quincy and consummated the deal, as previously mentioned; that he called her by phone, informed her that he managed to secure the loan of \$650.00 on her Buick coupe, and that she directed him to send her the money by telegraph, as she desired to purchase a beauty shop that day; and that she later, the same day, called him by phone to inquire why she had not received the money, and if he was having trouble in securing the loan. That returning from Quincy, he informed her fully about securing a loan on her car, and she stated the deal for the beauty shop had not gone through, but she thought she would close it shortly, and would keep the \$600.00 intact.

Mrs. Brown, appellant, testified that Hickman owed her \$650.00

for borrowed money, which was denied by him; that on August 10th, he came to her home, informed her he would get the money, if she would give him time; that later the same day he returned and told her he was going to Quincy, had made arrangements for her money, and that she would have it by ten o'clock the next morning; that not receiving the money by the following noon, she called Hickman at Quincy, and he informed her he had received the money, which she admits receiving that same afternoon.

It further appears that appellant and Hickman lived together for a few weeks thereafter; that he left on a business trip, and returning, found she had moved to another location, and had with her in the house a man named Rogers, whom she stated was a boarder.

In November, after he had defaulted in payments on the contract, Hickman called on appellant and tried to induce her to make some arrangements whereby the loan could be continued, but that she refused.

There are circumstances in proof which tend to corroborate both appellant and Hickman; also to contradict each of them. If Hickman's story is true, he was authorized to make the deal in question. If her account of the transaction is correct, his conduct was unwarranted. It is apparent that the decision of the case depends upon which narrative should be believed.

Where a cause has been submitted to the Court for decision, without the intervention of a jury, the finding of the Court, as to controverted questions of fact, will not be set aside by an Appellate tribunal, unless it is manifestly against the weight of the evidence. *Moore v. Molloy Co.*, 222 Ill. App. 295.

The proof was conflicting upon the material points. The trial judge, seeing, hearing and observing the demeanor of the witnesses, was in better position to determine their veracity than are we.

From a consideration of the evidence we are of opinion that the court was warranted in finding that Hickman made the deal in question, with the knowledge and assent of appellant.

Appellant also contends the trial court erred in permitting Hickman to testify to conversations, during August, with appellee, out of the presence of appellant, asserting that agency should have been established before acts or conversations of the agent were competent. We think there was sufficient proof of matters, anterior to these conversations, bearing upon the question of agency, to justify the admission of the evidence.

The judgment will be affirmed.

Judgment affirmed.

Not to be reported in full

151 7

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A.D. 1930.

Term No. 9

Agenda No. 21.

February
(R.H. No. 5 / Term A.D. 1931.)

C. I. HORNBECK,

2621 A. 668

VS

ROBERT AITKEN, JR., and
ANNA AITKEN,
APPELLANTS.

CITY COURT OF
EAST ST. LOUIS.

Fulton, W.J.

Appellee recovered a verdict and judgment for \$2,007.00 for property damage and personal injuries sustained by him in a collision with the car of Anna Aitken while being driven by her son, Robert Aitken, Jr.

Appellant Anna Aitken was the owner of the car which was being driven by her son Robert Aitken, with her knowledge and consent. The son was about twenty years of age and was driving entirely on a mission of his own, totally unconnected with any business of his mother. There was no relationship of master and servant or principal and agent existing between the mother and son.

The case of White v Seitz, 342 Ill. 286 clearly holds that in order to hold a parent for the tort of a child, such relationship should be proven and that liability cannot be based upon the relation of parent and child.

The judgment of the City Court of East St. Louis will be reversed.

REVERSED

not to be reported in full

October Term A.D. 1900.

Page No. 21.

Replevin.
(R.H. No. 3, Term A.D. 1900.)

SEPT 11 1900

APPEAL FROM

CITY COURT OF

WEST ST. LOUIS.

The plaintiff recovered a verdict and judgment for \$10,000.00
The plaintiff's and personal injuries sustained by him in a collision
with the car of one John H. Smith, driver of the same, on
August 17-
Appellant Anna Atkinson was the owner of the car which
caused injury to her son Robert Atkinson, with her knowledge and consent.
The car was about twenty years of age and was driving entirely on a
chain drive, and was totally unconnected with any business of his mother.
The car was a relationship of master and servant or principal and
agent existing between the mother and son.
The case of *Atkinson v. Smith*, 342 Ill. 324, recently holds that
in such a case, a parent is liable for the tort of a child, such relationship
existing as between master and servant, or principal and agent, or as
between parent and child.

Judgment of the City Court of West St. Louis

Not to be reported

(Case No.)
C. F. Hornbeck, appellee, v. Robert Aitkin, Jr. and Anna Ait-
ken, appellants. Gen. No.

Hornbeck vs. Aitkin & Aitken
in an
action
at the
first
Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
the Hon. *William F. Horn*, Judge, presiding. Heard
in the division of
this court for the first district at the term,

Affirmed;
~~Reversed~~
~~Reversed and remanded with directions.~~

Opinion filed *January 11, 1901* ~~Rehearing denied~~

Charles W. Major and → for appellants.
McGuire & McGuire → for plaintiffs in error.
→ for appellees.
→ for defendants in error.
→ delivered the opinion of the court.
MR. PRESIDING JUSTICE *Fulton*

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

JAN 10 1931

OCTOBER TERM A.D. 1930.

Term No. 9

Agenda No. 21.

C. I. HORNBECK,
VS APPELLEE

ROBERT AITKEN, JR., and
ANNA AITKEN,

APPELLANTS.

APPEAL FROM

CITY COURT OF EAST ST. LOUIS.

FULTON: WILLIAM J.,

Appellee recovered a verdict and judgment for \$2,087.00 for property damaged and personal injuries sustained by him in a collision with the car of Anna Aitken while being driven by her son, Robert Aitken, Jr.

On the evening of September 27, 1929, Robert Aitken, Jr., a young man of 20 years of age residing at home with his parents, with the knowledge and consent of his mother, Anna Aitken, one of the Appellants, drove to the home of a friend, one Ralph Tessmer, and with him drove south on Eleventh Street and thence eastwardly along Piggott Avenue, an east and west street in the residence section of East St. Louis. There is a street car track running on Piggott Avenue, the center line of which is a few feet north of the center line of the street. From the south rail of the car track to the south curb for a distance of 154 feet just west of Twelfth Street on Piggott Avenue, the bricks have been torn out of the pavement and that portion of the street was in a roughened condition. All witnesses agree that the collision occurred in the intersection of Piggott Avenue and Twelfth Street.

The witnesses for Appellee testify that the Aitken car was being driven along the north or left hand side of Piggott Avenue going, east, and the Appellant, Robert Aitken, Jr., and his passenger Ralph Tessmer, state that the left wheel of the Aitken car was six or eight inches from the south rail of the car track, which is

admittedly north of the center line of the street. All of Appellee's witnesses state that the Aitken car was travelling at a rate of speed, estimated at between 40 and 50 miles per hour. Aitken, Jr., and Tessmer testified to a speed of 14 miles per hour, and one Alec Toth corroborated that as being the speed, when the car passed him somewhere between Eleventh and Twelfth Street on Piggott Avenue.

Appellee was driving west on Piggott Avenue close to the curb and as he approached the intersection with Twelfth Street, he moved out around some cars parked on the north side of Piggott Avenue and moved on west into the intersection. At this point there is a sharp conflict in the testimony. Appellee testifies that when he saw the Aitken car travelling east at a rapid rate of speed on the wrong side of the street, he stopped, and the Aitken car, veering a little to the right, struck the car of Appellee between the radiator and the left front wheel, turning his car over and landing it at the southeast corner of the intersection, thoroughly smashed.

Aitken, Jr., and Tessmer state that Appellee was proceeding west at the rate of 25 to 30 miles per hour, and that without warning Appellee made a left turn down Twelfth Street, so that he crossed immediately in front of the Aitken car, and the latter struck Appellee's car on the right hand side just behind the left front wheel.

The Appellants urge that the verdict is clearly against the weight of the evidence, and that the Appellee was guilty of contributory negligence which contributed to his injuries. From the testimony, it is clear that both sides gave their version of the accident and how it occurred, and it was a pure question of fact for the jury to determine whether the injuries to Appellee were caused by the negligence of the driver of the Aitken car and whether the Appellee was guilty of contributory negligence in causing the injury.

The jury have found both of these issues in favor of the plaintiff, and we believe the testimony fully supports the findings of the Jury, that is, that the damage and injuries to Appellee were caused by the negligence of Robert Aitken, Jr., while driving the car, and that Appellee was not guilty of any negligence that contributed to his damage or injuries.

his damage or injuries.

who was the owner of the Buick car

Appellant, Anna Litken,ⁿ further claims that she is not liable at all in this case, because she was in nowise responsible for her son's actions. We think this question was passed upon in the case of Gates v Mader, 316 Ill. 313, and also by this Court in White v Seitz, 258 Ill. App. 318, adverse to Appellant's contention.

The refusal of the Court to give to the jury Appellant's instructions Nos. 2, 4 and 5, was warranted because other instructions offered by Appellants and given to the jury by the Court, fully covered the same principles of law. Appellants' Instruction No. 2 was an abstract proposition of law, and the refusal to give it to the jury was not error.

We do not believe the amount of the verdict was excessive and is supported by proof. Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Not to be reported in full

152 17

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MAY TERM A.D. 1931.

Term No. 10.

Agenda No. 5

262 I.A. 669

ALEX RUGGERI and CHARLES
RUGGERI, doing Business as
RUGGERI BROTHERS, a Partnership
Appellants

-vs-

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a Corporation,
Appellee

APPEAL FROM THE

CITY COURT of the
CITY OF HERRIN, Illinois.

FULTON, W.J.

This suit is an action in case brought by the Appellants, Ruggeri Brothers, against the Appellee, to recover \$1000.00 for alleged damage to a shipment of grapes.

A demurrer to Appellants' original declaration was sustained, whereupon an amended declaration consisting of three counts was filed.

Appellee filed general and special demurrers to each count, which were sustained by the trial court. Appellants elected to abide by their amended declaration and judgment was entered against them, from which judgment they appeal to this Court; assigning as error the sustaining of the general and special demurrers of Appellee to the amended declaration of Appellants.

A declaration should contain a clear and distinct statement of the facts which constitute the cause of action so they may be understood by the party who is to answer them. City of Chicago vs Selz, Schwab & Co., 202 Ill. 545.

In actions growing out of damage caused by a common carrier to goods shipped over its road, it is necessary to aver and prove three elements to make out a cause of action.

First: The relationship of shipper and carrier; second, - the failure of the carrier to properly and safely carry ~~xxxx~~ the property entrusted to its charge and third, - loss or damage to the plaintiff resulting from such failure.

Appellee has directed its argument particularly against the second and third counts of the declaration and in fact it seems to us that the first count, while not clearly and definitely drawn, does state a cause of action.

In Appellee's brief they contend that nowhere in the second count is it stated from what point defendant received the shipment, and if this omission had been pointed out in the special demurrer to the second additional count, *which was not done,* it would have been sufficient grounds upon which to have sustained the demurrer. Otherwise, the count is sufficient in our judgment to state a complete cause of action, and being good in substance is not subject to general demurrer.

The Appellants' claim is based on loss and damage to the shipment of grapes while in the custody of the Appellee as a common carrier, and it is therefore not necessary to allege who the initial carrier was, nor what the contract of shipment was between the consignor and the initial carrier and connecting lines. "Every carrier connected with an Interstate shipment is liable for damage or loss to the property so received or transported, caused by its own negligence."

Pennington v Grand Trunk Ry.Co. 277 Ill. 42.

The reasoning in that case applies to the main objection to the third additional count. We believe the facts concerning ownership and the name of the alleged consignor can be reasonably inferred from the language set forth in the Count and that it states a cause of action.

The declaration in question in this case is somewhat imperfectly drawn, but for the reasons set forth in this opinion we believe it to be sufficient and the judgment will be

reversed and the cause remanded with directions
to the Trial Court to overrule the general and
special demurrers .

Reversed and remanded.

Not to be reported in full

1534

NEW YORK, N.Y. 1931.

Term No. 16.

Agenda No. 17.

Fred Waters.
Appellee

-vs-

THE CITY COURT OF
GRANITE CITY
Appeal from

Sinclair Refining Company,
a Corporation,
Appellant.

City Court of
Granite City.

262 I.A. 669²

Fulton, N.J.

Appellee was a truck driver and had worked for the Waters Pierce Oil Company ten or twelve years and when that company sold to the Appellant he entered its employ at \$180.00 per month under a written contract which included the following provision:

"Either party may determine this contract, with or without cause. In the event of termination employer shall not be liable to employee for wages or salary, except as may have been earned at the date of termination, based on the rate then in force, and may deduct therefrom any amounts due employer from employee. This contract cancels and supersedes any and all previous contracts of employment by and between the parties hereto."

In the usual course of his duties appellee would collect in and turn over the days receipts at the Sinclair City office of Appellant. If the office was closed before he finished his work appellee would take the days receipts home and deposit them at the office the next morning. On September 22, 1930, his receipts were \$175.75 cash and \$9.80 in checks. When he finished his work the office was closed and he drove to a garage which rented space to appellant along with others. In changing his clothes at the garage appellee deposited the days receipts on top of his trunk and went home forgetting all about the same. The next

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morning when he reached the garage the money was gone. He reported the loss to the office and at the request of the local manager he signed the following written statement:

" Dated this 23rd day of September, in the City of Granite City, Illinois.

I, Fred Waters, tank truck salesman for the Sinclair Refining Company at Granite City, Ill., hereby state:-

That One Ninety One Dollars and Fifty three Cents (\$191.53) representing monies belonging to Sinclair Refining Company was stolen from on top of my locker in said Company's garage on the night of September 22nd, 1930.

I hereby admit responsibility for this money and further state that this money should not have been left on top of my locker and the loss is entirely due to my own carelessness.

Thos. J. ^WGlynn,
Witness.

Fred Waters. "

Appellee promised to repay the amount, but upon his failure to do so was discharged on November 7, 1930. This suit was brought in justice court to recover wages for the first seven days of November, 1930. Appeal was taken to the City Court of Granite City, where the case was tried before the Court ~~and~~ ^{and} the finding was in favor of the Appellee for \$55.00 and costs of suit and later judgment was entered on the finding. Motion for new trial was overruled and the appeal from the judgment was brought to this Court. Appellee has not appeared.

It seems to this Court that appellant had a right under its contract to deduct any amount due and owing to it from the Appellee in a suit for wages.

We believe there can be but little question that the Appellee was the custodian of funds belonging to his employer and through his carelessness the entire sum in his hands was lost.

The Appellee seems to have acknowledged his liability by putting his signature to the written statement made to the local manager. The Trial Court should have granted the motion of Appellant, at the close of the testimony, to find the issues for Appellant and the judgment is accordingly reversed.

REVEREND.

Not to be reported in full

the following statement:

"Dated this 23rd day of November, in the City of Ontario, this 1930.

I, Fred Watson, being sworn, depose that the Ontario Railway Company of Ontario City, Ill., hereby states:-

That one Winifred Ann Bellamy and fifty-two (52) representatives of the Ontario Railway Company were present at the Ontario Railway Company's annual meeting on the 15th of November 1929. I have a full responsibility for this meeting and I have stated that this meeting was held on the 15th of November 1929 at my house and the same was held on the 15th of November 1929. I am entirely true to my own statement.

Fred Watson, Witness.

Applicant requested to copy the account, but upon this

failure to do so was discharged on November 1, 1930. This will

be brought in before the court to recover wages for the first seven

days of November 1930. Applicant was taken to the City Court of

Ontario City, where the case was tried before the Court and the

finding was in favor of the Applicant for \$50.00 and costs of suit

and later judgment was entered on the finding. Motion for new trial

was overruled and the appeal from the judgment was brought to this

Court. Applicant has not appeared.

It seems to this Court that applicant had a right when

the contract was broken by respondent to sue and owing to it from the

We believe there can be but little question that the

applicant was the author of the fraud committed by his employees

and in consequence the entire sum in his hands was lost.

The Applicant seems to have acknowledged his liability

by giving his signature to the written statement made to the local

magistrate. The Trial Court should have given the motion of applicant

at the time of the testimony, to find the issue for Applicant and

Not to be repeated

154 H
STATE OF ILLINOIS
APPELLATE COURT

NEW TERM A.D. 1931

Term No. 20.

Agenda No. 11.

JEFFERSON S. BUSH,
Appellee

vs

NATHAN MATHEWS, Doing
Business as Tri-City Finance
Company,
Appellant.

APPEAL FROM THE
CIRCUIT COURT OF MADISON
COUNTY.

262 I.A. 669³

Fulton, William J.

Appellee sued the Appellant in the Circuit Court of Madison County to recover damages, actual and exemplary, for the alleged wrongful use of a demand in garnishment by Appellant, served on employer of Appellee.

In March, 1930 and for some time prior thereto, Appellee was in the employ of the C. & E. I. R.R. Company at its yards in Mitchell, Illinois as car inspector. Appellant was in the loaning business as the Tri-City Finance Company and also running a shoe store. Appellee, with Ed Williams and Otto Mc Bride, had theretofore obligated himself to Appellant on a note for \$500.00. In September, 1929 Appellant instituted suit in justice court on the note against the makers including Appellee. On November 12, 1929 the suit was dismissed on the agreement of Ed Williams to convey by deed to Appellant, twenty acres of land. Williams afterwards failed to execute the deed. Payments had been made on the note reducing the principal amount to about \$300.00. In March, 1930 Appellant secured blank "Demand in Garnishment", filled it out, covering his claim against Appellee and mailed to the C. & E. I. R.R. Company at

1935 A.A. 10000

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was
Mitchell, Illinois. The demand received by the Company on
March 29th, 1930 and read as follows:

Demand in Garnishment, Act of 1901.
March 17, 1930.

To Mr. Jefferson M. Bush, wage earner, and Chicago
and Eastern Illinois Railway Company, employer:
.....hereby demand
of you the sum of \$200.00, plus interest from September
1, 1928, out of moneys now due or which may
become due to as wages in
excess of legal exemption, as provided by law under
an Act of the General Assembly of the State of
Illinois, in regard to garnishment, approved May
11, 1901, in force July 1st, 1901, and all amend-
ments thereto. Nathan Mathes is hereby authorized
to receive and receipt for the same for the Tri-
City Finance Company, 1904-06 Nineteenth Street,
Granite City, Illinois.

N.B. Employers are required by law to hold
all moneys due at time of service of notice, and
also for five days after date of service of this
notice, all moneys earned by wage earner, subject to
garnishment. (Sec.14, ch.62, or R.S. 1901). "

Appellee was paid on the first and sixteenth of each month.

On April 1, ¹⁹³⁰ ~~1929~~ his check was not delivered to him and he quit
work voluntarily because he was informed that it was customary to
take men out of service when garnished until the matter was
settled. He was not told to quit by any of his bosses. On April
3rd, ¹⁹³⁰ ~~1929~~ he again went to work and has been working for the
company ever since. On April 4th, ¹⁹³⁰ ~~1929~~ he received his check and
none of his checks have been held up since that time.

The Justice of the Peace testified that he warned
Appellant not to mail demand to Railroad Company because he had no
judgment. Appellee testified that he was damaged because he was
no longer able to borrow money from his fellow employees and because
his grocer sent him a letter stopping his credit.

The declaration is in case and attempts to set up malicious
prosecution and malicious abuse of process, but we fail to see how
the proof in this case would sustain a verdict for either cause of
action.

"An action for malicious prosecution of a civil suit
without probable cause, will not lie where the process
in the suit so prosecuted, is by summons only, and is
not accompanied by arrest of the person, or seizure of

the property or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action."

Smith vs Michigan Puggy Co. 175 Ill. 619.

In the case under consideration there was no legal process issued and no special injury shown.

"Two elements are necessary to an action for the malicious abuse of legal process. First, the existence of an ulterior purpose; and second, an act in the use of the process not proper in the regular prosecution of the proceedings. Regular and legitimate use of process, though with bad intention, is not a malicious abuse of process. The declaration does not aver either that the Plaintiff was arrested or his property seized. The mere institution of civil suits does not constitute a malicious abuse of process. That action lies for the improper use of process after it has been issued, -not for maliciously causing process to be issued."

Bonney vs King 175 Ill. 47.

"An action for malicious prosecution is an action for damages by one against whom a criminal prosecution or civil suit has been instituted maliciously and without probable cause after termination of such prosecution or suit in favor of the defendant therein and it is not favored in the law."

Shedd vs Patterson, 302 Ill. 355.

In the authorities cited by Appellee in support of this judgment the cases have proceeded on the theory of an attachment sued out and levied upon funds or property whereby plaintiff was wrongfully deprived of the possession and use thereof, and was put to great expense in repossessing himself of the same; or, where there was an unwarranted detention of the funds of a party through garnishment; or, the procuring of the unlawful arrest of the plaintiff. It is such interference through the malicious abuse of process as warrants an action for damages, and the proof in this case does not measure up to the requirements of our laws with respect to either malicious prosecution or malicious abuse of process.

... other ...
... 19-21 ...
... 1921 ...

In the case under consideration there was no injury

process issued and no special injury shown.

"The elements are necessary to an action for the relief

of legal process. That, the elements of an action for

and second, as set in the case of the process not proper in the

regular prosecution of the proceedings. Regular and proper

of process, though it had in fact, is not a matter of

of process. The declaration does not aver that the defendant

was arrested or his property seized. The mere institution of civil

action does not constitute a malice in the sense of process. That

action lies for the improper use of process when it has been

issued, not for the institution of process to be issued.

Donkey vs King 175 Ill. 47.

An action for malicious prosecution is an action for

damages by one against whom a malicious prosecution or civil suit

has been instituted maliciously and without probable cause after

termination of such prosecution or suit in favor of the defendant

therein and it is not covered by the law.

Shah vs Watson, 308 Ill. 288.

In the authorities cited by appellee in support of this

judgment the cases have proceeded on the theory of an attachment

and not one based upon funds or property already attached and

wrongfully deprived of the possession and use thereof, and was not

to give against its representative himself of the same; or, where

the case is one of malicious prosecution, it is not a case of

malicious prosecution, but one of malicious prosecution.

It is not an action for damages, and the proof is

in cases of malicious prosecution an action for damages, and the proof is

the case does not amount up to the requirements of an action

to give against its representative or representative of the same.

Our conclusion is that the testimony of the Appellee is not sufficient to sustain the verdict and the judgment of the Circuit Court of Madison County will be reversed.

REVERSED.

Not to be reported in full

Our conclusion is that the testimony of the
Appellee is not sufficient to sustain the verdict and the
judgment of the Circuit Court of Appeals should be reversed.

Not to be separated

THE COURT
REVEREND JUSTICE
OF THE SUPREME COURT
OF THE UNITED STATES

THE COURT
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OF THE UNITED STATES

THE COURT
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THE COURT
REVEREND JUSTICE
OF THE SUPREME COURT
OF THE UNITED STATES

1557
STATE OF MISSOURI

APPELLATE COURT

Term No. 33

Month No. 24

WILLIAM HOWLATT,

Appellee

vs

MISSOURI PACIFIC RAILROAD
COMPANY,

Appellant.

AFFIDAVIT FROM

CITY COURT OF

EAST ST. LOUIS

262 T.A. 6697

Fulton, N.J.:

This is an action brought by appellee against the Missouri Pacific Railroad Company, Appellant, to recover damages for the loss of an eye, injured while Appellee was working as a sectionhand on Appellant's main line in Kansas on the 26th day of July, 1930. The suit is based on the Federal Employers' Liability Act.

The original declaration consisted of five counts, two of which were withdrawn at the close of all the evidence. A plea of not guilty was filed to the declaration and a special plea of Assumed Risk. A demurrer was filed to the special plea and a motion was filed by Appellant to carry the demurrer back to the fourth and fifth counts of said declaration.

The Court sustained the demurrer to the special plea of assumed risk and denied the motion of appellant to carry the demurrer back to the fourth and fifth counts of the declaration.

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The cause was tried before a jury and a verdict returned for appellee, assessing his damages at \$4,600.00. Remittitur for \$4,600.00 was consented to by the Appellee; motion for new trial overruled, judgment entered on the verdict for appellee in the sum of \$11,000.00 and costs of suit.

Appellant has brought the appeal to this court and seeks reversal for various errors assigned, one of them being that "the verdict of the jury is contrary to the clear preponderance of the evidence."

On July 28, 1936 appellee began work for the Missouri Pacific Railroad Company at Selkirk, Kansas on its main line. In the afternoon of that day he was injured by a piece of rock hitting him in the eye and the face. The injury proved serious and caused the loss of the right eye.

Appellee contends that the injury was caused by a fellow servant striking a piece of rock behind him causing the rock to burst and a piece to fly up and hit him in the eye. Appellant contends that while the appellee was tamping ties with a pick a piece of slag flew up and hit him in the eye. If the injury was the negligent act of a fellow servant the question of assumed risk could not be considered as a defense in the case. If the injury came about through the act of Appellee himself, assumed risk was a proper question to be raised as a defense in the case. Appellee testified that while he was working with his brother, Ed Howlett on the track and engaged in tamping ballast under the ties and while he was in a bent over position, a Mexican whom he did not know, came up back of him and when he got to his side, hit down upon a piece of rock with a pick and that a piece of rock flew up and injured his right eye. The subsequent treatment of the eye and the final serious results are not disputed.

No one was called by appellee to corroborate his story, not even his brother who was working with him.

On the 1st of June 1900, the following was received from the
British Consul at Shanghai, dated the 1st of June 1900.
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The British Consul at Shanghai, dated the 1st of June 1900.

Appellant introduced the track foreman, Steve Padilla, who first talked with Appellee about the injury; Charles Winford, the time keeper who took Appellee into camp and rendered first aid to him; Dr. Ott a physician at Leota, Kansas to whom appellee first went for professional attention and Dr. Brown of Hoisington, Kansas, who later treated Appellee and each of these witnesses testified that in discussing how the accident occurred with appellee, he told them he was using a pick, tamping down ties and that a piece of rock or pebble flew up and hit him in the eye. Similar statements were made by appellee to John L. Riley, Claim Agent for Appellant and a Court reporter, John G. Miller who took down in shorthand all that was said between Riley and appellee. Edward Bailey, an assistant claim agent for Appellant, testified to a similar admission by appellee in Bailey's office in St. Louis, Missouri.

It is clear that appellee's account of how the accident occurred is contrary to what he told six or seven witnesses shortly after the accident. His case rests entirely on his own testimony, while the contention of appellant as to how the accident occurred is supported by the evidence of all these other witnesses as to what appellee said.

An examination of the testimony as it appears in the record compels us to the conclusion that the accident happened as related by Appellee to these other witnesses and because the verdict is clearly against the manifest weight of the evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full Page three.

introduced the first witness, Brown.

First, he first asked with appellee about the injury;

then, the first asked who took appellee into camp

and answered first and to him; Dr. Goff a physician at Leola,

Kansas to whom appellee first went for professional attention

and Dr. Brown of Holington, Kansas, who later treated appellee

and each of these witnesses testified that in discussing how

the accident occurred with appellee, he told them he was using

a stick, down then and that a piece of rock or pebble

threw up and hit him in the eye. Similar statements were made

by appellee to John L. Riley, claim agent for appellant and

a court reporter, John G. Miller who took down in shorthand

all that was said between himself and appellee. Edward Bailey,

a assistant claim agent for appellant, testified to a similar

statement in Bailey's office in St. Louis, Missouri.

It is clear that appellee's account of how the accident

occurred is contrary to that he told six or seven witnesses

shortly after the accident. His own words entirely on his own

testimony, while the testimony of appellee as to how the

accident occurred is supported by the testimony of all these

other witnesses as to what appellee said.

In examination of the testimony as it appears

in the record compare as to the contention that the accident

occurred as related by appellee to those other witnesses and

because the verdict is clearly against the manifest weight of

the evidence, the judgment is reversed and the cause remanded.

THE COURT AND REVEREND.

Not to be reported in full

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MAY TERM A.D. 1931.

Agenda c. 14.

Term No. 25

People of the State of Illinois
ex rel Jeanette Morgan,
Appellee

vs

Joseph Zurowski,
Appellant.

APPEAL FROM
COUNTY COURT OF
RANDOLPH COUNTY

SEP 1931

262 I.A. 670

Fulton, William J.

This is an appeal from the County Court of Randolph County in an action for bastardy. Jeanette Morgan filed a complaint before a police magistrate charging Appellant with being the father of a bastard child born to her on May 17, 1930. A warrant was issued, hearing before the magistrate waived, and bond given by Appellant for appearance in County Court of Randolph County at the December Term thereof. On December 15, 1930 the case was called for trial. Appellant made a motion for continuance on the ground that there was no pleading on file to which appellant could plead and no issue had been made up for jury to try. Motion was overruled, trial proceeded; verdict of jury found the Appellant guilty; motion for new trial was overruled and judgment was entered on the verdict.

The facts testified to by the prosecuting witness show that she was a girl fifteen years of age, working in East St. Louis, Illinois; that she kept company with Appellant steadily for two or three times a week during the months of August and September, 1929 and had intercourse with him during the month of August; that during said period of time she did not keep company with any other boys; that she first discovered she was pregnant about the middle of September, 1929; that she was unmarried and that the child was born on May 17, 1930.

STATE OF TEXAS
COUNTY OF DALLAS
JANUARY 1930

IN SENATE
JANUARY 1930

LEGISLATIVE

COMMITTEE ON

EDUCATION

2621A.670

This is an appeal from the County Court of

Dallas County in an action for recovery of damages caused by

a defendant before a justice of the peace in the County Court of

Dallas County, Texas, in an action for recovery of damages caused by

a defendant before a justice of the peace in the County Court of

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Dallas County, Texas, in an action for recovery of damages caused by

a defendant before a justice of the peace in the County Court of

2621A.670

During the taking of her testimony she was permitted to state, over ~~the~~ objection that Appellant was the father of the child. Two witnesses for the Appellant testified that complaining witness was continually out nights with other boys during the time in question and one testified that in a conversation, Jeanette Morgan told her she did not know who was the father of the child.

Appellant seeks reversal first, because of the overruling of his motion for continuance without an issue being joined. The amended record discloses that on December 15, 1930 before entering upon the trial, the appellant entered a plea of not guilty to the Complaint filed before the magistrate. In the case of People vs Woodside, 72 Ill. 407 where a similar question was raised the Court said: The Court had before it the sworn complaint which showed the complete character of the charge against the Defendant. To this complaint the record shows a plea of not guilty, and while the issue thus made up is not as formal as it might be, we regard it as sufficient." To the same effect is the case of People vs Suhling, 231 App. 256.

Appellant also insists that the Court erred in permitting complaining witness to answer the direct question as to who was the father of the child over his objection. While ordinarily a witness will not be permitted to state conclusions as to any ultimate fact in issue, in this case the witness had already testified positively that she had kept company with Appellant during the months of August and September, had had intercourse with him and did not keep company with any other boys during that period, and the answering of the question complained of is not prejudicial to the Appellant.

The instruction in which the jury were told "that if the evidence preponderates in her favor but slightly" has been the subject of consideration of both our Supreme Court and the Appellate Courts of this State many times and has been condemned; it has not in and of itself been held as reversible error and in this case we do not believe it is such substantial error as would warrant a reversal of the case.

The language of the States Attorney in referring to
as
the appellant/having committed "rape", when he had intercourse with
the prosecuting witness, is not to be commended, if true, but the
Bill of Exceptions does not properly set forth the words used by
counsel and therefore cannot be considered on this appeal.

We are of the opinion that appellant has had a fair
trial, and that no substantial error has intervened.

The judgment of the County Court of Randolph County
will therefore be affirmed.

AFFIRMED.

Not to be reported in full

The undersigned, being duly sworn, deposes and says that he has information of the facts and circumstances of the case herein set forth, and that the same are true and correct, and that the same are not properly set forth in the report of the undersigned, and that the same are not properly set forth in the report of the undersigned, and that the same are not properly set forth in the report of the undersigned.

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1574
STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A.D. 1930.

Term No. 35
(Rehearing No. 2 February Term, 1931.)

Agenda No. 27.

FRANK ZIMRING and
SADIE ZIMRING,
APPELLANTS

VS

FANNIE POLAND and
HARRY HERSHENSON,
APPELLEES.

APPEAL FROM THE

CIRCUIT COURT OF

MADISON COUNTY.

262 I.A. 670²

FULTON, WILLIAM J.,

This was a bill in equity in the Circuit court of Madison County to enjoin the collection of a judgment for an accounting to enforce a set-off. After the bill was filed a temporary injunction was issued without notice to the Appellees. Afterward Appellees filed an answer to the Bill and a Replication was filed by Appellants. Appellees then filed a motion to dissolve the temporary injunction, which, after a full hearing, was granted and an order entered by the Court dissolving the temporary injunction. Appellants bring this appeal to reverse said decree.

The bill shows in substance that appellants in the summer of 1929 were engaged in the wholesale and retail sale of tobacco, etc., in Granite City. Appellee, Harry Hershenson was engaged in the operation of a grocery store in the same city. The business was located on the ground floor of a two-story brick building, and the second floor was occupied by Hershenson and family.

The bill alleges that the real estate was owned by Hershenson, but title thereto was held by one Cecelia Silverman of St. Louis, Mo.; that the business was owned by Hershenson but conducted in the name of his sister, Fannie Poland of East St. Louis; that Appellants and Hershenson had been doing business together for

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many years; that Hershenson was in failing circumstances and became largely indebted to Appellants on a merchandise account and Appellants were also surety on notes of Hershenson at the bank; that after negotiations, Appellants agreed to buy the real estate and the business of Hershenson and to pay off the latter's indebtedness; that, in closing the deal Hershenson was paid \$1,800.00 in cash and a note of Appellant for \$1000.00; that at the request of Hershenson the note was made payable to Appellee Fannie Polan; that after Appellants had taken over the business and possession of the real estate, Hershenson became liable to pay them large sums of money itemized in the bill and amounting to several hundred dollars; that on October 15, 1929 the note of \$1000.00, being a judgment note which had been made payable to Fannie Polan, was entered in judgment, obtained and judgment obtained by confession for \$1,116.75; that subsequent to the entry of the judgment Hershenson was active and urgent in his demands for collection of the judgment; that the Sheriff finally refused to make a levy and sale without an indemnifying bond being furnished him, and that Hershenson was making arrangements to furnish such bond; that Appellants were notified that as soon as the bond was given, their place would be closed and stock sold to satisfy the judgment; that the judgment was owned by Hershenson, although the judgment was obtained in the name of Fannie Polan.

The bill prayed for an adjustment of the equities between Appellants and Hershenson, averring that Hershenson was indebted to Appellants in nearly as large a sum as the amount of the judgment. We believe the facts averred in this Bill of Complaint were sufficient to warrant a temporary injunction to stay the collection of the judgment for a limited period. We think the bill charges, with reasonable certainty facts concerning set-off, insolvency of Hershenson and inadequacy of Court of law to afford complete relief and other facts that would support such an order.

C.D. v V.B.R. Co. vs Field, et al, 86 Ill.270
Hahn v Gates, 102 App. 385.

The decree of the Circuit Court of Madison County will therefore be reversed and the cause remanded with instructions to continue the temporary injunction in force until the merits of the

to be controversies between the parties can be litigated and determined.
not in bill REVERSED AND REMANDED WITH DIRECTIONS.

RESERVE BOOK

III. Unpublished opinions

262

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| | <i>Int. Agency</i> |
| 6/20 | R. S. Kahn |
| | J. P. Schaps |
| | Blatt |

